OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

December 23, 2019

To:

Hon. Thomas J. Walsh
Circuit Court Judge
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

Daniel Goggin II
Goggin & Goggin
P.O. Box 646
Neenah, WI 54957-0646

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Isaac Hughes 288538
Oakhill Correctional Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2017AP936-CRNM State of Wisconsin v. Isaac Hughes (L.C. No. 2014CF1516)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for Isaac Hughes has filed a no-merit report and supplemental no-merit report concluding no grounds exist to challenge Hughes's convictions for delivering three grams or less of heroin, as a second or subsequent offense; possession with the intent to deliver between five and fifteen grams of cocaine, as a second or subsequent drug offense; possession of cocaine, as a second or subsequent offense; and two counts of felony bail jumping, with all but the cocaine

possession count and one bail jumping count as repeaters. Hughes filed responses challenging the effectiveness of his trial counsel.[1] Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2017-18).[2]

The State charged Hughes with the above offenses together with a count of uttering a forgery. The State alleged that a confidential informant conducted a controlled buy of heroin from Hughes. Following an ongoing drug investigation, Hughes was stopped and arrested several weeks later. During a search of Hughes and the vehicle he was driving, police found 7.07 grams of what was later identified as crack cocaine in Hughes's pocket. Another .22 grams of crack cocaine and ten counterfeit twenty-dollar bills were located "in the headliner above the driver's side sun visor."

Following a two-day trial, Hughes was convicted upon the jury's verdicts of all but the uttering a forgery charge. Hughes was sentenced without counsel more than nine months after trial, following his refusal to cooperate with the presentence investigation report writer and his

[1] This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review of our decision in ***State v. Trammell***, No. 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). The order noted that here, at trial, jury instruction WIS JI-CRIMINAL 140 was given to the jury. In ***Trammell***, the supreme court granted review to address whether the holding in ***State v. Avila***, 192 Wis. 2d 870, 535 N.W.2d 440 (1995)—that it is "not reasonably likely" that WIS JI-CRIMINAL 140 reduces the State's burden of proof—is good law, or whether ***Avila*** should be overruled on the ground that it stands rebutted by empirical evidence. The supreme court has issued a decision in ***Trammell***, holding "that WIS JI-CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

requests to discharge four appointed attorneys.[3] Out of a maximum possible sixty-one-year sentence, the circuit court imposed concurrent sentences aggregating twelve years and consisting of seven years' initial confinement and five years' extended supervision.

Hughes filed a postconviction motion seeking sentence credit for the time from his arrest until his receipt at Dodge Correctional Institution. In an order, the circuit court explained Hughes began serving his sentence when it was imposed, and he was not entitled to additional credit for the time between the imposition of his sentence and his reception at the institution. The court, however, granted 389 days of presentence credit for the time from Hughes's arrest until the date his sentence was imposed.

The no-merit report addresses whether the circuit court properly granted the State's pen register[4] application; whether the court properly admitted other acts evidence; whether there was sufficient credible evidence to support the guilty verdicts; whether the court properly exercised its sentencing discretion, including whether the court properly determined that Hughes had forfeited his right to counsel at the sentencing hearing[5]; and whether Hughes's trial counsel was ineffective by failing to file a motion to suppress evidence found as a result of Hughes's stop and arrest. Upon reviewing the record, we agree with counsel's description, analysis, and

[3] A fifth attorney withdrew because he left his position and could no longer accept court appointments.

[4] "Pen register" means a device that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which the device is attached. *See* WIS. STAT. § 968.27.

[5] *See* ***State v. Suriano***, 2017 WI 42, ¶34, 374 Wis. 2d 683, 710, 893 N.W.2d 543 (holding that the defendant forfeited his constitutional right to counsel by engaging in voluntary and deliberate conduct, which frustrated the progression of his case and interfered with the proper administration of justice).

conclusion that none of these issues has arguable merit. The no-merit report sets forth an adequate discussion of these potential issues to support the no-merit conclusion, and we need not address them further.

In his response to the no-merit report, Hughes raises additional challenges to the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Hughes must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance affected the outcome of the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

First, Hughes claims his trial counsel was ineffective by failing to challenge the repeater enhancer. Hughes asserts that he did not meet the criteria for that penalty enhancer because the escape conviction "that provided the basis for the repeater enhancer is excluded by statute from the range of charges which qualify a defendant to be a repeater." Hughes's argument, however, is based on a misinterpretation of the statute. WISCONSIN STAT. § 939.62(1) provides:

> If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed, except for an escape under s. 946.42 or a failure to report under s. 946.425, the maximum term of imprisonment prescribed by law for that crime may be increased [as set forth in the statute].

We give statutory language its common, ordinary, and accepted meaning. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Where, as here, the statute's meaning is plain, the inquiry typically ends. ***Id.*** Under a plain reading of the statute, a repeater enhancer cannot be applied to a conviction for escape or for failure to report. Nothing in the statute, however, prevents the State from utilizing Hughes's past conviction for escape as a basis for the repeater enhancer applied to the present crimes. Therefore, there is no

arguable merit to a claim that trial counsel was ineffective by failing to challenge application of the repeater enhancer.

Next, Hughes asserts his trial counsel breached the attorney-client privilege. At the hearing on the State's motion to admit other acts evidence, defense counsel confirmed that the case involved "an identity issue," noting that someone other than Hughes was in the vehicle when the controlled buy occurred "because it was not him, and that's his position." On the morning of the first day of trial, outside the presence of the jury, defense counsel relayed to the court that Hughes did not think counsel could fairly represent him, as they had a dispute regarding counsel's characterization of the "identity issue." Specifically, counsel recounted that at the motion hearing, counsel told the court "there was an issue of identity and [Hughes] wasn't the driver." Hughes alleges that his counsel breached attorney-client privilege when counsel added: "This morning he told me that he was the driver." Hughes clarified to the court that he never said he was not driving the vehicle, he only said it was "a case of mistaken identity if a person [thinks] that I sold them some drugs." Hughes then reiterated his belief that his trial counsel "hasn't properly represented me up to this point."

When a defendant charges that his or her attorney has been ineffective, the defendant's attorney-client privilege is waived to the extent that counsel must answer questions relevant to the charge of ineffective assistance. WISCONSIN STAT. § 905.03(4)(c) specifically states that there is no attorney-client privilege "[a]s to a communication relevant to an issue of breach of duty by the lawyer to his [or her] client or by the client to his [or her] lawyer." ***State v. Flores***, 170 Wis. 2d 272, 277-78, 488 N.W.2d 116 (Ct. App. 1992). A discussion of the nature of counsel's conflict with Hughes was appropriate under the circumstances of this case. Therefore, any challenge to the effectiveness of Hughes's trial counsel on this ground would lack arguable

merit. Our review of the record and the no-merit report discloses no other basis for challenging trial counsel's performance.

Our independent review of the record discloses no other potential issue for appeal.[6]

Therefore,

IT IS ORDERED that the judgment is modified, and as modified, affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Daniel R. Goggin II is relieved of his obligation to further represent Isaac Hughes in this matter. *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

[6] We note that although the record shows the Information did not charge Hughes as a repeater for either counts four or six—cocaine possession as a second or subsequent offense and felony bail jumping—the judgment of conviction includes the "repeater" designation for these two crimes. Because this appears to be a clerical error, upon remittitur, the court shall enter an amended judgment of conviction correctly describing Hughes's convictions for these counts without the repeater designation.