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**DISTRICT I**

September 6, 2019

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

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2019AP571-CRNM      State of Wisconsin v. Antonio L. Price (L.C. # 2017CF2539)

Before Brash, P.J., Kessler 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).**

Antonio L. Price appeals from a judgment of conviction for party to the crime of heroin possession with intent to deliver, party to the crime of delivery of heroin, party to the crime of maintaining a drug trafficking place, and possession of a firearm by a person convicted of an out-of-state felony. He also appeals from an order denying his supplemental postconviction motion.

His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Upon consideration of the report, Price's response, and an independent review of the record, the judgment and order are summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Two people identified Price as having supplied heroin to a person who died from a drug overdose. In investigating Price's potential involvement in the heroin death, police arranged a controlled drug buy. A confidential informant made arrangements with Price to purchase heroin and the drug was delivered by a person exiting what was believed to be Price's location. Police then obtained and executed a search warrant at the residence in which Price, his girlfriend, and his brother were located. A large amount of heroin and one loaded firearm was found during the search. Price admitted to selling heroin from the residence, to working with the person who delivered the drug purchased by the confidential informant, and to having handled the firearm hidden in his residence. Price has a felony drug conviction in the state of Illinois.

Price was charged with the crimes of which he is convicted. Although the prosecution indicated that it was going to charge Price with homicide for the overdose death and it was anticipated that the cases would be resolved together, this case proceeded to the plea taking before any additional charge was filed. Price entered a no contest plea to the charged crimes. Both sides were free to argue for an appropriate sentence.

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

Price was sentenced to consecutive terms totaling thirteen years' initial confinement and twelve years' extended supervision. He was made eligible for the Challenge Incarceration Program (CIP) after serving six years.<sup>2</sup> When Price learned that he had to be within three years of release before he could participate in CIP, he filed a supplemental postconviction motion seeking a reduction of his total initial confinement time so that he could be age appropriate when hitting the within-three-year eligibility mark. In the alternative, he asked to be made eligible for the Substance Abuse Program, which has no age restriction. The court rejected Price's argument that his ineligibility because of age at the within-three-year mark was a new factor. It denied the supplemental postconviction motion.

The no-merit report addresses the potential issues of whether Price'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 supplemental 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.

In his response, Price first asserts that he should not have been convicted of the firearm possession charge because there was no DNA testing and "they lied and said I knew about the firearm." It is not necessary that a person has actually handled the firearm to establish a factual basis for the conviction. It is enough if the firearm is in an area over which the person has

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<sup>2</sup> The wait period for eligibility for CIP was originally set at ten years. Price filed a postconviction motion to reduce the waiting period because he would be too old after ten years to participate in CIP. Price's postconviction motion also sought to correct sentence credit by increasing it and modification of one of the conditions of extended supervision. The court granted the postconviction motion.

control and person intends to exercise control over the firearm. WIS JI—CRIMINAL 1343 (2016). It follows that DNA testing is not required to show possession. As to the assertion that the police lied about Price knowing about the firearm, Price choose not to test the veracity of potential testimony that Price admitted handling the firearm. There is no arguable merit to a challenge to the factual basis for the firearm possession conviction.

Price next suggests that he “was forced for a trial” and that he had “no other choice” but to pled no contest. He points out that a pretrial was set for January 31, 2018 and the jury trial set for March 12, 2018. If Price’s claim is that he was forced to go to trial too soon, such a claim lacks merit. Price was arrested June 15, 2017. The March 12, 2018 trial date was set on October 30, 2017. After the trial date was set, Price had over four months to prepare for trial. Nothing suggests there was an inadequate amount of time to prepare. During the plea colloquy, Price gave no indication that the plea was not freely entered or that he felt he “had no choice.” Also, Price’s attorney explained at sentencing that from “day one,” Price accepted responsibility for the crimes and that he indicated he wanted to enter a plea sooner but waited to see if the homicide would be charged. Having offered in mitigation that he accepted responsibility early on, Price cannot now claim that the case proceeded too quickly. *See State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (a position on appeal which is inconsistent with that taken at trial is subject to judicial estoppel).

One of the items Price lists in his response as an item of concern is that the judge “didn’t want to accept my plea of No Contest. She stated that it was not a plea that she accepted.” No arguable issue arises from this point. The judge in fact accepted Price’s no contest plea after hearing the reasons why a no contest plea was entered instead of a guilty plea. There is no error

to be associated with the judge's comment that she did not usually accept no contest pleas. Price was not prejudiced in any way.

Related to the plea taking is Price's assertion that "[m]otions were not gone over with me," and that his attorney lied to the court when she indicated during the plea colloquy that she had gone over motions with Price.<sup>3</sup> There were no motions pending when Price entered his no contest plea. Moreover, the record does not suggest any potential motions that should have been filed in advance of the plea taking, *i.e.* a motion to suppress evidence or statements. There was nothing to go over with Price. Price's assertion that there was some shortcoming in his attorney's performance lacks merit. It is also contrary to his affirmation during the plea colloquy that he was satisfied with his attorney's representation.

Finally, Price questions three items related to sentencing: why he received more time for the delivery of just one gram of heroin than he did for possession of forty-three grams of heroin, why the prison terms on all four counts were made consecutive, and why he was made eligible for CIP at a time when he is above the age limit for the program. These are matters within the discretion of the sentencing court. Our determination that the sentencing court properly exercised its discretion means no arguable issue arises from Price's queries.

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 Price further in this appeal.

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<sup>3</sup> During the plea colloquy, the circuit court asked Price's attorney, "Did you go over defenses and motions with him?" Counsel responded, "Yes."

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 Christopher P. August is relieved from further representing Antonio L. Price 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*