OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

January 15, 2014

To:

Hon. Sandy A. Williams
Circuit Court Judge
1201 S. Spring St.
Port Washington, WI 53074-0994

Marylou Mueller
Clerk of Circuit Court
Ozaukee County Circuit Court
1201 S. Spring St.
Port Washington, WI 53074-0994

Adam Y. Gerol
District Attorney
P.O. Box 994
Port Washington, WI 53074-0994

John J. Grau
Grau Law Office
P.O. Box 54
Waukesha, WI 53187-0054

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Brian D. Nutten, #305699
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2012AP2416-CRNM State of Wisconsin v. Brian D. Nutten (L.C. #2011CF59)

Before Brown, C.J., Reilly, and Gundrum, JJ.

Brian Nutten appeals from a judgment of conviction for burglary and operating a vehicle without the owner's consent. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Nutten has filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal.[2] *See* WIS. STAT. RULE 809.21.

At the time of the crimes, Nutten had been living with a friend. After it was discovered that Nutten had attempted to take a cellphone picture of the friend's daughter while she was in the shower, Nutten broke into the house of his friend's parents and took a vehicle from the house to flee from Wisconsin. Days later he returned with the vehicle to his friend's house and had a confrontation with his friend's fiancé. Nutten was charged in three separate cases and all were resolved on the same day.[3] Nutten entered a no-contest plea to the charges of which he is convicted. The plea agreement required the prosecution to cap its sentencing recommendation at a six-year prison sentence on the operating without consent conviction and to request that sentence be withheld and Nutten be placed on consecutive probation for three years on the burglary conviction. The prosecution also agreed to take no position on possible requests

[2] In the supplemental no-merit report, appellate counsel requests that he be relieved of any obligation to further represent Nutten because Nutten waived his right to a no-merit appeal by engaging in pro se postconviction motion litigation in the circuit court while the no-merit appeal was pending. Automated circuit court records show that before filing his response to the no-merit report, Nutten filed in the circuit court motions for meaningful review of the presentence investigation report and for sentence modification and that the motions were denied at a hearing held July 17, 2013. Nutten also filed a petition for sentence adjustment. These motions are not part of the appellate record and we cannot rely on them alone as the requisite showing of a valid waiver of the right to appeal or appointed counsel. *See* ***State v. Thornton***, 2002 WI App 294, ¶21, 259 Wis. 2d 157, 656 N.W.2d 45. Indeed, the motion for meaningful review of the presentence investigation report is compatible with the no-merit appeal. *See* ***State v. Parent***, 2006 WI 132, ¶35, 298 Wis. 2d 63, 725 N.W.2d 915.

[3] Relating to the attempted cellphone photo, after dismissal of felony charges Nutten faced misdemeanor charges of invasion of privacy, attempted invasion of privacy, and attempt to capture an image of nudity without consent. In that case he pled no contest to attempted invasion of privacy and the other two counts were dismissed as read-ins. Nutten was sentenced to the maximum sentence of four and one-half months, which was time already served. Relating to the confrontation with his friend's fiancé, Nutten was charged with misdemeanor disorderly conduct involving the use of a dangerous weapon and operating after revocation. Those charges were dismissed as read-ins. This appeal only involves the burglary and operating a vehicle without consent convictions.

regarding eligibility for the earned release (ERP) or challenge incarceration (CIP) programs.[4] Nutten was sentenced to consecutive terms for a total of six years' initial confinement and seven years' extended supervision.

The no-merit report addresses the potential issues of whether Nutten's motion to suppress his statement to police was properly denied, whether Nutten's plea was freely, voluntarily and knowingly entered, whether rulings on objections made during sentencing were a proper exercise of discretion, whether the sentence was the result of an erroneous exercise of discretion, and whether the circuit court judge should have disqualified herself because she had previously prosecuted another defendant in a case in which Nutten was the victim. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further, except as necessary to address Nutten's response to the no-merit report.

Nutten's response to the no-merit report is lengthy and he breaks it into six sections: (1) the prosecutor's breach of the plea agreement; (2) ineffective assistance of counsel at sentencing for not objecting to breach of plea agreement, treatment of the picture-related crimes as read-ins, and reference to information only found in the confidential presentence investigation report (PSI), for the mishandling of corrections to the PSI, and for not informing Nutten of the opportunity to obtain a private PSI;[5] (3) the sentencing court's reliance on inaccurate

[4] Nutten was sentenced February 9, 2012. Effective August 3, 2011, the legislature renamed the Earned Release Program to the Wisconsin Substance Abuse Program. *See* 2011 Wis. Act 38, § 19.

[5] Nutten also claims his trial counsel was ineffective for not allowing Nutten to see the results of an examination for a not guilty by reason of mental disease or defect plea or advising Nutten that he could seek a second examination. By entry of his no-contest plea, Nutten forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

information; (4) a conflict of interest for trial counsel after intimidation by the disorderly conduct victim outside of the courtroom and a conflict of interest for the judge; (5) improper structure to the sentence; and (6) an incomplete appellate record because the case file for the picture-related prosecution and transcript of the hearing on Nutten's pro se post-appeal motions were not included. The supplemental no-merit report addresses Nutten's complaints and concludes his claims do not present issues of arguable merit. With the additional points made below, we agree with the analysis made in the supplemental no-merit report and that no issues of arguable merit are presented by the entirety of Nutten's response.

A recurrent theme in Nutten's response is his belief that the dismissed charges in the picture-related case were improperly treated as read-ins at sentencing in this case.[6] Although we disagree with the conclusion in the supplemental no-merit report that during the plea hearing Nutten orally agreed that the dismissed counts in the picture-related case would be considered at the subsequent sentencing, we conclude that Nutten's belief that they were considered as read-ins in this case is incorrect. First, the plea questionnaire in this case only referenced the disorderly conduct case as dismissed as a read-in. During the plea colloquy the circuit court treated the dismissed picture-related charges as read-ins only in that case. It separately informed Nutten that the disorderly conduct and operating after revocation charges would be dismissed as read-ins and therefore considered when Nutten returned for sentencing in this case. Additionally, the circuit

[6] Nutten first claims the plea agreement was breached when, at the plea hearing the prosecutor moved to dismiss the two charges relating to the attempted taking of the photo and requested the court "to consider them at sentencing in all matters." Nutten's response states that he tried to resolve this issue at the hearing held in July 2013, after the no-merit appeal was filed. Again, what occurred at the July 2013 hearing is not part of the record and not before this court. Nutten also claims that at sentencing the court relied on inaccurate information because it relied on the dismissed picture-related charges as read-ins in this case and other information about those dismissed charges and from persons who were not the victims of the crimes in this case.

court's attention was drawn to the fact that the picture-related charges were not read-ins for this case when Nutten filed a two-page document making corrections to the PSI. One of the corrections was that those charges were not part of sentencing in this case. The circuit court accepted the corrections.[7] At no time during sentencing did the court mention the dismissed picture-related charges.

Nutten cannot escape the fact that his convictions in this case were related to the attempted picture taking as it precipitated the crimes he committed.[8] As the supplemental no-merit report acknowledges, the sentencing court was entitled to consider those facts and other unproven allegations. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984) (other factors the sentencing court may consider include the defendant's record of past criminal offenses); ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990) (sentencing court may consider evidence of unproven offenses to the extent they indicate a pattern of conduct). Nutten's disagreement with the inferences the sentencing court drew from his past conduct does not mean the court relied on improper factors or otherwise erroneously exercised its sentencing discretion.

[7] Nutten complains that with respect to prison programming, he continues to be plagued by inaccurate information in the PSI and that the incorrect statement that he was attracted to the picture-taking victim has caused him to be labeled a sex offender. The record shows that the circuit court required the corrections to the PSI to be forwarded to the Department of Corrections. That procedure is sufficient. *See* ***State v. Melton***, 2013 WI 65, ¶76, 349 Wis. 2d 48, 834 N.W.2d 345. The supplemental no-merit report indicates that appointed appellate counsel was informed by the DOC that the corrections were put in Nutten's file with his PSI.

[8] Nutten claims that the court did not truly accept the corrections as evidenced by the inclusion of the victim of the attempted picture taking in the no-contact provision of the judgment in this case. Because the crime victims and crimes were related, it was appropriate to list the victims of all crimes in the no-contact provision.

Nutten states that he was denied meaningful review of the PSI at the July 2013 hearing, a post-appeal hearing held on Nutten's pro se motions for meaningful review of the PSI and for sentence modification.[9] A defendant in a no-merit appeal is entitled to access to parts of the PSI not sealed or subject to redaction. ***State v. Parent***, 2006 WI 132, ¶35, 298 Wis. 2d 63, 725 N.W.2d 915. This is not a case like ***Parent*** where no corrections were made to the PSI at sentencing and the defendant sought to raise issues from the PSI for the first time in response to the no-merit report. *See* ***id.***, ¶8. Indeed, at sentencing Nutten's attorney confirmed he had gone over the PSI with Nutten and a two-page document with corrections was submitted and accepted. Nutten's response to the no-merit report details items in the PSI Nutten contends are inaccurate and thus demonstrates familiarity with the content of the PSI sufficient to make a meaningful response to the no-merit report. Although Nutten was denied access to the PSI in July 2013, he does not demonstrate that he never had meaningful access to the PSI or that the denial of a second look at the PSI prejudiced his ability to respond to the no-merit report.[10] There is no arguable merit to a claim that the no-merit procedures were not followed. *See* ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574.

Nutten also claims that "my appellate counsel too has proven to be ineffective." A no-merit report is an approved method by which appointed counsel discharges the duty of

[9] After Nutten was denied access to the PSI at the July 2013 hearing, he asked whether this court could grant him access. Our August 21, 2013 order directed Nutten to make his inquiry regarding access to his appointed counsel and indicated that if Nutten was unable to view the PSI at his correctional institution, appointed counsel may review the PSI with Nutten while preserving confidential portions or move the circuit court for permission to allow Nutten to review the PSI. Nutten does not indicate that he pursued access to the PSI with appointed counsel.

[10] Nutten's desire for access to the PSI is tied to his desire to make the PSI "complete," and "to stop the D.O.C. from using the disputed portions of the PSI to wrongfully label me a sex-offender." Access for this purpose is beyond the scope of this appeal.

representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). This court's decision accepting the no-merit report and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required.

We may not have addressed with particularity each of Nutten's claims in his no-merit response. It is sufficient that we have reviewed the record, considered Nutten's response, and have determined that the record discloses no potential issues for appeal. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on appeal."). Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Nutten further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney John J. Grau is relieved from further representing Brian D. Nutten in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals