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DISTRICT II

January 4, 2023

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Kenosha County Courthouse
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Christopher M. Bohatkiewicz, #303560
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P.O. Box 3310
Oshkosh, WI 54903-3310

You are hereby notified that the Court has entered the following opinion and order:

2019AP2239-CRNM	State of Wisconsin v. Christopher M. Bohatkiewicz (L.C. #2016CF1257)
2019AP2240-CRNM	State of Wisconsin v. Christopher M. Bohatkiewicz (L.C. #2017CF532)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Attorney Leon Todd, appointed counsel for Christopher M. Bohatkiewicz, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). After receiving a copy of the report, Bohatkiewicz filed a no-merit response raising multiple issues, and Attorney Todd filed a

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

supplemental no-merit report concluding that none of those issues have arguable merit. Subsequently, Attorney Lauren Jane Breckenfelder was appointed as successor counsel to represent Bohatkiewicz in these appeals.

Upon our independent review of the records, the no-merit report, response, and supplemental no-merit report, we are unable to conclude that there would be no arguable merit. Accordingly, we reject the no-merit report.

Pursuant to a global plea agreement, Bohatkiewicz pled guilty to twenty-two counts of capturing an image, either of nudity or an intimate representation, without consent, and to ten counts of possessing child pornography. The court sentenced Bohatkiewicz to a total of sixteen and one-half years of initial confinement and twelve years of extended supervision, and a three-year term of probation.

The no-merit report addresses whether there would be arguable merit to a claim that the circuit court erred by denying Bohatkiewicz's motion to dismiss fourteen counts of capturing an image of nudity without consent; that Bohatkiewicz's pleas were not knowingly, intelligently, and voluntarily entered; or that the circuit court erroneously exercised its discretion at sentencing. Bohatkiewicz argues in response, among other things, that his plea was not knowing, intelligent, and voluntary, and that one of the conditions of his extended supervision violates his First Amendment rights.

The supplemental no-merit report concludes that a motion for plea withdrawal would lack arguable merit. It agrees with Bohatkiewicz that a challenge to one of the conditions of his extended supervision would have merit but asserts that Bohatkiewicz has chosen to waive that

argument. For the reasons set forth below, we are unable to conclude on the record before us that there is no issue with arguable merit in this case.

Extended Supervision

The no-merit report concludes that there would be no arguable merit to a challenge to the sentence imposed by the circuit court. In response, Bohatkiewicz asserts that the condition of his extended supervision that prohibits him from possessing any electronic devices that access the internet, record, and/or store videos or images violates his First Amendment rights. *See, e.g., State v. King*, 2020 WI App 66, 394 Wis. 2d 431, 950 N.W.2d 891.

The supplemental no-merit report agrees that a challenge to this condition of Bohatkiewicz's extended supervision would have merit. It asserts, however, that Bohatkiewicz informed counsel, both prior to the filing of the no-merit report and after Bohatkiewicz filed his no-merit response, that Bohatkiewicz does not wish to pursue that issue.

Thus, this court has been presented with counsel's conclusion that an issue has arguable merit, and a dispute between counsel and Bohatkiewicz as to whether Bohatkiewicz wishes to pursue it. Because this court cannot resolve the dispute presented to us by the filings, we cannot conclude that there are no issues of arguable merit to pursue in this matter.

In sum, the no-merit report and supplemental no-merit report do not persuade us that further proceedings would be wholly frivolous. *State v. Parent*, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (in deciding a no-merit appeal, the question is whether a potential issue would be "wholly frivolous"). This standard means that the issue lacks any basis in fact or law.

McCoy v. Court of Appeals, 486 U.S. 429, 438 n.10 (1988). The test is not whether counsel or this court expects the argument to prevail.

Our discussion does not address all issues contained in appellate counsel's no-merit report or Bohatkiewicz's response. Because we determine there is at least one arguably meritorious issue to pursue, we reject the no-merit report. Because we have rejected the no-merit report, defense counsel is not limited to pursuing only the sentence issue should he conclude there is also merit to other issues.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected.

IT IS FURTHER ORDERED that these no-merit appeals are dismissed without prejudice.

IT IS FURTHER ORDERED that the time to file a postconviction motion or notice of appeal is extended to sixty days from the date of this opinion and order.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals