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**DISTRICT I**

May 19, 2020

To:

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

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2019AP2049-CRNM      State of Wisconsin v. Parnell Edward Myles (L.C. # 2017CF2831)

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

Parnell Edward Myles appeals from a judgment of conviction for homicide by intoxicated use of a vehicle after a prior OWI conviction and from an order denying his postconviction motion for resentencing. 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). Myles received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the no-merit report, a supplemental no-merit report required by our March 10, 2020 order, and an independent review of the record as mandated by *Anders*, we conclude there is no arguable merit to any issue that could be raised on appeal. Further, we modify the judgment and summarily affirm the judgment as modified and the order denying the postconviction motion. *See* WIS. STAT. RULE 809.21. Accordingly, we remand for entry of an amended judgment of conviction.

When making a left turn, Myles turned into the path of an oncoming moped causing the death of the moped operator, an eighteen-year-old man. After the accident, Myles was transported to the hospital and a sample of his blood was drawn pursuant to a warrant. Myles was charged with homicide by intoxicated use of a motor vehicle after a prior OWI conviction, homicide by operating a motor vehicle with a prohibited blood alcohol content after a prior OWI conviction, and operating a motor vehicle while revoked causing the death of another person. Myles entered a guilty plea to homicide by intoxicated use of a motor vehicle. The plea agreement called for the dismissal of the other counts and left both parties free to argue for an appropriate sentence.

Myles was sentenced to eighteen years, eight months, and three days of initial confinement and ten years of extended supervision. The sentencing court noted that the term of initial confinement was one day longer than the victim lived. Myles filed a postconviction motion for resentencing arguing that the sentencing court had erroneously exercised its discretion by giving controlling weight to the victim's age at sentencing and failing to impose the shortest sentence

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

consistent with mandatory sentencing factors as required by *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court denied the motion explaining that the near maximum sentence was justified because the crime was “uniquely aggravated” by Myles’ high BAC and his failure to see the moped approaching the intersection. The court indicated that the victim’s age was not controlling but was used to convey a greater meaning to the sentence for Myles, the victim’s family, and the public.

The no-merit report addresses potential issues of whether Myles’ plea was freely, voluntarily, and knowingly entered and whether there is a basis to challenge the sentence, including the denial of the postconviction motion for resentencing. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit, and this court will not discuss them further.

The judgment of conviction reflects that the charge of knowingly operating while revoked causing death—count three of the criminal complaint—was dismissed and read-in at sentencing. Because this appears to contradict the plea agreement as recited by the prosecutor at the start of the plea hearing and at the start of the sentencing hearing, a March 10, 2020 order directed appellate counsel to file a supplemental no-merit addressing the exact terms of the plea agreement and whether any potential lack of clarity as to the whether count three was to be dismissed outright or as a read-in provides a meritorious basis for a motion for plea withdrawal. The supplemental no-merit report expresses the view that the plea agreement called for the outright dismissal of count

three and that the circuit court inadvertently misconstrued the recitation of the agreement.<sup>2</sup> Counsel's supplemental report concludes that there is no plea withdrawal remedy for Myles because the plea agreement called for the outright dismissal of count three and the judgment of conviction merely fails to reflect the agreement. We agree. The judgment of conviction is modified to remove any reference to count three in the "Dismissed but Read In" section because that charge, according to the plea agreement, was dismissed outright.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction as modified and the order denying the postconviction motion, and discharges appellate counsel of the obligation to represent Myles further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is modified to remove any reference to count three being dismissed but read-in; as modified the judgment is summarily affirmed, the order denying postconviction relief is summarily affirmed, and the cause is remanded for entry of a corrected judgment of conviction. *See* WIS. STAT. RULE 809.21.

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<sup>2</sup> At the start of the plea hearing, the prosecutor put the plea agreement on the record that "[i]n exchange for a guilty plea to Count 1 the State would move to dismiss Count 3. Count 2 would be dismissed by operation of law." Both Myles and his attorney confirmed that was their understanding of the negotiations. Later at the plea hearing, the court adjudged Myles convicted of count one and stated, "Count 3, consistent with the negotiations, is dismissed and read-in." The court went on to explain to Myles that he is not convicted of count three and could never be charged with that count again but "I do get to consider Count 3 at the time of sentencing." The court also asked Myles, "Is that what you would like me to do with respect to Count 3? That it's dismissed and read-in?" Myles answered, "Yes, your honor." At sentencing, after the sentencing court indicated that count three was dismissed and read-in, the prosecutor recited the agreement was a plea to one charge and "the other will be dismissed."

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved from further representing Parnell Edward Myles 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*