



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

DISTRICT II

April 27, 2022

To:

Hon. Steven Michael Cain
Circuit Court Judge
Electronic Notice

Winn S. Collins
Electronic Notice

Hon. Joseph W. Voiland
Circuit Court Judge
Electronic Notice

Adam Y. Gerol
Electronic Notice

Marylou Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Jay R. Pucek
Electronic Notice

Joseph D. Marion, #638434
Kettle Moraine Correctional Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2020AP1250-CRNM State of Wisconsin v. Joseph D. Marion (L.C. #2018CF59)

Before Gundrum, P.J., 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).

Counsel for Joseph D. Marion has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),¹ concluding that no grounds exist to challenge Marion's convictions for two counts of manufacture or delivery of three grams or less of heroin and one count of felony

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

bail jumping, and an order denying Marion's postconviction motion for resentencing.² Marion was 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 that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction and the order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The State charged Marion with a total of ten counts: three counts of manufacture or delivery of three grams or less of heroin (Counts 1, 3, and 7); one count of manufacture or delivery of one gram or less of cocaine (Count 4); one count of manufacture or delivery of more than one gram but not more than five grams of cocaine (Count 8); and five counts of felony bail jumping (Counts 2, 5, 6, 9, and 10). According to the criminal complaint, on December 21, 2017, Marion sold 1.5 grams of heroin to an undercover law enforcement officer for \$250. On December 27, 2017, Marion sold heroin and 0.3 grams of cocaine to the same undercover officer for \$300. On January 4, 2018, Marion again sold heroin and cocaine to the undercover officer in exchange for \$350. The complaint further alleged that Marion had been charged with seven felony offenses in Milwaukee County case No. 2017CF5687 and had been released on bail in that case on December 13, 2017. One of Marion's bail conditions required that he commit no new crimes.

Marion entered guilty pleas to Counts 1, 2, and 3, pursuant to a plea agreement. In exchange for Marion's pleas, the State agreed that the remaining counts would be dismissed and

² Although Attorney Leon W. Todd submitted the no-merit report, Attorney Jay R. Pucek was later substituted as counsel in this matter.

read in for purposes of sentencing. The State also agreed to recommend consecutive sentences totaling thirteen years' initial confinement and thirteen years' extended supervision, comprised of: five years' initial confinement and five years' extended supervision on Count 1; three years' initial confinement and three years' extended supervision on Count 2; and five years' initial confinement and five years' extended supervision on Count 3. Following a plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Marion had completed, the circuit court accepted Marion's guilty pleas, finding that they were knowingly and voluntarily entered.³ The court also confirmed Marion's agreement that the court could rely on the allegations in the criminal complaint as the factual basis for Marion's pleas.

Thereafter, during Marion's sentencing hearing, the State made the sentence recommendation required by the plea agreement. Marion asked the sentencing court to impose sentences not exceeding the recommendation set forth in the presentence investigation report (PSI)—i.e., concurrent sentences totaling three to four years' initial confinement and three to four years' extended supervision. The court ultimately imposed consecutive sentences totaling ten years' initial confinement and ten years' extended supervision.

Marion subsequently moved for postconviction relief, seeking resentencing. He contended that the sentencing court had erroneously exercised its discretion by making an unsupported factual finding during its sentencing remarks. Specifically, Marion cited the court's statement: "I'll guarantee you that—I'll bet you any dollar to doughnuts that that operation that

³ The Honorable Joseph W. Voiland presided over Marion's plea hearing. The Honorable Dennis P. Moroney later presided over Marion's sentencing hearing. The Honorable Steven M. Cain presided over the hearing on Marion's postconviction motion and entered the order denying postconviction relief. We refer to Judge Moroney as the sentencing court and to Judge Cain as the postconviction court.

you had back in the day had an AODA component as well.” Marion asserted the “most likely” interpretation of this remark was that the court believed Marion “had driven while intoxicated when he was involved in [a 2017] car accident that necessitated [a] surgery/operation on his wrist.” Marion contended another possible interpretation was that the court believed “there was some sort of AODA treatment associated with Mr. Marion’s wrist operation.” Marion asserted that neither of those potential factual findings was supported by evidence in the record. Marion further asserted that the court’s erroneous factual finding “formed part of the basis for” its sentence.

The postconviction court denied Marion’s motion, following a nonevidentiary hearing. The court noted that during her sentencing argument, defense counsel had emphasized that Marion became addicted to opioids after he was “initially prescribed them[,]” “started abusing them[,]” and then “fell down this black hole of addiction.” Consistent with counsel’s remarks, Marion and his mother had told the PSI author that Marion’s addiction began in 2016 when he was prescribed Percocet and Oxycodone for pain after an ex-girlfriend threw hot water on him, and that his addiction worsened after he was in a car accident in 2017 that required him to undergo surgery on his wrist. Given this factual context, the postconviction court determined that the sentencing court’s statement regarding Marion’s “operation” having an “AODA component”—although somewhat ambiguous—was merely an acknowledgement that Marion’s addiction issues had been exacerbated by the 2017 car accident and the subsequent operation on his wrist. The postconviction court rejected Marion’s claim that the sentencing court had made an unsupported factual finding that the 2017 car accident occurred because Marion was operating while intoxicated.

The no-merit report addresses: (1) whether Marion knowingly, intelligently, and voluntarily entered his guilty pleas; (2) whether the sentencing court properly exercised its discretion when sentencing Marion; and (3) whether the postconviction court erred by denying Marion's postconviction motion for resentencing. Having independently reviewed the record, we agree with counsel's description, analysis, and conclusion that any challenge to Marion's convictions or sentences on these grounds would lack arguable merit. Accordingly, we do not address these issues further.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Jay R. Pucek is relieved of further representing Joseph D. Marion in this matter. *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