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**DISTRICT II**

October 9, 2019

To:

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

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2018AP1003-CRNM      State of Wisconsin v. Robert R. Piggee (L.C. #2010CF111)

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).**

Robert Piggee appeals from a judgment sentencing him after revocation of his probation. Piggee's 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). Piggee received a copy of the report

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

and filed a response. We have considered the no-merit report, Piggee's response, and counsel's supplemental no-merit report. After an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

Piggee's probation for three counts of manufacturing/delivering tetrahydrocannabinols contrary to WIS. STAT. § 961.41(1)(h)1 (2009-10) was revoked. The no-merit report addresses whether the circuit court misused its discretion in imposing three consecutive three-year sentences after revocation (each sentence consisted of one year of initial confinement and two years of extended supervision). We agree with appellate counsel that this issue does not have arguable merit for appeal.

We conclude that there would be no arguable merit to a challenge to Piggee's sentences. The discretion of the sentencing judge must be exercised on a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In fashioning the sentences after revocation, the court considered the severity of the offenses, Piggee's character and lengthy history of other offenses, his failure on probation, and the need to protect the public. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court also considered Piggee's history of violent conduct, some of which Piggee admitted (e.g., swinging a knife while drunk). Even though criminal charges relating to some of that conduct were dismissed, the circuit court was free to consider the conduct. See *State v. McQuay*, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990) (sentencing court may consider unproven offenses). The weight to be given the various factors was within the circuit court's discretion. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court

properly exercised its discretion at sentencing. There would be no arguable merit to a challenge to the sentences.

In his response, Piggee alleges ineffective assistance of trial counsel at sentencing. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing.

Piggee complains that during sentencing, his trial counsel was ineffective in connection with counsel's statement about a knife the State claimed Piggee wielded in a stabbing (the stabbing was the subject of the dismissed criminal charges). Counsel stated that the knife could have been wielded by Piggee even if his DNA was not found on the knife. As the circuit court noted, Piggee did not deny swinging a knife while drunk, dangerous conduct the circuit court was permitted to consider pursuant to *McQuay*. We conclude that the record does not support Piggee's ineffective assistance of trial counsel claim.

Counsel's supplemental no-merit report advises that additional sentence credit was granted postconviction as Piggee requested. No issue with arguable merit arises from the amount of sentence credit awarded.

In his response, Piggee asks the court to review his probation revocation proceeding. Review of probation revocation is by way of certiorari review to the court of conviction. *State*

*ex rel. Marth v. Smith*, 224 Wis. 2d 578, 583, 592 N.W.2d 307 (Ct. App. 1999). The probation revocation proceeding is outside the scope of this appeal, and we do not address it.

Our independent review of the record does not disclose any potentially meritorious issues 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, affirm the judgment and relieve Attorney Timothy O’Connell of further representation of Robert Piggee in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Timothy O’Connell is relieved of further representation of Robert Piggee in this matter.

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*