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

May 2, 2018

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

Catherine Malchow
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

Gary T. Gilstrap Jr., #571192
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2017AP2316-CRNM State of Wisconsin v. Gary T. Gilstrap, Jr. (L.C. #2016CF186)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Gary T. Gilstrap, Jr., appeals from a judgment convicting him of second-degree sexual assault of a child. Gilstrap's appointed appellate counsel 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). Gilstrap

---

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

has exercised his right to file a response. Upon consideration of the no-merit report and response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2011, while on probation for another crime, Gilstrap, then twenty-two, gave alcohol to the thirteen-year-old friend of his younger sister and had sexual intercourse with the girl. The girl first revealed the assault in 2016. By that time, Gilstrap had married, fathered two sons, and become a minister. He pled guilty and, although he faced up to twenty-five years' initial confinement (IC) and fifteen years' extended supervision (ES), he was sentenced to five years' each of IC and ES. This no-merit appeal followed.

The no-merit report addresses the potential issues of whether Gilstrap's guilty plea was freely, voluntarily, and knowingly entered and whether the sentence was unduly harsh or otherwise the result of an erroneous exercise of discretion. Our review of the record satisfies us that the no-merit report properly and thoroughly analyzes these issues as without arguable merit. Still, we consider the sentencing issue further because Gilstrap raises it in his response to the no-merit report and to explain why challenging his sentence would lack arguable merit.

Gilstrap seeks sentence modification—specifically, that the confinement portion of his sentence be reduced and the supervision portion be extended—because of the dramatic life changes he has made since committing the assault and the significant responsibilities his wife now bears alone.

We agree with the circuit court that Gilstrap's efforts, accomplishments, and concern for his family are commendable. It is the circuit court that modifies a sentence, however. *See* WIS.

STAT. § 973.19; ***State v. Meyer***, 150 Wis. 2d 603, 608-09, 442 N.W.2d 483 (Ct. App. 1989). This court only reviews the sentence imposed, and our review is limited to whether the circuit court erroneously exercised its discretion. ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). If sentence modification is an issue, a motion first must be made in the circuit court. ***State v. Norwood***, 161 Wis. 2d 676, 681, 468 N.W.2d 741 (Ct. App. 1991); *see also* § 973.19(1). Gilstrap did not do so, under § 973.19 or otherwise.

To warrant sentence modification now, Gilstrap must persuade the circuit court of the existence of a new factor.[2]

> [A] "new factor" refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

Gilstrap does not allege that his post-offense conduct and endeavors constitute a new factor. They plainly do not. His response to the no-merit report is substantially the same as the information presented to the circuit court at the time of sentencing. Gilstrap's wife, a church friend, and defense counsel earnestly spoke on his behalf. The court referenced the "multiple, multiple" testimonial letters it received and expressly acknowledged that this was "not an easy case," as the court usually did not "see people make such good positive changes." A motion to

[2] The circuit court may modify a sentence without a new factor if it determines its sentence was unduly harsh or unconscionable. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990). As noted, however, appellate counsel has thoroughly examined Gilstrap's sentence. We agree with her conclusion that the sentence is not legally excessive.

modify the sentence on the basis of a new factor would lack arguable merit.

Our review of the record discloses no other potential issues for appeal. Gilstrap's guilty plea waived the right to raise nonjurisdictional defects and defenses arising from proceedings before entry of the plea, including claimed violations of constitutional rights. ***State v. Kraemer***, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990). Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Gilstrap 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 Catherine Malchow is relieved from further representing Gary T. Gilstrap, Jr., in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals