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**DISTRICT IV**

October 22, 2015

To:

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

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2014AP918-CRNM      State of Wisconsin v. Brenda M. Bunnell (L.C. # 2012CF446)

Before Lundsten, Higginbotham, and Blanchard, JJ.

Attorney Clayton Griessmeyer, appointed counsel for Brenda Bunnell, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)<sup>1</sup> and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Bunnell's plea, the counting of prior operating while intoxicated (OWI) offenses to qualify the current conviction as a seventh offense, or the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

court's decision to deny Bunnell eligibility for the Earned Release Program (ERP). Bunnell filed a no-merit response asserting that the only issue she wishes to pursue in an appeal is a challenge to the circuit court's decision to deny Bunnell eligibility for ERP. Because Bunnell has informed us that she does not wish to pursue any other issues on appeal, we limit our discussion to whether there would be arguable merit to a challenge to the court's decision as to Bunnell's eligibility for ERP. Upon our independent review of the record, as well as the no-merit report and response, we agree with counsel's assessment that there would be no arguable merit to that issue. Accordingly, we affirm.

Bunnell asserts in her no-merit response that the court erred by denying Bunnell eligibility for ERP. She argues that the court's decision denied Bunnell participation in ERP for the total sentence Bunnell is serving as to this case and Bunnell's sixth offense OWI case, in which a different circuit court judge had found Bunnell eligible for ERP. Bunnell asserts that the judge in this case should have considered the fact that the other judge found Bunnell eligible, and that the judge in this case erred by taking away the eligibility ordered by the other judge. Bunnell also asserts that, in declining to grant Bunnell eligibility for ERP, the circuit court failed to consider Bunnell's diagnosis of Attention Deficit Disorder (ADD), that Bunnell was able to stay sober when on the right ADD medication, and that, at the time of the current offense, Bunnell had lost her health insurance coverage and was not on the proper medication. Bunnell asserts that the presentence investigation report (PSI) was missing information regarding Bunnell's ADD diagnosis, as well as the fact that Bunnell had told her counselor prior to this case that she wished to go into treatment, precluding the circuit court from considering that information. Finally, Bunnell asserts that the circuit court gave no reason for denying Bunnell

eligibility in ERP. We disagree with Bunnell that there would be arguable merit to a challenge to the court's decision as to Bunnell's ERP eligibility.

Our review of the record reveals that the information that Bunnell asserts was important for the court to consider was presented to the court, that the court considered that information, and that the court properly exercised its discretion by denying Bunnell eligibility for ERP. *See State v. Owens*, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187 (explaining that a circuit court's decision as to a defendant's eligibility for ERP is part of the court's exercise of its sentencing discretion). At the sentencing hearing, defense counsel informed the court that Bunnell had been found eligible for ERP at her sentencing for her sixth offense OWI, and argued that the court should find Bunnell eligible in this case, as well. Defense counsel also highlighted information from the PSI, including Bunnell's diagnosis with ADD and depression. Defense counsel argued that Bunnell was able to get to the root cause of her drinking and control the stressors in her life through medication and by maintaining sobriety, but that Bunnell then lost her health insurance and had a change in medication that led to a relapse. Counsel argued that Bunnell has demonstrated that she can dedicate herself to treatment, and that Bunnell needed the substance abuse counseling available through ERP.

In imposing sentence, the court explained that it considered Bunnell's offense in this case for seventh offense OWI as a completely separate offense from her sixth offense OWI, and that seventh offense OWI is "an incredibly serious and dangerous offense." The court explained that it had imposed the minimum time that would not unduly depreciate the offense and that, had the court imposed a longer sentence, the court may have considered eligibility for ERP. *See id.* (explaining that ERP allows the defendant the opportunity to reduce confinement time). The court also explained that it considered the information in the PSI, including Bunnell's diagnoses,

that Bunnell had been able to maintain her sobriety for several years before losing her insurance, and that Bunnell had successfully completed several inpatient treatment programs. The court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offense, Bunnell’s character and criminal history, Bunnell’s rehabilitative needs, and the need to protect the community. *See State v. Gallion*, 2004 WI 42, ¶¶38-46, 270 Wis. 2d 535, 678 N.W.2d 197; *Owens*, 291 Wis. 2d 229, ¶9 (holding that a court’s ERP eligibility decision will be upheld “so long as the overall sentencing rationale ... justifies the ERP determination”). We conclude that it would be wholly frivolous to argue that the circuit court erroneously exercised its discretion by denying Bunnell eligibility for ERP.

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

IT IS FURTHER ORDERED that Attorney Griessmeyer is relieved of any further representation of Bunnell in this matter. *See WIS. STAT. RULE 809.32(3).*

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*