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 IV

November 19, 2020

To:

Hon. Joseph G. Sciascia
Circuit Court Judge
Dodge County Justice Facility
210 W. Center St.
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge County Justice Facility
210 W. Center St.
Juneau, WI 53039

Michael J. Herbert
P.O. Box 4
Sun Prairie, WI 53590

Gilbert G. Thompson
Assistant District Attorney
210 W. Center St.
Juneau, WI 53039-1056

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

Shandy R. Hein 373501
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2019AP776-CRNM State of Wisconsin v. Shandy R. Hein (L.C. # 2017CF10)

Before Blanchard, Graham, and Nashold, 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).

Attorney Michael Herbert, appointed counsel for Shandy Hein, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Hein was sent a copy of the report and has not filed

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

a response. In response to an order of this court, counsel has filed a supplemental no-merit report. Upon consideration of the report, the supplemental report, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Hein was charged with one count of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood and one count of operating under the influence of a controlled substance. The parties entered into a plea agreement under which Hein agreed to plead guilty or no contest to the operating with a restricted controlled substance charge. The State agreed to dismiss the remaining charge and recommend a prison sentence of 26 months of initial confinement and 36 months of extended supervision, consecutive to any other sentence previously imposed. The circuit court accepted Hein's plea of no contest to the operating with a restricted controlled substance charge and dismissed the remaining charge. The court adopted the State's recommendation for Hein's prison sentence and imposed a $600 mandatory minimum fine.

The no-merit report addresses whether the circuit court erred in determining that Hein was competent to proceed. We agree with counsel that there is no arguable merit to this issue. A circuit court's competency determination will not be overturned unless clearly erroneous, *see* ***State v. Byrge***, 2000 WI 101, ¶45, 237 Wis. 2d 197, 614 N.W.2d 477, and the circuit court's determination here was supported by an expert report contained in the record.

The no-merit report addresses whether Hein's plea was knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. The circuit court's plea colloquy, including the court's references to the plea questionnaire and waiver of

rights form, sufficiently complied with the requirements of WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, relating to the nature of the charges, the rights Hein was waiving, and other matters. The circuit court expressly informed Hein of the $600 mandatory minimum fine. The record shows no other arguable ground for plea withdrawal.

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The circuit court discussed the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum.

The no-merit report addresses whether a pro se motion for sentence modification that Hein filed in the circuit court sets forth a new factor that would justify a modification to Hein's sentence.[2] We agree with counsel that there is no arguable merit to this issue.

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.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoted source omitted). Whether a new factor exists is a question of law for de novo review. *See* ***id.***,

[2] The no-merit report explains that Hein filed the motion pro se prior to the appointment of appellate counsel.

¶33. However, "[t]he determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court." ***Id.***

Here, the only arguably new circumstances alleged in Hein's motion for sentence modification were Hein's performance in treatment programs and the Department of Corrections' determination to disqualify Hein from the Earned Release Program. As to Hein's performance in treatment programs, the circuit court correctly concluded that this was not a new factor. *See* ***State v. Krueger***, 119 Wis. 2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984) (progress in prison rehabilitation system not a new factor). As to Hein's disqualification from the Earned Release Program, the circuit court concluded that this "may" be a new factor, but the court nonetheless declined to modify Hein's sentence on that basis. Even if we assume that Hein's disqualification from the Earned Release Program could be a new factor, we see no arguable basis for Hein to challenge the circuit court's exercise of discretion to decline to modify his sentence based on this factor. In declining to modify Hein's sentence, the circuit court explained that it was aware at the time of sentencing that Hein was not guaranteed entry into the Earned Release Program, and that the court had not based Hein's sentence on whether Hein would gain entry to the program. The record shows no other arguable basis for Hein to challenge his sentence.

Finally, the no-merit report and supplemental report address whether trial counsel's untimely filing of a suppression motion constitutes ineffective assistance of counsel. The suppression motion raised the issues of whether police lacked reasonable suspicion to extend Hein's stop to conduct field sobriety tests, and whether police lacked probable cause to believe that Hein was committing or had committed a crime. The circuit court denied the motion as untimely without considering the substance of the motion. For the reasons explained below, we

agree with no-merit counsel that there is no arguable merit to pursuing further proceedings on this issue.

To show ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

In the no-merit report, counsel stated that, even if trial counsel performed deficiently as to the suppression motion, there was an insufficient basis to conclude that Hein was prejudiced. This court ordered further input from no-merit counsel on this potential ineffective assistance issue. Our order noted that the no-merit report appeared to presume that the facts adduced at a suppression hearing would be the same as the facts alleged in the complaint. In other words, the no-merit report appeared to presume that trial counsel would have been unable to meaningfully challenge the alleged facts at a suppression hearing. Our order stated that the no-merit report did not explain the basis for this presumption, nor appear to take into account the State's burden of proof.

In the supplemental no-merit report that counsel filed in response to our order, counsel expands significantly upon his analysis of the potential ineffective assistance issue. Counsel clarifies that he conducted an investigation outside the record and that he considered the burden of proof in concluding that there is not a reasonable probability that the suppression motion

would have succeeded. Counsel also points out that the officer who stopped Hein testified at the preliminary hearing consistent with the complaint allegations. Based on counsel's expanded analysis and our independent review of the record, we are satisfied that there is no basis for further proceedings on the ineffective assistance issue.

Our review of the record discloses no other potential issues for appeal.

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 Herbert is relieved of any further representation of Shandy Hein in this matter. *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