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

2018AP945-CRNM State of Wisconsin v. Oliver D. Kennedy (L.C. # 2016CF2972)

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

Oliver D. Kennedy appeals the judgment convicting him of homicide by intoxicated use of a firearm. *See* WIS. STAT. § 940.09(1g)(a) (2015-16).¹ Appellate counsel, Mark S. Rosen, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18), and *Anders v. California*, 386 U.S. 738 (1967). Kennedy was advised of his right to file a response and has elected not to

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

do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Initially, Kennedy was charged with homicide by negligent handling of a dangerous weapon. According to the complaint, in the early morning hours of June 28, 2016, police officers arrived at an apartment building in response to a 911 call. The officers found Kennedy outside crying. He directed the officers upstairs to his apartment where they found Alec Jackson seated in a chair with a gunshot wound to his head. A small handgun was on the floor near him. Jackson was pronounced dead at the scene. Results of the autopsy revealed that the muzzle of the gun was against Jackson's skin when the gun was fired.

The complaint further relayed that officers interviewed Curtis Long, who stated that he had known both Kennedy and Jackson for approximately fifteen years and that the two men were very good friends. According to Long, Kennedy and Jackson had a history of playing with guns and drinking. Long said that at 2:30 a.m. on June 28, 2016, he received a phone call from Kennedy who said that he and Jackson had been drinking and playing with a gun and that he accidentally shot Jackson. Long said that Kennedy was crying and said it was an accident.

Lamonte Daniels told police he had been drinking with Kennedy and Jackson prior to the shooting. Later at Kennedy's apartment, Daniels was looking at his phone when he heard a shot, at which point Kennedy stated: "Damn, I just killed my cousin on accident."

During his interview with police, Kennedy estimated that he drank a gallon of vodka and cranberry juice prior to the shooting. He described Jackson as the one with the gun. Upon

seeing it, Kennedy claimed he said that if Jackson was going to point the gun, Kennedy was going to take it from him and use it. A struggle followed, and the gun went off.

The no-merit report addresses the potential issues of whether Kennedy's plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit. We discuss them further only insofar as they relate to a discrepancy between the plea questionnaire and waiver of rights form and the State's summation of the negotiations during the plea hearing and the circuit court's restitution order.

The plea questionnaire and waiver of rights form indicated that in exchange for Kennedy's guilty plea, the State would recommend incarceration with the length left to the circuit court's discretion. At the plea hearing, however, the State informed the circuit court that if Kennedy went forward with his plea, at the time of sentencing, it would recommend that he serve two to four years of initial confinement and would not make a specific recommendation as to extended supervision.² Both trial counsel and Kennedy independently confirmed that this was

² When describing the plea negotiations, the State described the charge as carrying "a maximum penalty, as it's stated, five years confinement and 10 years extended supervision." The State's breakdown, which may be the result of an error in transcription, was incorrect. Kennedy faced a maximum sentence of fifteen years of initial confinement and ten years of extended supervision. *See* WIS. STAT. § 973.01(2)(b)4., (d)3.

The State's description of the plea negotiations followed the circuit court's statement that it had a copy of the amended information and the plea questionnaire and waiver of rights form. Both documents properly reflected that Kennedy faced a twenty-five year sentence. Additionally, later during the plea colloquy, the circuit court informed Kennedy that he faced maximum penalties of twenty-five years in prison and a \$100,000 fine, or both. Kennedy confirmed that he understood these penalties.

Given that Kennedy was informed he faced a maximum sentence of twenty-five years on multiple occasions and confirmed that he understood, the circuit court fulfilled its obligation to properly advise him of the potential punishment for his crime. One isolated misstatement by the State regarding sentence bifurcation does not create an issue of arguable merit.

their understanding of the negotiations. The circuit court accepted Kennedy's plea without any discussion related to the discrepancy.

At Kennedy's sentencing, the State reiterated that pursuant to the plea negotiations, it was recommending confinement time between two and four years but leaving extended supervision to the circuit court's discretion. The State additionally recommended restitution. Trial counsel confirmed that this was also his understanding of the negotiations.

It was at this point that the circuit court noted that the plea questionnaire and waiver of rights form indicated that the State was going to recommend an unspecified period of incarceration. Trial counsel responded:

It must have been my error. We did reach the ultimate agreement on the morning of the plea, and I may not have gone back and added that to the plea form, but my client's understanding of the agreement is what's been stated in court today and what was stated at the plea hearing.

The circuit court then asked Kennedy if that was his understanding of the negotiations. Kennedy answered affirmatively. Consequently, there would be no arguable merit to pursuing a claim for plea withdrawal based on the discrepancy.

Additionally, although the no-merit report does not specifically address it, we have considered the circuit court's restitution award. The circuit court sentenced Kennedy to a fifteen-year sentence, comprised of nine years of initial confinement and six years of extended supervision. The circuit court also ordered Kennedy to pay more than \$10,000 in restitution related to Jackson's funeral expenses.

The circuit court asked trial counsel about Kennedy's position on restitution, to which trial counsel responded: "He's not objecting to the v[e]racity of those requests." Trial counsel

went on, however, to express concern about Kennedy's ability to pay if he was incarcerated. Notwithstanding this concern, trial counsel noted for the circuit court that Kennedy had posted a significant bond that would cover almost half of the amount of restitution requested.

The circuit court concluded that Kennedy, who was employed prior to the shooting, had an ability to earn an income and would ultimately be able to meet his restitution obligations. The record supports the circuit court's exercise of discretion in ordering restitution. *See* WIS. STAT. § 973.20(13)(c); *State v. Madlock*, 230 Wis. 2d 324, 329, 602 N.W.2d 104 (Ct. App. 1999) (a request for restitution is addressed to the circuit court's discretion). A challenge to the restitution order would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Mark S. Rosen of further representation in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Mark S. Rosen is relieved from further representing Oliver D. Kennedy in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals