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**DISTRICT II**

December 5, 2018

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

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2018AP1009-CRNM      State of Wisconsin v. Daniel Miller (L.C.# 2016CF3003)

Before Neubauer, C.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).**

Daniel Miller appeals from a judgment of conviction for burglary, as a party to the crime, and from an order denying his postconviction motion to make him eligible for substance abuse programming (SAP). His appellate counsel has filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2015-16),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Miller has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, the judgment and order are summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

A Milwaukee police officer returning home after his shift observed Miller removing a shop vacuum from a neighbor's garage between 4:00 and 4:30 a.m. on the Fourth of July holiday. Miller gave the officer multiple stories about why he was at the residence and who had given him permission to take the shop vacuum from the garage. Officers found a window had been broken out on a car parked inside the garage. The homeowner later reported that there were pry marks near the lock on the service door to the garage, the door lock was damaged, and tools were missing from the garage.

Miller was charged with being a party to the crime of burglary. He entered a guilty plea. As to sentencing, the prosecutor made the agreed upon recommendation for a consecutive prison term of five years split evenly between initial confinement and extended supervision. The court imposed the prosecutor's recommended sentence and made it consecutive to a reconfinement sentence Miller was serving. The court did not make Miller eligible for SAP because Miller had not made efforts to address his drug addiction.<sup>2</sup> Miller filed a postconviction motion to be made

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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> The sentencing court stated: "The thing about programming is, Mr. Miller, this has been a very long term thing, and you haven't made decisions in 25 years of opportunities to do so. So I'm not recommending or making you available [for] any programming." When Miller indicated that he never got any programming, the court responded, "You've had 25 years of notice sir. You should have done something."

eligible for SAP. He argued that in the years preceding the offense, he had attempted to deal with his drug addiction issues and therefore, it was inaccurate for the court to deny programming opportunities on the belief that Miller had not done anything to address his drug problem. The court denied the motion explaining that the weight of Miller's record diminished the significance of a few months treatment Miller sought in 2013. The court confirmed its intent that Miller serve the full duration of confinement because prior incarceration and probation had failed to curb Miller's criminality and early release programming would be counterintuitive to the court's goal of punishment, deterrence and community protection.

The no-merit report addresses the potential issues of whether Miller's plea was knowingly, voluntarily, and intelligently entered, whether the sentence was the result of an erroneous exercise of discretion or unduly harsh or excessive, and whether the postconviction motion was properly denied. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further except as necessary to address Miller's response.

In his response, Miller first asserts that his guilty plea was based on false information from his trial counsel that Miller would be able to participate in SAP. The record belies Miller's assertion that he believed he would be given the benefit of an early release program. During the plea colloquy, Miller indicated that he understood that despite the recommendations of the parties, the court could sentence him to the maximum. Miller also confirmed during the colloquy that no one had promised him anything to induce his guilty plea. There is no arguable merit to a claim that Miller's plea was based on a promise that he would be able to participate in SAP.

Miller next asserts that the sentence was an erroneous exercise of discretion because the sentencing court refused to acknowledge Miller's extensive drug history and efforts he personally put into recovery. He claims the court gave too much weight to the wrong factors and failed to recognize mitigating factors, such as the addiction crisis. The initial determination of eligibility for earned release programming rests in the sentencing court's discretion. *See* WIS. STAT. § 973.01(3g). Miller's treatment efforts were presented to the sentencing court by the postconviction motion. The court gave a reasoned explanation for why those efforts were not sufficient to afford Miller the opportunity to participate in SAP and earn early release. There is no arguable merit to the claim that the sentence was an erroneous exercise of discretion.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Miller further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and order denying the postconviction motion are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christopher P. August is relieved from further representing Daniel Miller in this appeal. *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*