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DISTRICT II

April 6, 2022

To:

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Circuit Court Judge
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Clerk of Circuit Court
Racine County Courthouse
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Pamela Moorshead
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Ashley D. McGraw, #504110
Taycheedah Correctional Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2021AP506-CRNM State of Wisconsin v. Ashley D. McGraw (L.C. #2017CF1117)

Before Neubauer, Grogan and Kornblum, 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).

Ashley D. McGraw appeals a judgment of conviction, entered upon her guilty pleas, for two counts of delivery of three grams or less of heroin as a second or subsequent offense, contrary to WIS. STAT. §§ 961.41(1)(d)1 and 961.48(1)(b) (2019-20).¹ McGraw's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v.*

¹ One of the offenses had an additional penalty modifier based on distribution in or near a park. See WIS. STAT. § 961.49(1m)(b)1 (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

California, 386 U.S. 738 (1967). McGraw did not file a response. Per this court's February 14, 2022 order, counsel has also filed a supplemental no-merit report addressing the circuit court's misstatement at sentencing of the maximum term of imprisonment on one of the counts. Upon consideration of the no-merit report and the supplemental no-merit report, and after an independent review of the record as mandated by *Anders* and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

McGraw was charged in a four-count criminal complaint with the crimes of conviction, as well as additional counts of delivering heroin in or near a park as a second or subsequent offense and maintaining a drug trafficking place as a second or subsequent offense. McGraw pled guilty to the two crimes of conviction pursuant to a plea agreement with the State, under which the two additional counts were dismissed and read in at sentencing and the State agreed to recommend consecutive sentences consisting of five years' initial confinement and five years' extended supervision. The circuit court accepted McGraw's pleas following a colloquy, and the matter was scheduled for sentencing using the presentence investigation report from a Kenosha County case. The court imposed sentences consisting of five years' initial confinement and five years' extended supervision each, concurrent to one another but consecutive to the sentence in the Kenosha County case. McGraw filed a pro se motion seeking to vacate DNA surcharges that was denied.

Postconviction counsel was appointed for McGraw and filed a motion seeking an amendment to her eligibility for the substance abuse program (SAP) after it was discovered that she would be ineligible because of her sentence structure. The circuit court concluded McGraw's SAP ineligibility was not a new factor and denied the motion.

The no-merit report concludes that there is no potentially meritorious challenge regarding the validity of McGraw's pleas, the circuit court's exercise of its sentencing discretion, or the court's denial of McGraw's postconviction motion. In this court's February 14, 2022 order, we noted that although appellate counsel had analyzed the court's sentencing remarks, the no-merit report did not address the fact that at the outset of its comments, the court, without objection, identified the maximum sentence on the delivery charge subject to the WIS. STAT. § 961.49(1m)(b)1 modifier as "22 years in prison." The correct maximum penalty for that offense was twenty-one and one-half years.²

Appellate counsel subsequently filed a supplemental no-merit report that concludes there would be no potentially meritorious argument concerning the circuit court's misstatement of the maximum term of imprisonment applicable to the offense involving the WIS. STAT. § 961.49(1m) modifier. Specifically, counsel concludes that the misstatement does not constitute a new factor warranting sentence modification, nor does the record demonstrate that the circuit court relied on its misstatement of the maximum term of imprisonment when pronouncing her sentence.

Our independent review of the appellate record satisfies us that the no-merit report properly concludes that any argument concerning the validity of McGraw's pleas, the circuit court's exercise of its sentencing discretion, or the court's denial of McGraw's postconviction

² Pursuant to WIS. STAT. § 961.41(1)(d)1, delivery of less than three grams of heroin is a Class F felony. Class F felonies, in turn, are punishable by a maximum term of imprisonment of twelve and one-half years. *See* WIS. STAT. § 939.50(3)(f). The penalty enhancer for second and subsequent offenses adds four years, *see* WIS. STAT. § 961.48(1)(b), and the penalty enhancer for the conduct occurring in or near a park adds an additional five years, *see* WIS. STAT. § 961.49(1m), for a total potential term of imprisonment of twenty-one and one-half years. McGraw was advised of the correct maximum term of imprisonment at the time she entered her plea, and the plea/waiver of rights form also includes the correct maximum.

motion would lack arguable merit. We similarly accept appellate counsel's conclusion that any challenge based upon the circuit court's misstatement of the maximum term of imprisonment applicable to the offense involving the WIS. STAT. § 961.49(1m) modifier would lack arguable merit. *See State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491. Our independent review of the appellate record reveals no other potentially meritorious 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 Pamela Moorshead is relieved from further representing Ashley D. McGraw 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