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December 23, 2024

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

2024AP104-CRNM State of Wisconsin v. Dawuan Roshawn Robinson
(L.C. # 2021CF816)

Before Donald, P.J., Geenen and Colón, 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).

Dawuan Roshawn Robinson, by Attorney Jill Marie Skwor, is pursuing an appeal from judgments of conviction and a postconviction order under the procedures set forth in ***Anders v.***

California, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2021-22).[1] Attorney Skwor filed a no-merit report and two supplemental no-merit reports. Upon review of the record and the no-merit reports, we conclude that Robinson could pursue further postconviction proceedings that would not be wholly frivolous. Specifically, the record and submissions show that Robinson could pursue an arguably meritorious claim that the circuit court failed to establish a factual basis for his plea to the charge of knowingly violating a domestic abuse temporary restraining order as a habitual offender and as an act of domestic abuse. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the time for Robinson to file a postconviction motion or a notice of appeal on the merits.

The criminal complaint charged Robinson with committing multiple crimes as a habitual offender. As relevant here, the complaint alleged that on March 2, 2021, Robinson violated WIS. STAT. § 813.12(8)(a) by knowingly violating a temporary restraining order issued under WIS. STAT. § 813.12(3). The probable cause section of the complaint stated that on March 2, 2021, police were looking for Robinson and found him with I.J.P. at I.J.P.'s residence, where officers arrested him. The probable cause section also alleged:

> This complaint is further based upon review of a copy of the Domestic Abuse Injunction, issued pursuant to WIS. STAT. § 813.12 on March 9, 2018, in Milwaukee County, Court case No. 18FA1144, which remain effective, which names IJP as petitioner and defendant, Robinson, as respondent. The injunction prohibits the defendant from contacting IJP.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Robinson resolved the case with a plea agreement. Pursuant to its terms, he pled guilty to two crimes, including knowingly violating a domestic abuse temporary restraining order as a habitual offender and as an act of domestic abuse.

When accepting a plea other than not guilty, the circuit court must conduct an inquiry sufficient to establish a factual basis for the plea. ***State v. Higgs***, 230 Wis. 2d 1, 9-10, 601 N.W.2d 653 (Ct. App. 1999); WIS. STAT. § 971.08(1)(b). During the plea colloquy here, the attorneys agreed that the circuit court could use the criminal complaint as the factual basis, and Robinson stated that the facts in the complaint were true "for the most part." The issue is whether it would be frivolous for Robinson to pursue a claim that the circuit court failed to establish a factual basis for his plea to the charge of knowingly violating a domestic abuse temporary restraining order.

A factual basis determination is sufficient when the circuit court establishes that the defendant's conduct satisfies the elements of the crime. ***State v. Thomas***, 2000 WI 13, ¶22, 232 Wis. 2d 714, 605 N.W.2d 836. To prevail at trial on the charge that Robinson violated a domestic abuse temporary restraining order, the State would be required to prove three elements: (1) A temporary restraining order was issued against Robinson under § 813.12(3) of the Wisconsin Statutes; (2) Robinson committed an act that violated the terms of the temporary restraining order; and (3) Robinson knew that the temporary restraining order had been issued and knew that his acts violated its terms. *See* WIS JI—CRIMINAL 2040.

Appellate counsel acknowledges that the complaint does not include facts to satisfy the foregoing elements, explaining: "The criminal complaint states only that the injunction remained in effect [on March 2, 2021]. This statement does not explicitly state that

Mr. Robinson was served or had knowledge." Counsel concludes, however, that notwithstanding the omissions in the criminal complaint, the docket entries for case No. 2018FA1144 demonstrate that "Robinson was served, and therefore had knowledge of the domestic abuse temporary restraining order." In support, counsel provides the docket entries for case No. 218FA1144. In her view, they reflect that "proof of service was filed on August 18, 2018, and February 21, 2021," and that the latter filing was "a mere eight days before Mr. Robinson contacted I.J.P." on March 2, 2021.

We are perplexed by appellate counsel's description of the docket entries in case No. 2018FA1144. They do not reflect any activity in 2021. Our review of the docket in 2018FA1144 reveals that the circuit court entered a temporary restraining order on February 26, 2018. A docket entry on March 7, 2018 states: "proof of service." On March 9, 2018, the circuit court held an injunction hearing at which Robinson did not appear. According to the docket, the circuit court entered an injunction at the conclusion of the hearing. The next docket entry is dated five months later, on August 15, 2018, and states: "affidavit of service." Six months after that, the docket has its final entry, dated February 21, 2019. That entry again states: "affidavit of service."

We nonetheless assume without deciding that appellate counsel is correct in her view that the docket entries in case No. 2018FA1144 must be considered when assessing whether Robinson can pursue an arguably meritorious claim that the circuit court failed to establish a factual basis for his plea. However, we are not satisfied that further proceedings would be frivolous.

First, while the State charged Robinson with violating a domestic abuse temporary restraining order on March 2, 2021, the complaint does not allege the existence of a temporary restraining order. The complaint alleges that on March 9, 2018, the circuit court issued a domestic abuse injunction in case No. 2018FA1144 and that the injunction was in effect on March 2, 2021. The docket entries in case No. 2018FA1144 similarly reflect that the circuit court issued an injunction following a hearing on March 9, 2018. Pursuant to WIS. STAT. § 813.12(3)(c), however, "a temporary restraining order is in effect until a hearing is held on issuance of an injunction under sub (4), except that the court may extend the temporary restraining order under [§]813.1285." Appellate counsel does not direct our attention to any portion of either the record or the docket entries showing that the circuit court extended the temporary restraining order past March 9, 2018. Therefore, it does not appear frivolous to argue that the circuit court failed to establish the existence of a temporary restraining order three years after the circuit court entered an injunction, and that the circuit court failed to establish Robinson's knowledge that his actions on March 2, 2021 violated an existing temporary restraining order.

Second, appellate counsel implies that Robinson could not pursue an arguably meritorious challenge to the factual basis for knowingly violating a temporary restraining order because a factual basis exists to show that he knowingly violated an injunction. Counsel does not explain that assumption or why a challenge to that assumption would lack arguable merit.

Third, counsel acknowledges that the complaint does not allege or show that Robinson was served with or had knowledge of an injunction. Counsel's supplemental no-merit report instead directs our attention to the docket entries in case No. 2018FA1144, particularly the docket entries dated August 15, 2018, and February 21, 2019. Both state only: "affidavit of

service." Neither entry includes any information as to who was served or what was served on either of those occasions. Accordingly, even accepting counsel's assumption that knowledge of an injunction is relevant to proving the crime of knowingly violating a domestic abuse temporary restraining order, it does not appear frivolous to argue that the circuit court failed to establish a factual basis for concluding that Robinson had such knowledge.

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be "'wholly frivolous.'" ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (quoting ***Anders***, 386 U.S. at 744 (1967)). The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (stating that an action is not frivolous even though the lawyer believes that the client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988). Because we cannot conclude that further proceedings would be wholly frivolous, we must reject the no-report report filed in this case. We emphasize that we do not reach any conclusion that Robinson would or should prevail, only that the record and the submissions reflect that pursuing the claim would not be frivolous within the meaning of RULE 809.32, and ***Anders***. We add that our decision does not mean that we have reached a conclusion in regard to the arguable merit of any potential issue that we have not discussed. Robinson is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

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

IT IS FURTHER ORDERED that the deadline for Robinson to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30 is extended through the date sixty days after this matter is remitted to the circuit court.

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

Samuel A. Christensen
Clerk of Court of Appeals