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December 23, 2016

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Jessica L. Labiszak
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You are hereby notified that the Court has entered the following opinion and order:

2015AP1979-CRNM State of Wisconsin v. Jessica L. Labiszak (L.C. # 2014CF303)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Jessica L. Labiszak appeals from a judgment convicting her of one misdemeanor and one felony. Labiszak's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967). Labiszak received a copy of the report, was advised of her right to file a response, and has not responded. Upon our independent review of the record, we conclude that there exists an arguably meritorious issue

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

relating to the bifurcated sentence of forty-two months imposed but stayed on the misdemeanor conviction and we reject the no-merit report.

According to the criminal complaint, Labiszak had been engaged in drug activity at a hotel with S.L., a codefendant. When Labiszak tried to drive away, S.L. jumped onto Labiszak's car while yelling about missing money. Labiszak tried to maneuver the car to get S.L. off. A police squad car came into sight; Labiszak drove away and S.L. fell off the trunk, suffering injuries. Labiszak was charged with six crimes. The parties reached a plea agreement wherein the State would amend count two to a misdemeanor charge of negligently operating a dangerous weapon (Labiszak's car), as a repeater, contrary to WIS. STAT. §§ 941.20(1)(a) and 939.62(1)(a). Labiszak would plead no contest to the misdemeanor and plead guilty to count ten, possessing heroin as a party to the crime, contrary to WIS. STAT. § 961.41(3g)(am). The parties agreed to jointly recommend the following: (1) on count two, the misdemeanor, an imposed and stayed twelve-month sentence (2) on count ten, an imposed and stayed prison sentence bifurcated into eighteen months of initial confinement and twenty-four months of extended supervision. The parties recommended three years of probation and specified that in the event of revocation, the stayed sentences should run consecutively.

At sentencing, the circuit court imposed the following:

I am going to go along with the basic structure of the sentence recommendation that's been made here. Having found the Defendant guilty of the ... the class A misdemeanor as a repeater, in Count 2 as amended, I am going to impose and stay a sentence and place you on probation, but I am imposing and staying the max; two years prison and that will be consecutive to any other sentence. Your lawyer is absolutely right, if you mess up on probation, you're just going straight to prison, and not for 12 months, for 24 months, which is the maximum. And you would be entitled to 20 days credit on that sentence, if it's ever served.

And on the possession of narcotics, Count 10 of the amended information, I am going to impose an additional three and a half years prison, 18 months confinement, plus 24 months extended supervision. And the sentence on the misdemeanor augmented by the repeated allegation is just two years confinement, but I am going to impose an additional 18 months confinement, plus 24 months additional extended supervision on the possession of narcotics charge.

The sentencing court ordered a three-year term of probation on both counts with various conditions.²

The ensuing judgment of conviction stated that as to count two, the misdemeanor, Labiszak received an imposed and stayed sentence totaling forty-two months, with eighteen months of initial confinement followed by twenty-four months of extended supervision. The mechanism by which this language appeared on the judgment is unclear from the record.

To the extent the judgment reflects a forty-two month bifurcated sentence in connection with count two, the sentence exceeds the maximum permitted by law. *See* WIS. STAT. § 939.62 (1)(a) (under the habitual criminality statute, “[a] maximum term of imprisonment of one year or less may be increased *to not more than 2 years.*”) (emphasis added); *See State v. Lasanske*, 2014 WI App 26, ¶¶2, 8-9, 11-12, 353 Wis. 2d 280, 844 N.W.2d 417 (for an enhanced misdemeanor, the circuit court can impose a maximum bifurcated sentence totaling two years, which total includes both the initial confinement and extended supervision components of the sentence). In *Lasanske*, we observed that the application of WIS. STAT. § 973.01(1) was different for enhanced misdemeanors than for felonies:

² Pursuant to a letter from the department of corrections, the term of probation on count two, the misdemeanor, was apparently amended from three years to twelve months.

Whereas for a felony, an enhancement lengthens the otherwise applicable “maximum term of confinement in prison,” for a misdemeanor, an enhancement transforms the misdemeanor sentence into a sentence to the state prisons, which *then* must be bifurcated. Because no “maximum term of confinement in prison” exists for a misdemeanor until the enhancement is applied, once it is applied, it cannot be applied again. WIS. STAT. § 973.01(2)(c)1. is not applicable to misdemeanors.

Lasanske, 353 Wis. 2d 280, ¶11. We further clarified that in the event the circuit court imposed a prison sentence on an enhanced misdemeanor, the confinement portion could not exceed “75% of the total length of the bifurcated sentence,” *see* WIS. STAT. § 973.01(2)(b)10, and the extended supervision portion could “not be less than 25%” of the confinement time ordered, *see* § 973.01(2)(d). *Lasanske*, 353 Wis. 2d 280, ¶¶9, 12.

In the instant case, the sentencing court’s oral pronouncement on count two imposed but stayed “the max; two years prison.” The written judgment stated that count two would be bifurcated into eighteen months of initial confinement and twenty-four months of extended supervision, for a total of forty-two months of imprisonment. Because this exceeds the two-year maximum permitted under WIS. STAT. § 939.62(1)(a) and conflicts with the sentencing court’s oral pronouncement for “two years” of imprisonment, we reject appellate counsel’s no-merit report.³

³ Because the sentencing court did not specify on the record how it intended to bifurcate the two years of imprisonment ordered on count two, we are unable to correct any error simply by ordering that the judgment be corrected to conform to the court’s oral pronouncement. *See State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857.

We also observe that according to the sentencing transcript, Labiszak was awarded twenty days of presentence credit on count two; the judgment reflects just two days of credit. This is another potentially meritorious issue requiring clarification.

Our discussion does not address all issues contained in appellate counsel's no-merit report. Our limited analysis is not intended to suggest that we have determined the issues addressed herein are the only potentially nonfrivolous issues arising from Labiszak's case. Rather, we provide the discussion to explain our conclusion that the no-merit report has not demonstrated that there are no issues of arguable merit in this case. Therefore,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appellate counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion or notice of appeal is reinstated and extended to sixty days after remittitur.

Diane M. Fremgen
Clerk of Court of Appeals