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**DISTRICT II**

September 12, 2018

To:

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Fond du Lac County Courthouse  
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Carnell B. Lewis, #620752  
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You are hereby notified that the Court has entered the following opinion and order:

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2015AP1680-CRNM      State of Wisconsin v. Carnell B. Lewis (L.C. #2015CF9)

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).**

Carnell B. Lewis appeals from a judgment of conviction entered upon his no contest pleas to conspiring to deliver one gram or less of cocaine, contrary to WIS. STAT.

§ 961.41(1)(cm)1g. (2015-16)<sup>1</sup>, and § 961.41(1x), and delivering not more than 200 grams of tetrahydrocannabinols (THC), contrary to § 961.41(1)(h)1.<sup>2</sup> Appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and *Anders v. California*, 386 U.S. 738 (1967), to which Lewis did not respond. Observing that the no-merit report discussed only potential sentencing issues, we directed appellate counsel to take further action; in pertinent part, if counsel determined that no issue of arguable merit arose from the entry of Lewis's pleas, counsel was ordered to file a supplemental no-merit report discussing the plea-taking procedures in this case. Counsel filed a supplemental no-merit report concluding that any challenge to the entry of Lewis's no contest pleas would be without arguable merit. As before, Lewis did not file a response to the supplemental no-merit report. The appeal was then placed on hold pending decisions in two Wisconsin Supreme Court cases, and the hold was lifted at the end of July 2018.<sup>3</sup> Upon consideration of the original and supplemental no-merit reports and our independent review of the record, we conclude that the judgment may be summarily affirmed

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

<sup>2</sup> As to both counts, Lewis was charged as a WIS. STAT. § 939.62(1)(b) repeater, and with the penalty enhancer of committing the offense within 1000 feet of either a school (the cocaine charge) or a park (the THC charge), as proscribed by WIS. STAT. § 961.49(1m)(b)1. or 6. We refer to § 961.49(1m) as a location enhancer.

<sup>3</sup> Two mandatory DNA surcharges were assessed on the judgments of conviction. Because of the multiple DNA surcharges, we previously put this appeal on hold pending the Wisconsin Supreme Court's decision in *State v. Odom*, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The *Odom* appeal was voluntarily dismissed before oral argument. This case was then held for a decision in *State v. Freiboth*, 2018 WI App 46, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_ (No. 2015AP2535). *Freiboth* holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. *Id.*, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Lewis was originally charged with seven drug-related counts: five counts of conspiring to deliver one gram or less of cocaine on or near a school or park, as a repeater; one count of delivering not more than 200 grams of THC on or near a park, as a repeater; and conspiring to possess with intent to deliver more than forty grams of cocaine, on or near a park, as a repeater. The charges resulted from a series of controlled drug buys made with the assistance of a confidential informant. Pursuant to a plea agreement, Lewis pled no contest to counts one (cocaine) and four (THC) with the repeater and location enhancers, and the State moved to dismiss but read in the remaining five counts. The State agreed to cap its sentencing recommendation at three to five years of initial confinement followed by three to five years of extended supervision, and Lewis was free to argue sentence. On each count, the court imposed a seven-year bifurcated sentence, with five years of initial confinement followed by two years of extended supervision, consecutive, for a total bifurcated sentence of fourteen years.

The no-merit and supplemental no-merit reports address the potential issues of whether Lewis has grounds to withdraw his no contest pleas, whether Lewis was properly charged and convicted as a repeater, whether the circuit court properly applied the location enhancers, and whether the circuit court erroneously exercised its discretion at sentencing. Our review of the record persuades us that no issue of arguable merit arises from either the plea-taking or sentencing procedures in this case.

During the plea hearing the circuit court fulfilled each of the duties set forth in *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record shows that the plea-

taking court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. With regard to the maximum penalties, the circuit court ascertained Lewis's understanding of the unenhanced maximums and how the enhancers operated to increase his potential terms of initial confinement, and Lewis said he understood the nature of the repeater and location enhancers and agreed they applied to his offenses. Additionally, the circuit court properly relied upon the defendant's signed plea questionnaire. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with appellate counsel that a challenge to the entry of Lewis's pleas would lack arguable merit.

The no-merit report discusses whether the repeater and location enhancers are properly applied to both counts of conviction, and concludes that both sentences are legal in terms of length and structure. We are satisfied that counsel's original no-merit report properly analyzes these issues as without merit.<sup>4</sup> The no-merit also addresses the circuit court's exercise of its sentencing discretion. It is a well-settled principle of law that sentencing is committed to the circuit court's discretion, and our review is limited to determining whether the court erroneously exercised that discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the sentencing court considered appropriate factors, did not consider improper

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<sup>4</sup> Count one was charged as the crime of conspiracy under WIS. STAT. § 961.41(1x). Because § 961.41(1x) is not one of the statutes listed in WIS. STAT. § 961.49(1m), we considered whether the application of the location enhancer gives rise to a potential issue and determined it does not. The location enhancer was not invoked on Lewis's sentence for count one. Additionally, the factual basis for count one is the delivery of cocaine, a violation of § 961.41(1)(cm)1g., to which § 961.49(1m) clearly applies.

factors, and reached a reasonable result. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76; *State v. Grindemann*, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507. Further, we cannot conclude that the fourteen-year prison sentence when measured against the maximum potential sentence of twenty-seven and one-half years is so excessive or unusual as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguably meritorious challenge to the sentence imposed in this case.

Our independent review of the record reveals no other potential issues of arguable merit. Therefore,

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

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski<sup>5</sup> is relieved from further representing Carnell B. Lewis 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*

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<sup>5</sup> Attorney Jeffrey Mann was originally appointed to represent Lewis, and filed the no-merit report. By an order dated July 30, 2018, we permitted Mann to withdraw because he was changing employment and the State Public Defender responded that it would appoint successor counsel. Attorney Angela Conrad Kachelski was appointed as Lewis's successor counsel.