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**DISTRICT I**

June 14, 2019

To:

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

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2017AP2207-CRNM      State of Wisconsin v. Randy D. Wilson (L.C. # 2015CF2775)

Before Brash, P.J., Brennan and Dugan, JJ.

Randy D. Wilson appeals a judgment convicting him of possession of heroin and possession of cocaine, both as a habitual criminal. Appellate counsel, Philip J. Brehm, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).<sup>1</sup> Wilson was advised of his right to respond, but he did not do so. After reviewing the no-merit report and conducting an independent review of the record, we conclude

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

that there are no issues of arguable merit that could be pursued on appeal. Therefore, we affirm. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses whether there was sufficient evidence to support the verdict. We view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The no-merit report summarized the trial testimony and stipulation. Based on our review of the trial testimony and stipulation, there was sufficient evidence to support the jury's verdict of guilty on the two charges. There would be no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report next addresses whether there would be arguable merit to a claim that trial counsel Thomas Erickson provided Wilson with constitutionally ineffective assistance. "Whether a defendant received ineffective assistance of trial counsel is a two-part inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984)." *State v. Jenkins*, 2014 WI 59, ¶35, 355 Wis. 2d 180, 848 N.W.2d 786. "A defendant must show both (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced the defendant." *Id.* Our review of the record reveals no basis for a claim that trial counsel performed deficiently when representing Wilson. Accordingly, there would be no arguable merit to this claim.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erred in giving a jury instruction on the lesser-included offenses of simple possession of heroin and simple possession of cocaine. "The submission of a lesser-included offense is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." *State v. Kramar*, 149 Wis. 2d 767, 792,

440 N.W.2d 317 (1989). When the prosecutor requested that lesser included offenses be submitted to the jury, Wilson's lawyer said that Wilson was not requesting the instructions, but Wilson did not object. Regardless, the evidence supported the instruction because there were reasonable grounds in the evidence to convict on the lesser offense and acquit on the greater offense, as detailed in the no-merit report. Therefore, there would be no arguable merit to this claim.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion. The circuit court imposed one year of initial confinement and one year of extended supervision for the cocaine possession conviction. The court imposed six months in jail for the heroin possession conviction. Both sentences were imposed consecutively. The circuit court considered appropriate factors in deciding the length of sentence to impose and explained its decision in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. As such, there would be no arguable merit to a challenge to the sentencing court's discretion.

The no-merit report next addresses whether there are any new factors that would support a motion to modify Wilson's sentence. Appellate counsel states, in the no-merit report, that he is not aware of any fact or set of facts that would support a motion to modify the sentence. Our review of the record reveals no grounds for a motion to modify the sentence. Therefore, we conclude that there would be no arguable merit to this claim.

Our independent review of the record reveals no other potential issues for appeal. Therefore, we affirm the judgment of conviction and relieve Attorney Philip J. Brehm from further representation of Wilson.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Philip J. Brehm is relieved from further representation of Wilson 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*