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DISTRICT IV

December 12, 2024

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

2023AP666-CRNM	State of Wisconsin v. Samone Nicole Miller (L.C. # 2019CF484)
2023AP667-CRNM	State of Wisconsin v. Samone Nicole Miller (L.C. # 2020CF6)

Before Kloppenburg, P.J., Graham, and Nashold, 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).

In this court's order of September 26, 2024, we directed counsel for appellant Samone Miller to review one issue. Counsel has responded with a supplemental no-merit report concluding that the issue lacks arguable merit. We now conclude that the issue has arguable merit, and, therefore, we dismiss the appeals and extend the time to file a postconviction motion.

The underlying facts and the issue for counsel to review were described in the September 26 order, and we do not repeat them in detail here. In brief, when sentencing Miller,

the circuit court imposed prison terms followed by consecutive jail terms. In doing so, the court correctly observed that the jail terms would actually be served in prison. The court also followed the State's agreed-to sentencing recommendation and granted Huber privileges for the jail terms. In the September 26 order, we questioned whether Huber privileges are available to persons serving jail terms in prison, and we directed counsel to review whether, if they are not, this provides a basis to seek relief as to these sentences.

In response, counsel concludes that Huber privileges are most likely not available in prison. However, counsel further concludes, for reasons discussed below, that this situation does not present an arguable issue. We disagree with counsel's assessment and conclude that there are potentially two arguable issues that could be raised on these facts.

The first potential issue goes beyond the sentences and instead implicates the validity of the plea agreement. As part of the plea agreement, the State agreed to recommend that the circuit court grant Huber privileges on the jail terms that would be served in prison. However, if Huber is not legally available for sentences that are served in prison, that means the parties agreed that the State would recommend a sentence that was impossible for the circuit court to lawfully impose. This may be a basis for a defendant to move to withdraw the pleas that she entered as part of that agreement, so that the agreement may be renegotiated to include provisions from which the defendant can actually benefit. However, because we did not previously seek counsel's input on this potential argument about plea withdrawal, and because we reject the no-merit report on a ground discussed below that is more directly related to the sentences, we need not reach a firm conclusion about whether a plea-withdrawal motion would be frivolous.

Instead, we conclude that it is not frivolous to move for resentencing on the ground that Miller was sentenced based on inaccurate information, specifically, on information that inaccurately suggested that Huber privileges are available in prison.

The supplemental no-merit report states the law applicable to such motions, and here, Miller would have grounds to file a motion seeking resentencing on the jail terms. When the circuit court imposed those sentences, the record arguably shows that the court believed that Huber privileges would be available for the consecutive jail terms. The court's granting of that privilege arguably indicates that the court intended for Miller to receive the benefits of Huber during the time she served those consecutive sentences. Miller can reasonably argue that, once the court is informed that these benefits will not actually be available, the court may choose to alter the jail sentences in some manner—whether by making them concurrent with the prison terms, or by making them shorter than the currently existing jail sentences. In other words, if the court intended for Miller to be able to work, receive services, or otherwise take advantage of Huber privileges as of the end of the felony sentences, the court might now reasonably choose to reach that same result by altering the misdemeanor sentences so that Miller is released from confinement at the end of the felony sentences, or at least earlier than is provided under the current sentences.

In the supplemental no-merit report, counsel presents several reasons for concluding that there is no arguable merit to this issue. First, counsel states that there is nothing in the record to suggest that any portion of the circuit court's sentencing decision was based on a misunderstanding or mistaken belief that Miller would be eligible for Huber release in prison. The report states: "To the contrary, the court explicitly recognized that Ms. Miller would serve her jail sentences in prison."

We do not agree that the circuit court's stated awareness that the jail terms would be served in prison is contrary to or inconsistent with the court's apparent belief that Huber privileges would be available in prison during those months. Although counsel may now be of the opinion that Huber is not available in prison, the record from sentencing does not appear to contain any information to that effect. Instead, the parties agreed for the State to recommend, and the State did recommend, a sentence that implies that Huber would be available to Miller while she is serving her jail sentences in prison.

Second, counsel states that "the sentencing court's single reference to 'Huber privileges' does not constitute inaccurate information," and that it would be frivolous to argue that Miller's "ineligibility for Huber release in prison was highly relevant to the sentences imposed in these cases." To clarify, the inaccurate information at issue is not the court's reference to Huber; it is instead the court's apparent underlying belief that Huber would be legally available in prison. The court's grant of Huber privileges implies that the court believed that Huber was legally available and, therefore, if Huber is not available, that implies that the court believed inaccurate information about the law. It is not apparent why more than a single reference to Huber would be necessary for the purpose of showing that the court did actually hold that erroneous belief. As to whether the court relied on that inaccurate belief, or whether it was relevant to sentencing, it is not frivolous to argue that these things are demonstrated by the fact that the court actually *granted* Huber privileges, and did not merely refer to them.

Finally, counsel describes the earlier postconviction process in the circuit court. After counsel filed a postconviction motion on grounds other than described above, the parties agreed that the circuit court should decide whether Miller was eligible for the earned release program. As part of that agreement, it appears that Miller agreed to withdraw her other existing claims.

However, counsel does not clearly describe, and we do not readily see, why that process would preclude the filing of a motion on the grounds we have discussed in this order, which do not appear to have been previously raised or withdrawn as part of an agreement. It does not appear, from the information we currently have, that this process precludes a further motion.

For these reasons, we conclude that it is not frivolous for Miller to file a postconviction motion seeking resentencing. We dismiss the appeal and extend the time to file a postconviction motion.

Separately, this court received a letter from Miller personally, dated November 15, 2024, asking for a “no-merit petition for review” and raising issues about her sentences that are different from the issues described above. We have not extended the time for Miller to respond to the no-merit report, and, therefore, we do not further consider the points raised in this letter.

IT IS ORDERED that the no-merit report is rejected and the appeals are dismissed without prejudice.

IT IS FURTHER ORDERED that the time to file a postconviction motion is extended to forty-five days from the date of this order.

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

Samuel A. Christensen
Clerk of Court of Appeals