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**DISTRICT IV**

March 31, 2022

To:

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Circuit Court Judge  
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Dennis J. Ryan  
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Lavekeio L. Smith 555284  
New Lisbon Correctional Inst.  
P.O. Box 2000  
New Lisbon, WI 53950-2000

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

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2020AP1618-CRNM      State of Wisconsin v. Lavekeio L. Smith (L.C. # 2015CF137)

Before Kloppenburg, Fitzpatrick, and Graham, 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 Jennifer Lohr, as appointed counsel for Lavekeio Smith, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Smith responded to it. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

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

In 2016, Smith pled no contest to and was convicted of two counts of delivery of cocaine (1 to 5 grams) and one count of possession of cocaine with intent to deliver (5 to 15 grams). The circuit court withheld sentence and placed him on probation.

In 2018, Smith's probation was revoked and he was returned to the circuit court for sentencing. On the two counts of delivery of cocaine, the court imposed concurrent sentences of two years of initial confinement and two years of extended supervision. On the count of possession with intent to deliver, the court imposed a consecutive sentence of seven years of initial confinement and five years of extended supervision.

As the no-merit report acknowledges, a challenge to a sentence imposed after revocation of probation does not bring the underlying conviction before this court for review. *See State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994); *State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). Therefore, only issues related to sentencing after revocation are before us in this appeal.

Smith filed a postconviction motion alleging that he should be resentenced due to a new factor. The new factor was alleged to be the COVID-19 pandemic and Smith's particular vulnerability to that illness in a prison environment due to his underlying health conditions. The circuit court held a hearing at which it determined that the pandemic met the legal test to be considered a new factor.

However, the circuit court further exercised its discretion to conclude that the new factor did not warrant a change in Smith's sentence. In reaching that conclusion, the court relied on the fact that its primary focus in imposing the prison sentences was to protect the community from

Smith's activities, and the court stated that it did not believe there was a less restrictive sentence method available that would guarantee protection of the public.

Smith then moved for reconsideration of that denial after the presence of COVID-19 in his institution increased. The circuit court denied that motion without a hearing, for the reasons previously stated.

In the no-merit report, counsel concludes that it would be frivolous to argue on appeal that the circuit court erroneously exercised its discretion in denying these motions. We agree. The circuit court accurately described its original sentencing focus, and reached a reasonable decision in balancing that focus against the potential harm to Smith from remaining in prison during the pandemic.

In Smith's response to the no-merit report, he argues that the circuit court erred by denying him eligibility for the substance abuse program. He contrasts that decision with that of a different circuit court that sentenced him with eligibility for that program. In the case before us, when the court sentenced Smith after revocation, it stated that it would not find him eligible for that program because it was "most concerned about Mr. Smith's drug dealing, not his drug use." Smith asserts that this decision did not sufficiently consider his rehabilitative needs.

We conclude that it would be frivolous to raise this issue in a further postconviction motion. Smith may well be correct that it would have been reasonable to find him eligible for the program in this case, too, but it was also reasonable for the circuit court to reach a different weighing of his rehabilitative needs and the need for public protection. The court apparently did not expect that the program would be sufficiently likely to reduce Smith's drug sale activities. Although the circuit court's response to Smith's new-factor motions based on the pandemic is

not directly controlling on this issue, it demonstrates how the court's sentencing focus on protecting the public would likely prevail over the potential for treatment offered through the program, if the court were to be asked to consider the issue of program eligibility again.

Finally, the no-merit report addresses whether there are other grounds to challenge Smith's sentences. As explained in the no-merit report, the sentences are within the legal maximums. As to discretionary issues, the standards for the circuit court and this court are well-established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Therefore,

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 Lohr is relieved of further representation of Smith 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*