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**DISTRICT II**

November 18, 2020

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

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2018AP1571-CRNM      State of Wisconsin v. Richard A. Pocian (L.C. #2015CF615)

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).**

Richard Pocian appeals from a judgment convicting him of possessing heroin with intent to deliver contrary to WIS. STAT. § 961.41(1m)(d)1 (2015-16)<sup>1</sup> and maintaining a drug trafficking place contrary to WIS. STAT. § 961.42(1). Pocian's appellate counsel filed a no-merit report

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

pursuant to WIS. STAT. RULE 809.32 (2017-18) and *Anders v. California*, 386 U.S. 738 (1967). Pocian received a copy of the report and filed a response. Counsel filed a supplemental no-merit report. Upon consideration of the no-merit and supplemental no-merit report and Pocian's response, and after independently reviewing the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21 (2017-18).

The circuit court sentenced Pocian to concurrent terms of eight years for the heroin offense (four years of initial confinement and four years of extended supervision) and three years for maintaining a drug trafficking place (one year of initial confinement and two years of extended supervision). Pocian received sentence credit.

The no-merit report addresses the following possible appellate issues: (1) whether Pocian's no contest pleas were knowingly, voluntarily, and intelligently entered; (2) whether the circuit court should have granted Pocian's motions to suppress due to lack of probable cause and defects in the search warrant application process; (3) whether trial counsel provided effective assistance; and (4) whether the circuit court misused its sentencing discretion.

The plea colloquy complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.<sup>2</sup> “[A] no contest plea waives all nonjurisdictional defects and defenses.” *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. A challenge to the entry of the no contest pleas would lack arguable merit for appeal.

We conclude that the circuit court engaged in a proper exercise of sentencing discretion after considering various 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 factors discussed). A challenge to the sentencing would lack arguable merit for appeal.

Counsel’s no-merit report addresses the circuit court’s denial of Pocian’s motions to suppress. Across two motions to suppress, Pocian argued that the search warrant was not supported by probable cause and, under *Franks*,<sup>3</sup> the warrant application contained allegedly untruthful statements.

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<sup>2</sup> Even though the circuit court did not review with Pocian the specific constitutional rights waived by his no contest pleas or the elements of the crimes, we do not deem the plea colloquy defective. During the colloquy, the circuit court confirmed that Pocian signed the plea questionnaire and drew Pocian’s specific attention to the constitutional rights set out in the questionnaire. The court confirmed that Pocian and counsel spent a considerable period of time reviewing those rights, and he did not have any questions about them. The court also confirmed that counsel had explained each element of the crimes to which Pocian was pleading no contest and highlighted that the elements were attached to the plea questionnaire. Pocian stated that he initialed the elements. We conclude that the colloquy was not defective. See *State v. Pegeese*, 2019 WI 60, ¶¶37, 40-41, 387 Wis. 2d 119, 928 N.W.2d 590 (similar colloquy regarding the constitutional rights waived by a plea deemed adequate). Furthermore, we note that in his response to counsel’s no-merit report, Pocian does not contend that he did not understand the constitutional rights waived by his no contest pleas or the elements of the crimes to which he pled no contest.

<sup>3</sup> *Franks v. Delaware*, 438 U.S. 154 (1978).

On the question of probable cause, the circuit court reviewed the warrant application and found that sufficient, credible information was offered to the court such that a reasonable person would determine that a search of Pocian's property would yield evidence of wrongdoing in connection with the victim's drug overdose (Pocian provided heroin to the informant who then sold it to the victim, who overdosed). See *State v. Hillary*, 2017 WI App 67, ¶¶8-9, 378 Wis. 2d 267, 903 N.W.2d 311 (probable cause standards discussed). A challenge to the circuit court's determination that the search warrant was supported by probable cause would lack arguable merit for appeal.

Turning to the *Franks* claim, the circuit court concluded that Pocian did not establish grounds for an evidentiary hearing. A *Franks* motion seeking suppression of evidence obtained pursuant to a search warrant must allege that: (1) the affidavit in support of the search warrant contained a false statement; (2) the statement was made "knowingly and intentionally, or with reckless disregard for the truth;" and (3) the false statement was "necessary to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). In order to obtain an evidentiary hearing on the motion, Pocian had the burden to make a "substantial preliminary showing" on each part of the test. See *id.* We independently review the denial of a motion for a hearing on a motion to suppress evidence. *State v. Jones*, 2002 WI App 196, ¶25, 257 Wis. 2d 319, 651 N.W.2d 305.

In his response, Pocian argues that the detective falsely asserted that Justin Ellenbecker corroborated the informant, and the circuit court should have held an evidentiary hearing on his *Franks* motion. In her supplemental no-merit report, appellate counsel concludes that the circuit court did not err in denying the *Franks* motion without an evidentiary hearing. We agree with counsel.

The informant stated that she picked up heroin from Pocian which she then sold to the victim. It is undisputed that Ellenbecker drove the informant to Pocian's house (where she picked up the heroin) and then drove her to the victim's residence. During the telephonic hearing, the detective asserted:

[The informant] was driven to [Pocian's] residence by ... [Ellenbecker]. They have both been cooperative ... they've both provided corroborating statements that [the informant] had bought the heroin destined for [the victim] from [Pocian].

Pocian argued that Ellenbecker did not observe and therefore could not corroborate the heroin transfer from Pocian to the informant. Rather, Ellenbecker corroborated only that he drove the informant to Pocian's house for a visit that lined up with the informant's description of how she obtained the heroin from Pocian. For this reason, Pocian contended, the detective's assertion that Ellenbecker corroborated the informant was false and should be deleted from the probable cause showing. In the absence of Ellenbecker's corroboration, there was insufficient probable cause to issue the search warrant because the informant was not credible.

After listening to Ellenbecker's recorded statement and hearing argument on the *Franks* motion, the circuit court found that Ellenbecker corroborated information provided by the informant about the activity leading up to the sale of heroin to the victim (the visit to Pocian's house, the travel to meet the victim, and the large amount of money received from the victim). Because Pocian did not make a substantial preliminary showing that the detective's characterization of Ellenbecker's statement as corroborating the informant was made with reckless disregard for the truth, the circuit court denied the motion without an evidentiary hearing. *Franks*, 438 U.S. at 155-56. We agree with the circuit court's ruling. A challenge to

the circuit court's denial of Pocian's *Franks* motion without an evidentiary hearing would lack arguable merit for appeal.

Pocian also argues that his trial counsel was ineffective in connection with the *Franks* motion because he did not request further discovery material and did not make vital arguments during the motion hearing.<sup>4</sup> In her supplemental no-merit report, counsel responds that Pocian makes only conclusory statements about such discovery. Counsel reports that she “discussed Pocian’s concerns about evidence and the case with trial counsel” and counsel opines that nothing counsel did or did not do would have changed the outcome.

In an appeal after a no contest plea, a defendant alleging ineffective assistance of counsel must also allege that the ineffective assistance of counsel is grounds for plea withdrawal. *State v. Villegas*, 2018 WI App 9, ¶¶47-48, 380 Wis. 2d 246, 908 N.W.2d 198. Pocian does not allege either a connection between the alleged ineffective assistance of counsel and his decision to plead no contest or that he wants to withdraw his no contest pleas. *Id.*, ¶48. Because Pocian’s ineffective assistance of counsel claim does not satisfy *Villegas*, we conclude that Pocian has not established that this claim has arguable merit for appeal.

Pocian next argues that the conditions of his signature bond were sufficiently onerous such that he was effectively in custody while living at home and is due additional sentence credit

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<sup>4</sup> Among other things, Pocian argues that his trial counsel failed to argue that the search warrant affidavit omitted information that was critical to the probable cause determination. See *State v. Jones*, 2002 WI App 196, ¶25, 257 Wis. 2d 319, 651 N.W.2d 305 (citing *State v. Mann*, 123 Wis. 2d 375, 385-90, 367 N.W.2d 209 (1985)). We do not address the *Mann* claims because Pocian has not satisfied *State v. Villegas*, 2018 WI App 9, ¶¶47-48, 380 Wis. 2d 246, 908 N.W.2d 198.

for his time on bond.<sup>5</sup> In her supplemental no-merit report, counsel concludes that Pocian was not statutorily eligible for sentence credit because he was not in custody.

“[A]n offender’s status constitutes custody for sentence credit purposes whenever the offender is subject to an escape charge for leaving that status.” *State v. Magnuson*, 2000 WI 19, ¶25, 233 Wis. 2d 40, 606 N.W.2d 536. A defendant must be in either actual or constructive custody under one of the situations listed in WIS. STAT. § 946.42 before the defendant can be charged with escape. *See Magnuson*, 233 Wis. 2d 40, ¶48. Bond conditions requiring a defendant to remain largely at home do not constitute either actual custody, *see id.*, or constructive custody unless there is a requirement to return to jail after completing a specified furlough, task, or treatment, *see id.*, ¶¶41-43.

The record shows that the conditions of Pocian’s bond restricted his ability to leave his home for anything other than medical matters and a few other specified purposes and also restricted who could transport him for these out-of-home activities. We conclude that Pocian’s bond conditions did not have the legal effect of placing him in either actual or constructive custody for purposes of sentence credit. Pocian was not eligible for sentence credit during his time on bond.<sup>6</sup> A challenge to sentence credit would lack arguable merit for appeal.

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<sup>5</sup> The record shows that Pocian received concurrent sentences on two counts and a concurrent sentence in Sheboygan County Circuit Court case No. 2017CF179, which has not been appealed. The parties stipulated that Pocian was entitled to 232 days of sentence credit in both cases: forty-two days of sentence credit in the case on appeal and 190 days of sentence credit in the case not appealed. Other than arguing that he should have additional sentence credit for his time on bond, Pocian does not dispute this calculation.

<sup>6</sup> A violation of Pocian’s bond conditions would have exposed him to a bail jumping charge, not an escape charge. *State v. Friedlander*, 2019 WI 22, ¶36, 385 Wis. 2d 633, 923 N.W.2d 849.

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 relieve Attorney Roberta Heckes of further representation of Pocian in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Roberta A. Heckes is relieved of further representation of Richard Pocian in this matter.

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*