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February 11, 2015

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

2014AP1431-CRNM State of Wisconsin v. Mickey L. Miller (L.C. #2013CF118)

Before Neubauer, P.J.¹

Mickey L. Miller appeals from a judgment of conviction for three misdemeanors: battery as domestic abuse, criminal damage to property as domestic abuse, and obstructing an officer. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Miller received a copy of the report and filed a response. Upon consideration of the report, Miller's response, and an independent review of the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

record, we modify the judgment² and summarily affirm the judgment as modified because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Miller was charged with two felonies and four misdemeanors after an altercation with a woman with whom Miller had a very brief relationship. After meeting through an internet chat service, the woman picked Miller up in Milwaukee and drove him to her residence in Sheboygan. When the crimes occurred, Miller was staying with the woman at her residence and had been there for five days. The woman reported that when she asked Miller to leave her residence and return to Milwaukee, he became angry, broke down a door to get at her, punched her, strangled her, and threatened her with a knife. Miller reported that the woman became upset when he indicated he intended to leave and she attacked him, bit him, and self-inflicted her wounds. A jury acquitted Miller of three counts and found him guilty of battery, criminal damage to property, and obstructing an officer. Miller was sentenced to concurrent and consecutive jail terms totaling nine months with 179 days of credit.

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts, whether there are any arguably meritorious issues to support a motion for a new trial, and whether there is any arguable merit to challenge the sentence. In discussing possible issues for a new trial, the report discusses the pretrial rulings, including the denial of the

² The judgment is wrong because it states that Miller was sentenced to four months on the criminal damage to property conviction and that the term is consecutive to the sentence on the battery conviction. It also states that the five-month sentence on the obstruction conviction is concurrent with the sentence on the criminal damage to property conviction. The sentencing court clearly and unambiguously sentenced Miller to two concurrent terms of five months on the battery and criminal damage to property convictions and a consecutive four-month term on the obstruction conviction. The oral pronouncement controls the written judgment. *State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987); *State v. Schordie*, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997). The error in the judgment is a mere defect in the form of the certificate of conviction, which may be corrected in accordance with the actual determination by the sentencing court. *See State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. The circuit court may either correct the clerical error in the sentence portion of the written judgment of conviction or may direct the clerk's office to make such a correction. *Id.*, ¶5.

motion to suppress Miller's statements to police, jury selection, evidentiary rulings at trial, the colloquy by which the trial court confirmed that Miller's election to testify was knowing and voluntary, the propriety of opening statements, closing arguments and jury instructions, and how two questions from the jury were handled. Our review of the record confirms counsel's conclusion that any of these potential issues lack arguable merit. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion and we need not address them further.

The no-merit report does not address an objection made at Miller's initial appearance. At the initial appearance, Miller's attorney objected to his appearance by videoconferencing and reserved "jurisdictional objections." Miller's appearance by videoconferencing was authorized by WIS. STAT. §§ 967.08 and 970.01. There was no jurisdictional infirmity to reserve.

As indicated above, the jury found Miller guilty of battery and criminal damage to property. However, by reference to WIS. STAT. § 968.075(1)(a), the judgment of conviction lists the crimes as acts of domestic abuse. At sentencing the court made no finding that Miller's conduct was an act of domestic abuse. *See* WIS. STAT. § 973.055(1)(a)2. (a \$100 surcharge shall be imposed for each offense if the "court finds that the conduct constituting the violation under subd. 1 involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child"). We directed appointed counsel to file a supplemental no-merit report to address whether the crimes could be designated as acts of domestic abuse in the absence of a finding by the court, and whether Miller could argue that he was not a person that "resides or formerly resided" with the victim.

The supplemental report explains that because the crimes were charged as acts of domestic abuse and no objection was made at any time to that designation, any potential issue can only be raised as a claim of ineffective assistance of trial counsel. *See State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. The report concludes that there is no arguable merit to such a claim because the evidence supports a finding that Miller and the victim had in fact resided together and were planning to continue to do so but for the disruption caused by the crimes. We accept the no-merit conclusion for the reasons explained in the supplemental report. Additionally, there is no arguable merit to a claim that the crimes cannot be designated as acts of domestic abuse in the absence of an explicit finding because the evidence supports the court's implicit finding.

In his response, Miller first asserts that he was not adequately informed about the no-merit procedure and, had he been, he would never have allowed a no-merit appeal to be filed. He complains about the quality of appointed counsel's representation and asks that he be appointed new and competent counsel. Although Miller asserts he has "numerous grounds for appeal" and that there were "numerous technicalities and inconsistencies in the record" that deserve to be corrected, he does not identify any of them.

Miller is not entitled to the appointment of new counsel simply because he disagrees with counsel's no-merit conclusion. A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). We have concluded there is no arguable merit to further postconviction or appellate proceedings. This court's decision accepting the no-merit report and discharging counsel of any further duty of representation rests on the conclusion that counsel provided competent representation.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction as modified, discharges appellate counsel of the obligation to represent Miller further in this appeal, and remands for entry of a corrected judgment of conviction.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is modified to conform to the oral sentencing pronouncement; the judgment is summarily affirmed as modified and the cause remanded for entry of a corrected judgment of conviction. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven D. Grunder is relieved from further representing Mickey L. Miller in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals