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**DISTRICT III**

September 26, 2023

To:

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Circuit Court Judge  
Electronic Notice

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Trisha LeFebre  
Clerk of Circuit Court  
Oconto County Courthouse  
Electronic Notice

Jason L. Mulikin 691556  
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P.O. Box 3310  
Oshkosh, WI 54903-3310

Angela Dawn Chodak  
Electronic Notice

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

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2023AP987-CRNM      State of Wisconsin v. Jason L. Mulikin (L. C. No. 2019CF164)

Before Stark, P.J., Hruz and Gill, 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).**

Counsel for Jason Mulikin has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),<sup>1</sup> concluding that no grounds exist to challenge Mulikin's conviction for possession with intent to deliver more than fifty grams of methamphetamine. Mulikin was informed of his right to file a response to the no-merit report, but he has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967),

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Mulikin with three offenses: possession with intent to deliver more than fifty grams of methamphetamine; possession of narcotic drugs; and possession of an illegally obtained prescription. According to the criminal complaint, a state trooper stopped a vehicle operated by Mulikin after observing the vehicle deviating from its lane of travel and weaving within its own lane. During the traffic stop, a records check revealed that Mulikin had an outstanding Michigan warrant. A trooper asked dispatch to confirm the warrant, and Mulikin was detained pending that confirmation. While awaiting confirmation of the warrant, and while a trooper was preparing a citation and warning, a K-9 sniff of Mulikin's vehicle was performed. The dog alerted on the vehicle, and based on that alert, the troopers searched the vehicle. The search revealed ninety-seven grams of methamphetamine, as well as powdered fentanyl, thirty-four gabapentin pills, a scale, and two notebooks containing numbers and names.

Mulikin entered a guilty plea to the charge of possession with intent to deliver more than fifty grams of methamphetamine, pursuant to a plea agreement. In exchange for Mulikin's plea, the remaining counts were dismissed outright. Following a plea colloquy, supplemented by a signed plea questionnaire and waiver of rights form, the circuit court accepted Mulikin's guilty plea, finding that it was freely, voluntarily, and intelligently made. Mulikin agreed that the court could rely on the facts alleged in the complaint as the factual basis for his plea, and the court found that an adequate factual basis existed. The court later sentenced Mulikin to five years' initial confinement followed by five years' extended supervision. The court ordered that Mulikin would be eligible for the Substance Abuse Program after serving four years of his sentence.

Mulikin's appointed appellate attorney initially filed a no-merit report in case No. 2021AP101-CRNM, asserting that there were no arguably meritorious issues for appeal. Appellate counsel ultimately withdrew the no-merit report, however, and filed a postconviction motion for plea withdrawal. That motion alleged that law enforcement lacked probable cause to search Mulikin's vehicle because a police report showed that the dog did not actually alert on Mulikin's vehicle. Accordingly, the motion alleged that Mulikin's trial attorney was constitutionally ineffective by failing to file a suppression motion challenging the search.

In the meantime, Mulikin also filed a pro se motion for sentence modification. In that motion, Mulikin asserted that a new factor existed because after he was sentenced, the Department of Corrections (DOC) changed the minimum "eligibility date" for the Substance Abuse Program from thirty-six months prior to a defendant's release to forty-eight months prior to release. Mulikin therefore asked the court to modify his eligibility date "to come in line with recent eligibility criteria." The court denied Mulikin's motion for sentence modification without a hearing. The court explained that it had determined Mulikin's eligibility for the Substance Abuse Program at the time of sentencing, and the DOC's policy change had no effect on that decision.

The circuit court subsequently held an evidentiary hearing on Mulikin's motion for plea withdrawal. At the hearing, the K-9 handler testified regarding the dog sniff of Mulikin's vehicle. He explained that there are "two stages" when a dog is deployed—"a cursory sniff and a detail sniff." In the first stage, if the dog detects the odor of a controlled substance, it displays increased respiration and intense sniffing. During the second stage, if the dog is able to locate the source of the odor, it lies down at that location. The K-9 handler testified that, in Mulikin's case, the dog's increased respiration at the front bumper of Mulikin's vehicle constituted a

positive alert for the presence of controlled substances, but the dog's failure to lie down indicated that she was unable to locate the specific source of the odor. The K-9 handler also testified regarding both his and the dog's training and experience. In addition, evidence was introduced that the dog had previously located controlled substances in "hundreds" of training scenarios and other deployments.

Following the hearing, appellate counsel withdrew the motion to withdraw Mulikin's guilty plea. Counsel explained that, based on the testimony at the hearing, she had concluded the motion was not "arguably supported." Counsel subsequently filed the instant no-merit appeal.

The no-merit report addresses: (1) whether Mulikin's guilty plea was knowing, intelligent, and voluntary; (2) whether the circuit court erroneously exercised its sentencing discretion; and (3) whether Mulikin's trial attorney was constitutionally ineffective by failing to file a suppression motion. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.

The no-merit report does not address whether the circuit court erred by denying Mulikin's pro se motion for sentence modification. Having independently reviewed the record, however, we conclude that this issue lacks arguable merit. To prevail on a motion for sentence modification, a defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of his or her sentence. *State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a fact or set of facts that is highly relevant to the imposition of the defendant's sentence but was not known to the circuit court at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Id.*, ¶40.

Here, the circuit court concluded that the DOC's alleged change in policy regarding the minimum eligibility date for the Substance Abuse Program had no effect on the court's original decision to make Mulikin eligible for that program after he had served four years of his sentence. Stated differently, the DOC's policy regarding the minimum eligibility date was not highly relevant to the court's original determination of Mulikin's eligibility date. *See id.* On this record, there would be no arguable merit to a claim that the court erred by denying Mulikin's motion for sentence modification.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Angela Dawn Chodak is relieved of any further representation of Jason Mulikin in this matter. *See* WIS. STAT. RULE 809.32(3).

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*