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DISTRICT I

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

2018AP1216-CRNM State of Wisconsin v. Gerry C. Burdine, Sr. (L.C. # 2015CF2716)

Before Kessler, Fitzpatrick and Donald, 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).

Gerry C. Burdine, Sr., appeals from a judgment of conviction for one count of injury by intoxicated use of a vehicle causing great bodily harm, contrary to WIS. STAT. § 940.25(1)(a) (2015-16).[1] Burdine's appellate counsel, Christopher D. Sobic, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Burdine

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

was served with a copy of the no-merit report and advised of his right to file a response. He has not filed a response.[2] We have independently reviewed the record and the no-merit report as mandated by ***Anders***. We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgment.

In 2015, Burdine was charged with three felonies and two misdemeanors related to a car accident that injured the drivers of two other vehicles. The criminal complaint alleged that Burdine, whose driver's license was suspended, was driving while intoxicated when he turned left in front of two oncoming cars, causing an accident. The complaint alleged that both of the other drivers suffered injuries. One driver required multiple surgeries to repair a severed ankle.

Trial counsel was appointed for Burdine, but he subsequently retained counsel. Burdine's retained counsel filed a motion to suppress the results of a blood draw taken after the accident, alleging that Burdine's consent to the blood draw was invalid because the police officer "goaded" Burdine into signing the consent form.

At the final pretrial conference, the trial court told the parties that it would consider the motion to suppress on the first day of trial. Subsequently, Burdine asked for new counsel, and the trial court allowed the State Public Defender's office to appoint new counsel for Burdine. Ultimately, the previously filed suppression motion was never decided because the parties reached a plea agreement.

[2] On October 15, 2018, appellate counsel filed a motion asking this court to extend the deadline for Burdine to file a response to the no-merit report. We granted the motion, but Burdine never filed a response.

Burdine agreed to plead guilty to one count of injury by intoxicated use of a vehicle causing great bodily harm. In exchange, the State agreed to dismiss and read in the remaining counts and to recommend a sentence of two years of initial confinement and three years of extended supervision. The agreement also required Burdine to pay restitution for the injuries related to all five counts.

Burdine completed a written guilty plea questionnaire. He also signed a written addendum that stated he understood that he was giving up his "right to challenge the constitutionality of any police action such as the police stopping me, arresting me, searching me or my property, seizing any evidence, taking a statement from me, or having any witness identify me." The trial court conducted a plea colloquy with Burdine and accepted his guilty plea.

At sentencing, the trial court followed the State's sentencing recommendation and imposed two years of initial confinement and three years of extended supervision. One of the victims asked for $800 in restitution, while the other did not file a claim. After trial counsel and Burdine were given an opportunity to confer, trial counsel told the trial court that Burdine would stipulate to $800 in restitution. This appeal follows.

The no-merit report addresses two issues: (1) whether Burdine's plea was intelligently, knowingly, and voluntarily entered; and (2) whether the trial court erroneously exercised its sentencing discretion. The no-merit report thoroughly discusses those issues, including references to relevant statutes, case law, transcripts, and other court documents. This court is satisfied that the no-merit report properly analyzes the issues it raises.

With respect to Burdine's guilty plea, the no-merit report analyzes the trial court's compliance with WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379,

683 N.W.2d 14; and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). For instance, the no-merit report notes that the trial court, among other things, discussed with Burdine the maximum penalties for the crime and the constitutional rights he was waiving. Appellate counsel concludes that there would be no arguable merit to asserting that Burdine's plea was not intelligently, knowingly, and voluntarily entered. Having reviewed the record, including the plea hearing transcript, we agree with appellate counsel's conclusion.

The no-merit report also addresses the sentence that was imposed, providing citations to the sentencing transcript and analyzing the trial court's compliance with ***State v. Gallion***, 2004 WI 42, ¶¶9, 41-43, 270 Wis. 2d 535, 678 N.W.2d 197. Appellate counsel concludes that there would be no arguable merit to assert that the trial court erroneously exercised its sentencing discretion, *see* ***id.***, ¶17, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with these assessments. The trial court considered the requisite sentencing factors and explained its sentencing decision. Further, the trial court could have imposed seven and one-half years of initial confinement and five years of extended supervision. The sentence of two years of initial confinement and three years of extended supervision was well within the maximum sentence, and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

We will address one other sentencing issue. Although Burdine did not file a response to the no-merit report, he filed several *pro se* letters with the trial court after sentencing. In one of those letters, Burdine suggested that he wanted to seek sentence modification because the trial court had found him eligible for the Wisconsin substance abuse program—an early release

program—even though he was not statutorily eligible for it. *See* WIS. STAT. § 302.05(3)(a)1. (indicating that a person convicted of a crime enumerated in WIS. STAT. ch. 940 is not eligible for the Wisconsin substance abuse program). Burdine asserted that the trial court wanted him to participate in the substance abuse program, which would grant him early release from prison. He suggested that he could be found guilty of a different crime that allows for participation in the substance abuse program. In the alternative, he asked that his sentence be modified so that he could serve less time in initial confinement.

In response to Burdine's letter, a staff attorney from the circuit court wrote a letter to Burdine indicating that no action would be taken on his letter because postconviction/appellate counsel was being appointed for him and would file any necessary motions. Ultimately, no postconviction motions were filed.

We have considered whether there would be arguable merit to seek sentence modification based on the fact that Burdine was not statutorily eligible for the substance abuse program. A defendant may seek sentence modification upon the showing of a "'new factor.'" *See* ***State v. Harbor***, 2011 WI 28, ¶¶35, 57, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

Id., ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). We conclude that there would be no arguable merit to seeking sentence modification because the trial court did not indicate that Burdine's potential participation in the substance abuse program was "highly relevant" to the sentence imposed. *See* ***id.*** (citation omitted). Specifically, the trial court said:

"I will make you eligible for the [s]ubstance [a]buse program. Maybe that's what you need, but that will be up to the prison authorities." The trial court's comments make clear that it did not know whether Burdine would be allowed to participate in the substance abuse program and that it was not basing its sentence on Burdine's anticipated participation in that early release program. For these reasons, we conclude that there would be no arguable merit to pursue a sentence modification motion.

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 Burdine further in this appeal.

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 D. Sobic is relieved from further representing Gerry C. Burdine, Sr., 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