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 IV**

March 15, 2018

*To*:

Hon. John V. Finn
Circuit Court Judge
Portage Co. Courthouse
1516 Church Street
Stevens Point, WI 54481-3598

Heather Bravener
Clerk of Circuit Court
Clark County Courthouse
517 Court Street
Neillsville, WI 54456

Lyndsey A. B. Brunette
District Attorney
517 Court Street, Rm. 404
Neillsville, WI 54456-1903

Diane Lowe
Lowe Law, L.L.C.
P.O. Box 999
Eau Claire, WI 54702-0999

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Ryan D. Heintz
Oakhill Corr. Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

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2017AP570-CRNM State of Wisconsin v. Ryan D. Heintz (L.C. # 1997CF98)

Before Blanchard, Kloppenburg and Fitzpatrick, 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 Diane Lowe, appointed counsel for Ryan Heintz, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Counsel provided Heintz with a copy of the report, and he submitted two responses. We

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

The current appeal is from sentencing after revocation of probation. The circuit court imposed indeterminate, concurrent sentences of four and six years on two burglary counts, and two years on one count of operating a vehicle without the owner's consent.

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197.

In this case, the circuit court provided virtually no discussion explaining its exercise of discretion. The court said little more than that it had never seen somebody who had absconded from probation for such a long period of time, and that, because these are indeterminate sentences, Heintz would be eligible for parole and mandatory release. The court then imposed the sentences that were recommended by the Department of Corrections and the State. On this record, it would not be frivolous to argue that the circuit court failed to consider the required factors under ***Gallion***.

However, nothing in ***Gallion*** overrules the "independent review" doctrine established in ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). The majority opinion expressly disclaimed addressing that issue, ***Gallion***, 270 Wis. 2d 535, ¶18 n.6, and the concurrence by Justice Wilcox asserted that the doctrine should continue to apply. ***Id.***, ¶80. Therefore, even if the circuit court did not sufficiently explain how its analysis of sentencing

factors led to the sentence imposed, we must still conduct an independent review by searching the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained, and it is our duty to affirm a sentence on appeal if, from the facts of record, the sentence is sustainable as a proper discretionary act. ***McCleary***, 49 Wis. 2d at 282.

In this case, it would be frivolous to argue that we would not affirm this sentence under the independent review doctrine. Among other reasons, the sentences were less than the maximum available and were consistent with recommendations from the department and the State.

The no-merit report also addresses whether there is a basis for an argument in the fact that the revocation summary's discussion of a count under a different case number contains an error. The no-merit report states that Heintz asserts he may have been prejudiced at the sentencing after revocation by the fact that the revocation summary included inaccurate repeater information on a charge that Heintz was not being sentenced for.

The no-merit report concludes that this issue lacks arguable merit because the revocation summary does not actually mention this erroneous information. We agree that the summary does not mention this information, and accordingly there is no merit to this issue.

In Heintz's first response, he notes that, at his sentencing after revocation, the court mistakenly purported to sentence him on a charge on which he had already been sentenced. Heintz asserts that this was "a serious error as it had the potential to change the sentence structure dramatically." However, he does not explain, and we do not understand, how that error might have affected the sentence structure. It appears that there would be no harm to Heintz because the additional purported sentence was concurrent to the other sentences in this case, and

it was the same sentence that a different court had already given on that count. There does not appear to be arguable merit to this issue.

In Heintz's second response, he argues that, because this case was consolidated with another case, he should have received only one sentence for the whole case, rather than being sentenced for each individual count. The legal authorities that he cites do not stand for the proposition that consolidation of multi-count criminal cases has the effect of changing the total number of counts. There is no arguable merit to this issue.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Lowe is relieved of further representation of Heintz 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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*Sheila T. Reiff*
*Clerk of Court of Appeals*