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DISTRICT I

October 19, 2021

To:

Hon. Michael J. Hanrahan
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

David Malkus
Assistant State Public Defender
Electronic Notice

Kenneth Allen Carney
2425 S. 95th Street Lower
Milwaukee, WI 53227

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

2021AP624-CRNM State of Wisconsin v. Kenneth Allen Carney (L.C. # 2018CF2833)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Kenneth Allen Carney appeals a judgment convicting him of one count of possession of cocaine with intent to deliver and with use of a dangerous weapon, and two counts of unlawfully possessing a firearm as a convicted felon, all convictions as a party to a crime. He also appeals an order denying his postconviction motion for sentence modification. Assistant State Public Defender David Malkus filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),¹

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

and *Anders v. California*, 386 U.S. 738 (1967). Carney received a copy of the report and was advised of his right to file a response, but he has not responded. After considering the report and conducting an independent review of the record as mandated by *Anders*, we conclude that there are no issues of arguable merit that could be raised on appeal. See WIS. STAT. RULE 809.21. Therefore, we affirm.

The no-merit report first addresses whether there would be arguable merit to an appellate challenge to Carney's guilty pleas. The circuit court conducted a colloquy that conformed to the strictures of WIS. STAT. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). In addition, Carney reviewed and signed a plea questionnaire and waiver of rights form. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (stating that the court may rely on a plea questionnaire and waiver of rights form in assessing the defendant's knowledge about the rights he or she is waiving). Based on the plea colloquy and Carney's review of the plea questionnaire and waiver of rights form, we conclude that there would be no arguable merit to an appellate challenge to Carney's pleas.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its discretion when it ordered that new counsel be appointed for Carney during pretrial proceedings. The State moved the circuit court to remove Carney's counsel on the grounds that it may need to call Carney's counsel as an impeachment witness at the suppression hearing and the circuit court agreed with the State's assessment.² We

² The suppression hearing was never held because Carney opted to plead guilty.

agree with the no-merit report's discussion and analysis of this issue and its conclusion that there would be no arguable merit to this issue on appeal.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion. The circuit court sentenced Carney to twenty months of initial confinement and three years of extended supervision for possession of cocaine with intent to deliver. The circuit court also sentenced him to eighteen months of initial confinement and thirty-six months of extended supervision for each count of unlawfully possessing a firearm, to be served concurrently to each other and to the sentence for possession of cocaine with intent to deliver. The record establishes that the circuit court carefully considered the general objectives of sentencing and the appropriate sentencing factors, applied the factors to the facts of this case, and reached a reasonable sentencing decision. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (the court must identify the factors it considered and explain how those factors fit the objectives and influenced its sentencing decision). Therefore, there would be no arguable merit to a challenge to the court's sentencing discretion.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's order denying Carney's motion for sentence modification. Carney moved for sentence modification on the grounds that a co-defendant received a shorter sentence than he did. The circuit court explained that Carney's co-defendant received a shorter sentence "due to the magnitude of [his] cooperation" with the State. Carney and his co-defendant received different sentences because their circumstances were different. It is well established that sentencing disparity between co-defendants is not grounds for relief where the circumstances pertaining to each defendant vary. *See McCleary v. State*, 49 Wis. 2d 263, 271-

72, 182 N.W.2d 512 (1971). Accordingly, there would be no arguable merit to a challenge to the order denying sentence modification.

Our review of the record discloses no other potential issues for appeal. Accordingly, we accept the no-merit report, affirm the judgment and order, and discharge appellate counsel of the obligation to represent Carney further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved from further representing Carney 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