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**DISTRICT II**

September 4, 2019

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

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2019AP347-CRNM      State of Wisconsin v. Ashley C. Gandy, Jr. (L.C. #2017CF474)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

**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).**

Ashley C. Gandy, Jr., appeals from a judgment convicting him of possession of cocaine, second or subsequent offense, and obstructing an officer, as a repeater. Gandy's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)<sup>1</sup> and

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

*Anders v. California*, 386 U.S. 738 (1967). Gandy has exercised his right to file a response. Upon consideration of the filings 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.

A uniformed City of Racine police officer familiar with Gandy's appearance observed Gandy entering a business. The officer followed him in, as he knew Gandy had active warrants for his arrest. Gandy gave the officer false identifying information. When the officer confronted Gandy about his identity, he confirmed that he was Ashley Gandy. After the arrest warrants were verified, Gandy was arrested and searched. Six bindles containing a white powder that proved to be cocaine and four knotted baggie corners containing what proved to be marijuana were found on Gandy's person. Gandy was charged with, Count 1, possession with intent to deliver cocaine (>1-5 grams), second and subsequent offense; Count 2, possession with intent to deliver or manufacture THC ( $\leq$  200 grams), second and subsequent offense; and Count 3, obstructing an officer, as a repeater.

Pursuant to a plea agreement, Gandy entered pleas to possession of cocaine, second and subsequent offense, and obstructing an officer, as a repeater. Count 2 was dismissed and read in. The court sentenced Gandy on Count 1 to eighteen months' initial confinement (IC) and two years' extended supervision (ES), stayed for three years' probation, consecutive to Count 3 and to the revocation sentence he then was serving. On Count 3, the court sentenced him to one year IC and one year ES, consecutive to his revocation sentence. This no-merit appeal followed.

The no-merit report examines whether the potential issue of whether Gandy's plea was knowing, intelligent, and voluntary; whether the State breached the plea agreement; and whether the sentence was illegal, improper, or in any way reflects an erroneous exercise of the court's sentencing discretion. As our review of the record satisfies us that the no-merit report thoroughly analyzes these potential issues and concludes they are without merit, we address them no further.

Gandy's response alleges a sentencing error in regard to his obstructing conviction. He asserts that the penalty enhancer may not be applied to the ES portion of his sentence on that conviction. He relies on *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, ¶35, 654 N.W.2d 24, where this court held that WIS. STAT. § 973.01(2)(c) does not authorize a sentencing court to impose any portion of a penalty enhancer as extended supervision. Section 973.01(2)(c) provides that the "maximum term of confinement *in prison*" may be increased. (Emphasis added). *Volk* was a felony case, however, and was decided under § 973.01(2)(c) (1999-2000), which dealt only with felonies. Bifurcated sentences did not apply to misdemeanors, as such sentences have since the statute was amended in 2003.

A number of interrelated statutory provisions govern misdemeanor repeater sentences. WISCONSIN STAT. § 939.62(1)(a) sets forth the penalty enhancer that applies to misdemeanor repeater sentences, and allows a circuit court to increase the maximum term of imprisonment "to not more than 2 years." WISCONSIN STAT. § 973.02 provides that a sentence of more than one year must be to the Wisconsin state prisons. By definition, then, a misdemeanant may not be sentenced to prison, as opposed to jail, *unless* subject to a penalty enhancer, as the maximum penalties for misdemeanors are less than one year imprisonment. *See* WIS. STAT. § 939.60.

Under WIS. STAT. § 973.01(1), “whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony ... or a misdemeanor ... the court shall impose a bifurcated sentence.” A bifurcated sentence is a sentence that “consists of a term of confinement in prison followed by a term of extended supervision.” Sec. § 973.01(2). As applicable to misdemeanor repeater sentences, “the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence,” and “[t]he term of extended supervision may not be less than 25% of the length of the term of confinement in prison.” Sec. 973.01(2)(b)10. and (d).

In *State v. Lasanske*, 2014 WI App 26, ¶11, 353 Wis. 2d 280, 844 N.W.2d 417, we held that WIS. STAT. § 973.01(2)(c)1. does not apply to misdemeanor sentences and set forth a procedure for circuit courts to follow when imposing misdemeanor repeater sentences. *Lasanske*, 353 Wis. 2d 280, ¶¶8-9. Under this procedure, the court determines the “applicable maximum term of imprisonment for the misdemeanor,” and adds to that the “additional imprisonment authorized by any applicable penalty enhancement statute.” *Id.*, ¶9. The court then bifurcates the sentence into a term of IC and a term of ES, imposing “no more than 75% of the total length of the bifurcated sentence as confinement and no less than 25% of the length of the term of confinement as extended supervision.” *Id.*, ¶12.

Gandy’s offense, obstructing an officer, is a Class A misdemeanor that exposed him to a fine of not more than \$10,000 or imprisonment of not more than nine months, or both. *See* WIS. STAT. §§ 946.41(1) and 939.51(3)(a). The repeater sentence enhancer made him eligible for up to two years’ imprisonment for that offense. *See* WIS. STAT. § 939.62(1)(a). His sentence had to be bifurcated, WIS. STAT. § 973.01(1), with no more than 75% of the total length of the bifurcated sentence as confinement and no less than 25% of the length of the term of

confinement as extended supervision, § 973.01(2)(b)10. and (d). The structure of his sentence comported with those statutory directives.

Finally, Gandy's guilty plea, knowingly and understandingly made, constitutes a waiver of all nonjurisdictional defects and defenses including claimed violations of constitutional rights. *See State v. Kraemer*, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990).

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 Gandy further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Becky N. Van Dam is relieved from further representing Gandy 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*