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**DISTRICT IV**

February 5, 2018

To:

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Redgranite, WI 54970-0925

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

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2017AP422-CRNM	State of Wisconsin v. Jay E. Higbie (L.C. # 2015CF948)
2017AP423-CRNM	State of Wisconsin v. Jay E. Higbie (L.C. # 2015CF2087)

Before Lundsten, P.J., Sherman and Blanchard, 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).**

Attorney Carl Chesshir, appointed counsel for Jay E. Higbie, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)<sup>1</sup> and *Anders*

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

*v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Higbie's pleas or sentencing. Higbie was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

In May 2015, Higbie was charged with three counts of delivery of 3 grams or less of methamphetamine and one count of possession with intent to deliver between 3 and 10 grams of methamphetamine. In September 2015, after Higbie was released on bond in that case, Higbie was charged in a new case with possession with intent to deliver between 10 and 50 grams of methamphetamine and three counts of felony bail jumping. Pursuant to a global plea agreement, Higbie pled guilty to two counts of delivery of 3 grams or less of methamphetamine, one count of possession with intent to deliver 3 to 10 grams of methamphetamine, one count of possession with intent to deliver 10 to 50 grams of methamphetamine, and one count of felony bail jumping. The State agreed to move to dismiss the remaining charges in these two cases, along with the charges in two other cases that were pending against Higbie. At sentencing, the State recommended a total sentence of 13 to 15 years of initial confinement and 10 years of extended supervision. The presentence investigation report (PSI) writer recommended 3 to 4 years of initial confinement, 3 to 4 years of extended supervision, and 2 years of probation, consecutive to the prison sentence. Higbie argued for a sentence of 14 months of initial confinement, 3½ years of extended supervision, and 18 months of probation, consecutive to the prison sentence. The court sentenced Higbie to a total of 7 years of initial confinement and 6 years of extended supervision.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Higbie’s pleas. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire and waiver of rights form that Higbie signed, satisfied the court’s mandatory duties to personally address Higbie and determine information such as Higbie’s understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See State v. Hoppe*, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel’s assessment that a challenge to Higbie’s pleas would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Higbie’s sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins “with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Higbie was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Higbie’s character and criminal history, the seriousness of the offenses, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Higbie to a total of 7 years of initial confinement and 6 years of extended supervision, which was more than recommended by Higbie

or the PSI writer, but substantially less than the amount recommended by the State. The sentence was within the maximum Higbie faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive “only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances”) (citation omitted)). We discern no erroneous exercise of the court’s sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Carl Chesshir is relieved of any further representation of Jay E. Higbie 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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*Diane M. Fremgen*  
*Acting Clerk of Court of Appeals*