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**DISTRICT III**

February 8, 2022

To:

Hon. Eugene D. Harrington  
Circuit Court Judge  
Electronic Notice

Sharon Jorgenson  
Clerk of Circuit Court  
Polk County  
Electronic Notice

Frances Philomene Colbert  
Electronic Notice

Winn S. Collins  
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Jeffrey L. Kemp  
Electronic Notice

Roger Vernon O'Brien 112502  
Drug Abuse Corr. Center  
P.O. Box 190  
Winnebago, WI 54985-0190

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

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2019AP1695-CRNM      State of Wisconsin v. Roger Vernon O'Brien  
(L. C. No. 2018CF262)

Before Stark, P.J., Hruz and Gill, 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).**

Counsel for Roger O'Brien has filed a no-merit report concluding that no grounds exist to challenge O'Brien's convictions for operating under the influence of an intoxicant or other drug (OWI), fourth offense, and possession of tetrahydrocannabinol (THC), second offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 961.41(3g)(e) (2019-20),<sup>1</sup> respectively.<sup>2</sup> O'Brien was

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

<sup>2</sup> The no-merit report was filed by Attorney Catherine R. Malchow, who has been replaced by Attorney Frances Philomene Colbert as O'Brien's appellate counsel.

informed of his right to file a response to the no-merit report, and he has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

An amended Information charged O'Brien with OWI, as a fourth offense; possession of methamphetamine; possession of THC, as a second or subsequent offense; operating a motor vehicle while revoked; and failing to install an ignition interlock device (IID), with the two possession charges as a repeater. According to the complaint, law enforcement responded to a report that a vehicle crashed into a utility pole, causing damage, and then left the scene. After a responding officer encountered the suspected vehicle and initiated a stop, the officer observed that the driver, identified as O'Brien, appeared to be impaired, as O'Brien's speech and actions were "very slowed and slurred, and did not make sense at times." The officer administered standardized field sobriety tests, and based on O'Brien's performance, placed O'Brien under arrest. Although a preliminary breath test detected no alcohol, the officer found a "loaded" needle in the vehicle that tested positive for methamphetamine. During a search of O'Brien's person, incident to his arrest, law enforcement also discovered .5 grams of THC. The complaint recounted that O'Brien had three previous OWI convictions and that he also had an IID restriction.

Pursuant to a plea agreement, O'Brien pleaded no contest to fourth-offense OWI—which carried a mandatory minimum term of sixty days in jail pursuant to WIS. STAT. § 346.65(2)(am)4.—and felony possession of THC without the repeater enhancer. The State recommended that the circuit court dismiss and read in the remaining charges, and it joined defense counsel's recommendation for a withheld sentence and probation with sixty days'

conditional jail time. The court ultimately imposed the maximum sentence for each crime, concurrent with each other, resulting in an aggregate six-year term, consisting of three years' initial confinement and three years' extended supervision. The sentencing court considered proper sentencing factors, *see State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197, emphasizing that the sentence here was about “protecting society for as long as appropriate given the criminal history, the nature of this crime, the circumstances, and all the factors.”<sup>3</sup>

The no-merit report addresses whether O'Brien knowingly, intelligently and voluntarily entered his no-contest pleas and whether the circuit court properly exercised its sentencing discretion. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that any challenge to O'Brien's pleas or sentences would lack arguable merit. The no-merit report sets forth an adequate discussion of these potential issues to support the no-merit conclusion, and we need not address them further. Our independent review of the record discloses no other potential issue for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

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<sup>3</sup> According to the presentence investigation report, O'Brien reported that he had taken Percocet, a controlled substance that was not prescribed to him, and he used both methamphetamine and marijuana before falling asleep at the wheel and hitting the utility pole. We note that at the sentencing hearing, the circuit court recounted that O'Brien had taken Percocet and consumed alcohol before operating a motor vehicle and hitting the utility pole. Based on the record before us, there is nothing to suggest that this misstatement of the type of intoxicant, rather than the fact of the impaired driving, was relevant to the sentence imposed. Thus, any challenge to the sentence on this ground would lack arguable merit.

IT IS FURTHER ORDERED that Attorney Frances Philomene Colbert is relieved of her obligation to further represent Roger O'Brien in this matter. *See* WIS. STAT. RULE 809.32(3).

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*