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**DISTRICT II**

November 27, 2019

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

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2018AP2428-CRNM      State of Wisconsin v. Dwayne A. Hughes (L.C. #2015CF1121)

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).**

Dwayne A. Hughes appeals from a judgment convicting him of armed robbery. Hughes' appellate counsel 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). Hughes filed a response. Counsel then filed a

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

supplemental no-merit report. After reviewing the record, counsel's reports, and Hughes' response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

Hughes was convicted following a guilty plea to armed robbery. The charge stemmed from his holdup of a gas station clerk. Three additional charges were dismissed and read in.<sup>2</sup> The circuit court imposed a sentence of ten years of initial confinement and ten years of extended supervision.

Hughes filed a postconviction motion. In it, he accused his trial counsel of improperly promising him that he would not be sentenced to more than eight years of prison time, which is what the State agreed to recommend. He also accused the circuit court of (1) relying upon inaccurate information by misstating the maximum bifurcation of armed robbery<sup>3</sup> and (2) failing to exercise its discretion when it denied Hughes eligibility for the challenge incarceration and substance abuse programs. Finally, Hughes presented new factor information regarding his work history and productive lifestyle.

The circuit court held an evidentiary hearing at which Hughes and his trial counsel testified. At the conclusion of the hearing, the court denied the postconviction motion in full. Regarding Hughes' claim against trial counsel, the court found that Hughes' testimony was not

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<sup>2</sup> The additional charges were threats to injure with use of a dangerous weapon, intimidation of a victim with use of a dangerous weapon, and resisting an officer.

<sup>3</sup> At sentencing, the circuit court misstated the maximum bifurcation of armed robbery as twenty years of initial confinement and twenty years of extended supervision. At the earlier plea hearing, the court correctly stated the maximum bifurcation as twenty-five years of initial confinement and fifteen years of extended supervision. *See* WIS. STAT. §§ 943.32(2), 973.01(2)(b)3, (d)2.

credible and that his trial counsel's testimony was credible.<sup>4</sup> Regarding Hughes' claims against it, the court indicated that it misspoke about bifurcation; however, any misstatement was to Hughes' benefit, as it described less initial confinement time than was statutorily allowed. The court further indicated that it did not want Hughes eligible for the challenge incarceration and substance abuse programs based upon his prior record and this particular offense. Finally, the court concluded that the new factor information was not highly relevant to the sentence. This appeal follows.

The no-merit report addresses whether Hughes' guilty plea was knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in a colloquy with Hughes that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. In addition, a signed plea questionnaire and waiver of rights form was entered into the record, along with the relevant jury instruction detailing the elements of the offense. We agree with counsel that a challenge to the entry of Hughes' guilty plea would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." See *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court considered the primary sentencing factors, placing greatest weight on the seriousness of the offense and the need to protect the public, which was within its

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<sup>4</sup> Trial counsel denied advising Hughes of what the circuit court would do at sentencing. He testified that he informed Hughes of all the material in the plea form, including the portion that indicated the court is not bound by any agreements.

discretion. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, the sentence imposed does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Hughes’ sentence would lack arguable merit.

Finally, the no-merit report addresses whether the circuit court properly denied Hughes’ postconviction motion. The circuit court thoroughly explained its reasons for denying the motion. Moreover, its credibility findings are supported by the record. Accordingly, we are satisfied that the no-merit report properly analyzes this issue as without merit, and we will not discuss it further.

As noted, Hughes filed a response to counsel’s no-merit report. The response focuses upon his sentence and postconviction motion, which we have already addressed. It also includes a conclusory allegation of judicial bias. Hughes does not come close to overcoming the presumption that the circuit court was free of bias. *See State v. Neuaone*, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. In any event, we are not persuaded that Hughes’ response presents an issue of 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 Carly Cusack of further representation 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 Carly Cusack is relieved of further representation of Hughes 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*