



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 II

November 11, 2020

To:

Hon. Michael J. Aprahamian
Circuit Court Judge
Waukesha County Courthouse-Br. 9
515 W. Moreland Blvd.
Waukesha, WI 53188

Hon. Brad Schimel
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Jaymes Fenton
Fenton Law Office
1123 N. Water St., Ste. 400
Milwaukee, WI 53202

Susan Lee Opper
District Attorneyw
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

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

Nico R. Swanagan 665323
Racine Youthful Offender Corr. Facility
P.O. Box 2500
Racine, WI 53404-2500

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

2019AP939-CRNM State of Wisconsin v. Nico R. Swanagan (L.C. #2017CF167)

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).

Nico Swanagan appeals from a judgment¹ convicting him of two counts of first-degree recklessly endangering safety contrary to WIS. STAT. § 941.30(1) (2017-18)² and from an order denying his postconviction motion seeking resentencing. Swanagan's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Swanagan received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment and order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The circuit court sentenced Swanagan to two consecutive nine-year terms (four years of initial confinement and five years of extended supervision). The court also imposed \$6053 in restitution. Swanagan received sentence credit.

The no-merit report addresses whether the circuit court misused its discretion during sentencing and in resolving the postconviction motion challenging the sentence. After reviewing the record, we conclude that counsel's no-merit report properly analyzes the sentencing issues and correctly determines that these issues lack arguable merit.

¹ The judgment was entered by the Honorable Michael J. Aprahamian. The order was entered by the Honorable Brad Schimel.

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

Counsel's no-merit report does not address the plea colloquy.³ Our review of the record confirms that the plea colloquy complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The colloquy was thorough and informed Swanagan of each of the constitutional rights waived by his pleas and the effect of the three counts being dismissed and read in, among other matters properly addressed by the circuit court. Any challenge to the entry of Swanagan's guilty pleas would lack arguable merit for appeal. Swanagan's guilty pleas waived "all nonjurisdictional defects and defenses." *State v. Popp*, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471 (citation omitted).

Other than failing to address Swanagan's eligibility for the Challenge Incarceration Program and the Substance Abuse Program, which we address below, the circuit court engaged in a proper exercise of sentencing discretion after considering various, appropriate sentencing factors. *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (we review the sentence for a misuse of discretion); *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (sentencing objectives and factors discussed).

Postconviction, Swanagan sought resentencing because the circuit court failed to address his eligibility for the Challenge Incarceration Program or the Substance Abuse Program during the original sentencing. Swanagan also sought a reduction in his sentences. Although the circuit court did not address eligibility at sentencing, the judgment of conviction deemed Swanagan eligible for the Challenge Incarceration Program and the Substance Abuse Program for only one

³ Counsel contends that a challenge to the entry of Swanagan's pleas was waived by the failure to include such a challenge in the WIS. STAT. RULE 809.30 postconviction motion challenging the sentence. We do not decide the waiver issue. Rather, we will review the record surrounding the entry of the guilty pleas.

of the two counts of conviction. At the hearing on Swanagan's postconviction motion, the circuit court considered the sentencing court's sentencing rationale, declined to reduce Swanagan's sentence and found a basis in the record for the circuit court's eligibility decision as expressed in the judgment of conviction. *State v. Sinks*, 168 Wis. 2d 245, 255, 483 N.W.2d 286 (Ct. App. 1992) (resentencing is within the circuit court's discretion). The record supports the circuit court's decision to deny Swanagan's request to be resentenced. A challenge to this ruling would lack arguable merit for appeal.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any arguably 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, affirm the judgment of conviction and the circuit court order and relieve Attorney Jaymes Fenton of further representation of Swanagan in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jaymes Fenton is relieved of further representation of Nico R. Swanagan in this matter.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals