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**DISTRICT IV**

October 8, 2020

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

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2018AP749-CRNM      State of Wisconsin v. Rickey D. Howard (L.C. # 2016CF160)

Before Fitzpatrick, P.J., Kloppenburg, and Graham, 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).**

Rickey D. Howard appeals a judgment convicting him of battery by a prisoner. His appellate counsel, Michael J. Herbert, has filed a no-merit report pursuant to WIS. STAT. RULE

809.32 (2017-18) and *Anders v. California*, 386 U.S. 738 (1967).<sup>1</sup> Howard filed a response. Upon consideration of the no-merit report, Howard's response, and an independent review of the record as mandated by *Anders*, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The charge against Howard stemmed from an incident at a prison in 2016. The complaint alleged that police were dispatched to the Jackson Correctional Institution to investigate a reported battery by a prisoner. The victim relayed to police that he and Howard had an altercation that resulted in Howard pushing him. The victim fell backwards and suffered injuries. The complaint further alleged that Howard had previously been convicted of a felony. As a result, he was charged with battery by a prisoner as a repeater.

Howard subsequently pled guilty to battery by a prisoner. Pursuant to the plea agreement, the State moved the court to dismiss the repeater enhancer. The circuit court granted the motion and amended the charge accordingly. The State additionally agreed to recommend a bifurcated sentence consisting of two years of initial confinement and three years of extended supervision. At the combined plea and sentencing hearing, the State did not take a position as to whether that sentence should run consecutively or concurrently with the sentence Howard was serving at the time. The plea questionnaire and waiver of rights form, however, indicates that the State's recommendation would be for a concurrent sentence. The defense requested that the

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

circuit court adopt the State's sentencing recommendation but order the sentence to run concurrently.

When asked by the circuit court if there was anything he wanted to say, Howard advised the circuit court that the prosecutor told him she would be recommending a concurrent sentence. Howard's trial attorney also confirmed that he believed the prosecutor had told him that her recommendation would be for a concurrent sentence.

Trial counsel then conferred with Howard. Afterward, trial counsel explained to the circuit court that the two had discussed that Howard could request to withdraw his plea on the basis that it was not knowingly, intelligently, and voluntarily entered into. Trial counsel further explained that Howard wished to proceed to sentencing. When questioned by the circuit court, Howard confirmed that this was true.

The circuit court accepted Howard's plea and imposed a consecutive sentence consisting of thirteen months of initial confinement and three years of extended supervision.<sup>2</sup>

The no-merit report addresses the potential issues of whether the circuit court erred when it denied Howard's request for an adjournment of the trial, whether Howard's plea was knowingly, voluntarily, and intelligently entered, and whether the circuit court properly exercised its discretion during sentencing. This court is satisfied that the no-merit report properly concludes the issues it raises are without merit.

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<sup>2</sup> Initially, the circuit court sentenced Howard to thirteen months of initial confinement and four years of extended supervision. Upon being notified that the period of extended supervision exceeded that allowed by WIS. STAT. § 973.01(2)(d)5., the circuit court reduced the extended supervision time to three years.

We briefly discuss two of the issues Howard presents in his no-merit response. First, Howard argues that his trial attorneys provided ineffective assistance by not investigating and discovering witnesses—inmates who were located in the same cell block—to the offense.<sup>3</sup> Howard does not provide any identifying information for the inmates and does not elaborate on what testimony the inmates would offer, other than that they witnessed an argument between Howard and the victim. We further note that the record makes clear that trial counsel had retained an investigator to find the inmates, but the attempts were unsuccessful.

A defendant must base a challenge to his representation on more than speculation. *See State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (explaining that “[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [case]” (quoted source omitted)). Howard’s claim falls short. It is wholly speculative as to what the investigation Howard identifies would have revealed, let alone how it would have altered the outcome. His assertions lack arguable merit.

Howard also argues that he is entitled to three hundred days of sentence credit. The circuit court did not award him any sentence credit. Howard was already in prison on the date of the altercation with the victim. The record reflects that the initial confinement portion of the sentence Howard was serving at the time will not expire until 2029.

A convicted offender is to be given sentence credit for all days spent (1) in custody and (2) “in connection with the course of conduct for which sentence was imposed.” *State v. Hintz*,

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<sup>3</sup> Howard had two different trial attorneys while his case was pending.

2007 WI App 113, ¶6, 300 Wis. 2d 583, 731 N.W.2d 646 (quoted source omitted); *see also* WIS. STAT. § 973.155(1)(a). Here, Howard was in custody, but it was on an unrelated matter and therefore not in connection with the course of conduct for which this sentence was imposed. There would be no arguable merit to pursuing three hundred days of sentence credit.

Our review of the record discloses no other potential issues for appeal. This court has reviewed and considered the various issues raised by Howard. To the extent we did not specifically address all of them, this court has concluded that they lack sufficient merit or importance to warrant individual attention. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Howard further in this appeal.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael J. Herbert is relieved of further representation of Howard in this matter. *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*