



supplemental no-merit report in which she addressed the potential issues of the sufficiency of the evidence, sentencing discretion, and sentence credit. Beard filed a response to each of counsel's submissions. In an appeal under RULE 809.32, the question before this court is whether any 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)). We conclude here that further postconviction proceedings in this case would not be wholly frivolous. The record reflects that Beard could pursue an arguably meritorious claim that the circuit court sentenced him based on and in reliance on race. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the time for Beard to file a postconviction motion or a notice of appeal on the merits.

A jury found Beard guilty of second-degree reckless homicide by use of a dangerous weapon and possession of a firearm by a felon, both arising in 2021. For the homicide offense, he faced a 30-year term of imprisonment and a \$100,000 fine. *See* WIS. STAT. §§ 940.06(1), 939.50(3)(d), 939.63(1)(b) (2021-22). The circuit court imposed a 25-year term of imprisonment, bifurcated as 15 years of initial confinement and 10 years of extended supervision. For prohibited possession of a firearm, Beard faced a 10-year term of imprisonment and a \$25,000 fine. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g) (2021-22). The circuit court imposed a consecutive five-year term of imprisonment, bifurcated as three years of initial confinement and two years of extended supervision.

A circuit court exercises discretion at sentencing and may consider a broad range of factors, but the circuit court erroneously exercises its discretion by imposing a sentence based on clearly irrelevant or improper factors. *State v. Gallion*, 2004 WI 42, ¶¶17, 43 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. "It is beyond dispute that race and gender are improper factors;

they may not be relied upon—at all—in the imposition of a sentence.” *State v. Harris*, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409. This principle is grounded on “basic tenets of due process” providing that a defendant “has a constitutional due process right not to be sentenced on the basis of race or gender.” *Id.*, ¶33. To establish that the circuit court imposed a sentence in violation of that right, the defendant must prove by clear and convincing evidence that the circuit court actually relied on an improper factor. *Id.*, ¶41.

In the instant case, the circuit court’s sentencing remarks included, but were not limited to, the following:

This is just another situation of crime being out of control in certain parts of our community. This is just another case, and there are hundreds every year, of one African American male shooting and killing another African American male. No one seems the least bothered by it, not the people in the community, not our last mayor, not our current mayor, no one seems to care.

....

... I can’t think of how things get worse in Milwaukee, but every year they’re worse than the year before.

Just so we’re clear, for the [c]ourt of [a]ppeals, the defendant is being sentenced for his behavior, his actions, his conduct, based on the verdict and facts and circumstances of this case and this case alone.

Now having said that, it has the overlay of the awful, terrible, out-of-control, chaotic situation in Milwaukee. As recently [as] within the last month or month-and-a-half, I read a study that says Milwaukee has the fourth highest homicide rate in the United States. I’m surprised we’re not higher. This type of situation destroys communities.

....

... Mr. Beard, as you sit here today, you seem like a decent guy, but you engaged in terrible, terrible behavior.

Now your kids get to grow up without a father, making it statistically more likely that someday they’re sitting in front of a

judge, and we're now on about 30 to 40 years hearing about kids growing up, particularly in the African American community, without fathers, and yet we have black males killing other black males non-stop. That's unfortunate that I have to say that, but that's a fact. In the average year in Milwaukee County, 85 to 90 percent of the homicides are one black male killing another black male. It doesn't happen in other communities. I guess I can't figure out the reason. If I could I would have done something to stop it five or 10 years ago. This type of situation obviously just devastates and ruins the victim's family, significant other, the children, other family members. It's just absolutely out and out devastating.

The defendant needs to—looking at the *Gallion* factors—be punished. He needs to be deterred.... He needs to be taken off the streets. He needs to be punished for his behavior.

We have reviewed appellate counsel's discussion of the sentencing proceedings and appellate counsel's conclusion that the circuit court considered proper factors, including the gravity of the offenses, Beard's character, and the need to protect the community. Appellate counsel, however, did not include any discussion of the circuit court's references to race and thus did not analyze whether those references give rise to an arguably meritorious claim that the circuit court sentenced Beard in reliance on an improper factor.<sup>2</sup> We must, however, review the circuit court's sentencing remarks "in context and as a whole." *Harris*, 326 Wis. 2d 685, ¶4. Upon that review, we conclude that it would not be frivolous for Beard to pursue a claim that the circuit court sentenced him on the basis of and in reliance on race, regardless of any proper factor that the circuit court may have considered,

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<sup>2</sup> We are perplexed and disturbed by appellate counsel's failure to mention, let alone analyze, the sentencing court's references to race. We remind appellate counsel that the purpose of a no-merit appeal is to ensure that a convicted defendant's rights "are scrupulously honored." Appellate counsel's obligation is therefore to provide "a thorough review of the record and a discussion of the strongest arguments revealed by the review." *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 444 (1988). Counsel does not satisfy that obligation by submitting a no-merit report that omits references to significant aspects of the proceedings.

When considering whether a claim would be frivolous, 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 of Wis.*, 486 U.S. 429, 436 (1988). Because we answer that question in the negative, we must reject the no-report report filed in this case. *Id.* at 444. We will also refer this matter to the office of the state public defender for the possible appointment of successor counsel.<sup>3</sup> We do not reach any conclusion that Beard would or should prevail, only that, on the record before us, his pursuit of claims on the merits would not be frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32. We add that our decision to reject the no-merit report upon consideration of the matters discussed in this opinion and order does not mean that we have reached a conclusion in regard to the arguable merit of any potential issue that we have not discussed. Beard 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 this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Beard, any such appointment to be made within 45 days after this order.

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<sup>3</sup> Appellate counsel’s conclusion that this appeal lacks arguable merit, offered without mention or discussion of the references to race in the circuit court’s sentencing remarks, may conflict with the advocacy to which Beard is entitled. Appointment of new counsel may therefore be appropriate.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Beard or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Beard to file a postconviction motion under WIS. STAT. RULE 809.30 is extended until 60 days after the date on which this court receives notice from the State Public Defender's office advising either that it has appointed new counsel for Beard or that new counsel will not be appointed.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*