



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 III/I

August 29, 2018

To:

Hon. Timothy A. Hinkfuss
Circuit Court Judge
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Jefren E. Olsen
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Charles E. Carthage 427063
Dodge Corr. Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

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

2017AP1192-CRNM State of Wisconsin v. Charles E. Carthage (L.C. # 2013CF254)

Before Kessler, P.J., Brennan and Brash, 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).

Charles E. Carthage appeals from a judgment of conviction. Attorney Jefren E. Olsen filed a no-merit report concluding that further postconviction or appellate proceedings would lack arguable merit. *See* WIS. STAT. RULE 809.32 (2015-16).¹ Upon review, we conclude that a

¹ All references to the Wisconsin statutes are to the 2015-16 version unless otherwise noted.

challenge to the order declaring Carthage ineligible to participate in the Wisconsin substance abuse program would not lack arguable merit. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for filing a postconviction motion.

Carthage pled guilty to five crimes he committed in 2013, namely, one count of delivering between three grams and ten grams of heroin as a party to a crime, one count of maintaining a drug trafficking place, two counts of possessing a firearm while a felon, and one count of possessing marijuana. *See* WIS. STAT. §§ 961.41(1)(d)2. (2013-14), 939.05 (2013-14), 961.42(1) (2013-14), 941.29(2)(a) (2013-14), 961.41(3g)(e) (2013-14). The circuit court imposed an evenly bifurcated, ten-year term of imprisonment for the offense of delivering heroin and a concurrent thirty-day jail sentence for possessing marijuana. For the remaining counts, the circuit court withheld sentence and imposed concurrent terms of probation.

During the sentencing proceedings, the circuit court noted that Carthage:

indicated he would benefit from substance abuse treatment at this time. So I agree. I hope in prison, Mr. Carthage, you're able to get substance abuse treatment. That seems to me to be critical for when you come out that you're not able – that you don't return to this particular life.

The circuit court went on, quoting from the presentence investigation report:

[Wisconsin substance abuse] Program;^[2] madam clerk, this is on page 16. [“]It appears that the Defendant is not eligible for the program[”]; so I'm not making him eligible for that. For the challenge incarceration program [“]it appears that the Defendant is

² The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. § 302.05; 973.01(3g). The circuit court referred to the program as the earned release program during the sentencing hearing.

not eligible for the program['] as well and I'm not making him eligible for that.

Both the Wisconsin substance abuse program and the challenge incarceration program are prison treatment programs that, upon successful completion, permit an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(3m)(b)1., 302.05(3)(c)2.a. Defendants who have committed certain specified offenses not at issue here are statutorily barred from participation in these programs. *See* §§ 302.045(2)(c), 302.05(3)(a)1. Additionally, inmates who are forty years of age or older may not enter the challenge incarceration program. *See* § 302.045(2)(b). As to other offenders, the sentencing court must decide, as part of its exercise of sentencing discretion, whether they are eligible to participate in these programs. *See* WIS. STAT. §§ 973.01(3m), 973.01(3g).

In the no-merit report, appellate counsel acknowledges that Carthage is not statutorily excluded from participation in the Wisconsin substance abuse program.³ Counsel further acknowledges that "it is not clear why Carthage was viewed as ineligible for [the Wisconsin substance abuse] program, as none of the offenses in this case is in the list of excluded crimes." Counsel nonetheless concludes that Carthage's "need for frequent dialysis makes him an inappropriate candidate for the program as a practical matter."

Upon our independent review of the record, we are not satisfied that a motion to declare Carthage eligible for the Wisconsin substance abuse program would lack arguable merit. The

³ Carthage was forty-one years old at the time of sentencing and therefore is statutorily disqualified from participating in the challenge incarceration program. *See* WIS. STAT. § 302.045(2)(b).

circuit court found that Carthage would benefit from substance abuse treatment while incarcerated. It appears that the circuit court concluded he was statutorily excluded from participating in the program, but, as appellate counsel recognizes, the record does not support that conclusion. As to counsel's concerns that Carthage's medical treatment presents an impediment to participation, we conclude that any consideration due Carthage's health is a matter for the circuit court to assess in the exercise of its discretion. *See* WIS. STAT. § 973.01(3g).

In light of the foregoing, we cannot conclude that further proceedings challenging the decision to declare Carthage ineligible for the Wisconsin substance abuse program would lack arguable merit. We therefore will dismiss this appeal and extend the deadline for filing a postconviction motion in circuit court. We add that our conclusion regarding the arguable merit of a challenge to program ineligibility does not mean we have reached a conclusion about the merits of any other potential issues in this matter. Carthage is not precluded from raising any issue in the postconviction proceedings that counsel may now believe has merit.⁴

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for Carthage to file a postconviction motion is extended through the date thirty days after remittitur. *See* WIS. STAT. RULE 809.82(2)(a).

⁴ On remand, Carthage will also have the opportunity to seek the corrections to the judgment of conviction that appellate counsel explains are required.

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

Sheila T. Reiff
Clerk of Court of Appeals