



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](http://www.wicourts.gov)

**DISTRICT I**

March 2, 2021

To:

Hon. David L. Borowski  
Circuit Court Judge  
901 N. 9th St.  
Milwaukee, WI 53233

John Barrett  
Clerk of Circuit Court  
821 W. State Street, Rm. 114  
Milwaukee, WI 53233

Annice Kelly  
4623 75th St., #278  
Kenosha, WI 53142

Elizabeth A. Longo  
Assistant District Attorney  
District Attorney's Office  
821 W. State. St. - Ste. 405  
Milwaukee, WI 53233

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

Antonio LaBoy-Almodovar 487743  
Sturtevant Transitional Facility  
P.O. Box 903  
Sturtevant, WI 53177-0903

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

---

2020AP1038-CRNM      State of Wisconsin v. Antonio LaBoy-Almodovar  
(L.C. # 2018CF5149)

Before Brash, P.J., Donald and White, 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).**

Antonio LaBoy-Almodovar appeals from a judgment of conviction for a sixth offense of operating a motor vehicle while intoxicated (OWI), and from an order denying his postconviction motion to modify his sentence. 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). LaBoy-Almodovar has filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, as mandated by *Anders*, the judgment and order are summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

LaBoy-Almodovar was stopped for speeding. The officer noticed that LaBoy-Almodovar had a strong odor of alcohol and very slurred speech. LaBoy-Almodovar performed field sobriety tests poorly and registered at .20 on a preliminary breath test. LaBoy-Almodovar was charged with a sixth offense OWI and operating with a revoked license. He entered a guilty plea to the OWI charge. The plea agreement required the prosecution to dismiss the operating after revocation charge as a read-in at sentencing and to make a sentencing recommendation of two years of initial confinement and two years of extended supervision. At sentencing, the prosecution made the promised recommendation. LaBoy-Almodovar was sentenced to two years of initial confinement and two and a-half years of extended supervision.

On May 29, 2020, after serving eight months of his sentence, LaBoy-Almodovar filed a postconviction motion seeking an emergency stay or commutation of the sentence due to the

---

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

“ongoing and emergent circumstances brought on by COVID-19 and the resulting pandemic.”<sup>2</sup> LaBoy-Almodovar argued that a new factor existed because due to his underlying health condition, he was at higher risk of serious illness if he was to be infected with COVID-19 within the prison population. The motion was denied with the sentencing court concluding that individualized relief by a stay or commutation of the sentence was not warranted under the circumstances.

The no-merit report addresses the potential issues of whether LaBoy-Almodovar’s plea was knowingly, voluntarily, and intelligently entered; whether the sentence was the result of an erroneous exercise of discretion; and whether the denial of the postconviction motion for sentence modification was a proper exercise of discretion. 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.

In his response, LaBoy-Almodovar contends that he was unjustly given more time than the prosecution asked for. He also suggests the sentence was racially motivated because he observed the sentencing court impose just a six-month Huber program on a white man convicted of his eighth OWI offense and impose ten years on a “black girl” convicted of her first offense. LaBoy-Almodovar’s complaint about possible disparity in sentencing, however, is premised on observations and sentences that cannot be verified. Even if LaBoy-Almodovar’s recollection of the other sentences is correct, it does not create an issue of arguable merit. The mere fact that a

---

<sup>2</sup> Prior to the postconviction motion filed by appointed counsel, LaBoy-Almodovar filed *pro se* the form titled “Petition to Modify Bifurcated Sentence § 302.113(9g), Wis. Stats. (Geriatric/Extraordinary Health Condition).” LaBoy-Almodovar was informed that no action would be taken on the *pro se* petition because a petition under WIS. STAT. § 302.113(9g), must first be submitted to the correctional institution’s program review committee and approved by the committee for referral to the circuit court. *See* § 302.113(9g)(c), (cm). Because there was no indication that the committee had approved LaBoy-Almodovar’s petition for referral to the circuit court, it was not necessary for the circuit court to consider the petition.

defendant's sentence is different than others is insufficient to support a conclusion that it is unduly disparate. See *State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). It was within the sentencing court's discretion to give LaBoy-Almodovar six more months of extended supervision than requested by the prosecution. Moreover, the sentencing court indicated that the sentence was individually tailored to LaBoy-Almodovar's circumstances, particularly that LaBoy-Almodovar's crime was aggravated by driving while intoxicated at twice the speed limit at night.

LaBoy-Almodovar also complains that his appointed appellate counsel only presented one letter from a doctor with the postconviction motion when LaBoy-Almodovar provided counsel with two doctors' letters. LaBoy-Almodovar includes the omitted letter with his response. The doctor's letter predated LaBoy-Almodovar's sentencing<sup>3</sup> and only addressed LaBoy-Almodovar's dietary restrictions. The letter did not present a medical opinion relevant to the postconviction motion seeking sentence modification based on LaBoy-Almodovar's high risk if infected with COVID-19. There is no arguable merit to a claim that appointed appellate counsel was ineffective for not including both doctors' letters.

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

Upon the foregoing reasons,

---

<sup>3</sup> The letter was dated June 19, 2019. LaBoy-Almodovar was sentenced October 1, 2019.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Annice Kelly is relieved from further representing Anthony LaBoy-Almodovar in this appeal. *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*