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**DISTRICT III**

May 24, 2022

To:

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David M. Dolecki  
1604 River Street  
Niagara, WI 54151

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

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2020AP1163-CRNM      State of Wisconsin v. David M. Dolecki (L. C. No. 2018CF126)

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 David Dolecki has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),<sup>1</sup> concluding that no grounds exist to challenge Dolecki's conviction for one count of theft by contractor in an amount greater than \$2,500 but not exceeding \$5,000. Dolecki was informed of his right to file a response to the no-merit report, and he has filed a response raising multiple issues. 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

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

that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

In July 2018, Dolecki was charged with a single count of theft by contractor in an amount greater than \$2,500 but not exceeding \$5,000. The complaint alleged that in September 2017, the victim entered into a written contract for Dolecki to perform construction work at the victim's property in Marinette County. The victim made an initial payment of \$3,500 to Dolecki so that Dolecki could purchase materials for the job. Later that month, Dolecki informed the victim that he had spent the \$3,500 payment on unforeseen personal expenses and needed more money to purchase the necessary materials. The victim refused to give Dolecki any more money and asked Dolecki to refund the \$3,500 that he had already paid. On about November 1, 2017, Dolecki paid the victim \$300, but he subsequently failed to make any additional payments to the victim. The victim continued to communicate with Dolecki about refunding the money until May 2018, when Dolecki stopped responding to the victim's attempts to contact him. At that point, the victim contacted law enforcement. When interviewed by a sheriff's deputy, Dolecki conceded that he had spent the victim's \$3,500 payment on "other jobs and other expenses."

Dolecki ultimately entered a guilty plea to the theft by contractor charge, pursuant to a plea agreement.<sup>2</sup> As part of the plea agreement, Dolecki paid \$700 toward his restitution obligation to the victim, and the parties asked the circuit court to apply Dolecki's \$2,500 cash bond from Marinette County case No. 2018CF127 to fully satisfy the victim's restitution claim.

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<sup>2</sup> Under the plea agreement, Dolecki also entered no-contest pleas to two charges in a separate case—Marinette County case No. 2018CF127. Dolecki's convictions and sentences in case No. 2018CF127 are the subject of a separate no-merit appeal.

The parties also agreed to jointly recommend a sentence of six months in jail on the theft by contractor charge, consecutive to Dolecki's sentences in case No. 2018CF127.

Following a plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Dolecki had completed, the circuit court accepted Dolecki's plea to the theft by contractor charge, finding that it was freely, voluntarily, and intelligently made. Dolecki agreed that the facts alleged in the criminal complaint were true and that the court could use those facts as the factual basis for his plea. The court subsequently sentenced Dolecki to one year of initial confinement and two years of extended supervision on the theft by contractor charge, consecutive to all other sentences.

The no-merit report first addresses whether Dolecki's guilty plea to the theft by contractor charge was knowing, intelligent, and voluntary. We agree with counsel's description, analysis, and conclusion that any challenge to the validity of Dolecki's plea would lack arguable merit. Moreover, in his response to the no-merit report, Dolecki clarifies that he is not challenging the validity of his plea. We therefore do not address that issue further.

The no-merit report next concludes that there would be no arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion. In his response to the no-merit report, Dolecki asserts that the court erroneously exercised its discretion by imposing a prison sentence, rather than following the parties' joint recommendation of six months in jail. Having independently reviewed the record, we agree with counsel's conclusion that any challenge to the court's exercise of its sentencing discretion would lack arguable merit.

When sentencing a criminal defendant, a circuit court must provide a rational and explainable basis for the sentence imposed. *State v. Gallion*, 2004 WI 42, ¶39, 270 Wis. 2d 535,

678 N.W.2d 197. The court must specify the objectives of the sentence, which may include the protection of the public, punishment, rehabilitation, and deterrence. *Id.*, ¶40. The court must describe the facts relevant to the specified objectives and explain why the sentence advances those objectives. *Id.*, ¶42. “Courts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision.” *Id.*, ¶43. In addition, a court must consider probation as the first alternative and should impose probation unless it determines that: (1) confinement is necessary to protect the public; (2) the offender needs correctional treatment available only in confinement; or (3) probation would unduly depreciate the seriousness of the offense. *Id.*, ¶44.

In this case, the circuit court provided a rational and explainable basis for its decision to impose a three-year prison sentence consisting of one year of initial confinement and two years of extended supervision. The court began by emphasizing the seriousness of the offense, noting that Dolecki had taken advantage of the victim by promising to perform construction work and then spending the victim’s money on other things. The court highlighted that Dolecki’s conduct was intentional and was not the result of an accident or misunderstanding. The court also emphasized that Dolecki’s conduct had forced the victim, who lived in Baraboo, to make repeated trips to Marinette County to attempt to resolve the situation.

The circuit court next reasoned that theft by contractor is “one of the few kinds of crimes that this Court sees where deterrence and punishment are actual factors that might make a difference to our community.” The court explained that other contractors in Marinette County “have to know that” when a contractor misappropriates funds that a customer has paid for a construction job, “there has to be a very significant consequence for that because it’s done on purpose.” In addition to deterrence, the court reasoned that it was necessary to punish Dolecki

for his “despicable” and “terrible” conduct in taking advantage of the victim. The court further reasoned that Dolecki’s sentence would protect the community because “if contractors understand that in Marinette County, if you cheat people like this, you’re going to do serious time, maybe they’ll just be a little more careful. I’m sure the word will go out. I’m sure the union hall is going to hear about that, so protection matters[.]”

The circuit court next noted that given Dolecki’s prior record, rehabilitation was not one of the objectives of the court’s sentence. The court reasoned that Dolecki had already been convicted of crimes in thirteen prior cases, and he had been revoked from extended supervision four times. Given that record, the court rejected the recommendation in the presentence investigation report (PSI) that the court impose two to three years of probation. The court explained, “[T]he Department of Corrections says we think we can treat him in the community. Really, what are they going to do the 14th time they didn’t do the other 13 times? What are they going to do ... this time that they didn’t do four times on extended supervision?”

The circuit court then addressed various factors that affected its sentencing decision, noting that Dolecki’s past record was “awful”; that he had a history of “undesirable behavior”; and that although his conduct was not “vicious or aggravated,” it was “terrible,” in that he took the victim’s money and then “dodged the guy repeatedly.” The court also noted that Dolecki had committed an intentional act and could not blame his conduct on anyone or anything else. The court further observed that Dolecki was awaiting sentencing on a charge in Oconto County that involved “exactly the same kind of conduct.”

On the positive side of the balance, the circuit court noted that Dolecki had been “cooperative,” and it gave him “substantial credit” for pleading guilty and admitting that his

conduct had harmed the victim. The court expressed some doubt, however, as to whether Dolecki was truly remorseful and repentant.

The circuit court next reiterated that there was “absolutely no indication” that probation was warranted “because this is the 14th time, four failures on ... extended supervision.” The court further stated that probation “would depreciate the seriousness of ... this offense, and it would send the wrong message to all the other guys who put a sign on the side of a pickup truck and say they’re a contractor, and then take people’s money, taking advantage, it’s terrible.” The court also reasoned that Dolecki’s conduct “feed[s] the narrative that contractors are all crooks” and sends a message “that the people in Marinette County take advantage of the visitors.”

Under these circumstances, and particularly given the seriousness of the offense, the circuit court concluded that the parties’ joint recommendation of six months in jail missed the mark “by miles.” Instead, given the twin objectives of deterrence and punishment, the court determined that it was appropriate to impose a prison sentence consisting of one year of initial confinement and two years of extended supervision. The court noted that it had not imposed the maximum sentence and had given Dolecki a “substantial reduction” because he had taken responsibility for his crime and pled guilty. Nevertheless, the court explained that it believed some prison time was appropriate and that prison was “a far better place for [Dolecki] to spend [his] time” than the Marinette County Jail because he would not benefit from the jail’s programming.

As the above summary shows, the circuit court provided a lengthy explanation for the sentence imposed. The court identified its sentencing objectives—i.e., deterrence, punishment, and protection of the public—and explained why it believed a prison sentence was necessary to

advance those objectives under the specific facts of this case. The court explained why it did not believe that probation was appropriate. It also explained that it did not believe the parties' joint recommendation of six months in jail was appropriate, given the seriousness of Dolecki's conduct and the need to punish Dolecki and deter others from committing similar acts. On this record, there would be no arguable merit to a claim that the court erroneously exercised its sentencing discretion by imposing a prison sentence, rather than following the parties' joint recommendation.

In his response to the no-merit report, Dolecki also asserts that he is entitled to resentencing before a different judge because the circuit court impermissibly participated in the plea bargaining process. Specifically, Dolecki claims that prior to the plea hearing, the court made a "quid pro quo" statement to him indicating that the court would follow the parties' joint sentence recommendation if Dolecki paid the full amount of restitution that was due to the victim. Dolecki further contends that, prior to sentencing, he had fully paid his restitution obligation. Dolecki therefore asserts that the court was bound to honor its promise and follow the parties' joint sentence recommendation.

This argument lacks merit because the record shows that the circuit court never promised to follow the joint recommendation if Dolecki fully paid his restitution obligation. Instead, during a status hearing on October 29, 2018, the parties informed the court that they anticipated reaching a plea agreement, but "the negotiations center[ed] on the repayment of restitution." In response, the court stated, "I don't want to come in here and be told he's going to pay restitution over the next two years. I want the restitution paid or I'm not going to take a deal, because I'm tired of the Department of Corrections sending me letters saying can we reduce this to a civil judgment[.]"

This statement did not constitute a promise to follow the joint recommendation if Dolecki paid the full amount of restitution due to the victim. Instead, the circuit court stated that it would not accept Dolecki's plea unless his restitution obligation was paid in full. Dolecki subsequently satisfied his restitution obligation, and the court accepted his plea. During the plea hearing, Dolecki confirmed his understanding that the court was not "bound by any sentencing recommendation or any other term of the plea agreement" and could impose "anything up to and including the maximum possible penalties ... in spite of any agreement to the contrary or recommendation." Under these circumstances, there would be no arguable merit to a claim for resentencing on the grounds that the court promised Dolecki that it would follow the parties' joint recommendation if he paid his restitution obligation.<sup>3</sup>

Dolecki also argues that the same circuit court judge who presided over this case had previously presided over an unrelated case initiated against Dolecki's girlfriend by the Marinette County Health and Human Services Department. Dolecki contends that in that case, the court "was subjected to significantly inaccurate and inflammatory" allegations about Dolecki—namely, that he was a drug dealer and was present at a hotel room in violation of multiple court orders. Because the court was aware of those allegations due to its involvement in the case against Dolecki's girlfriend, Dolecki contends that the court was required to recuse itself in this case, *sua sponte*.

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<sup>3</sup> We also note that when a circuit court improperly participates in the plea bargaining process, the appropriate remedy is plea withdrawal, not resentencing. See *State v. Williams*, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58 ("[A] defendant who has entered a plea, following a judge's participation in the plea negotiation, is conclusively presumed to have entered his [or her] plea involuntarily and is entitled to withdraw it."). In his response to the no-merit report, Dolecki expressly asserts that he is "seeking remand for resentencing not vacation of [his] plea." Dolecki cites no authority, however, supporting the proposition that resentencing is an available remedy under these circumstances.



WISCONSIN STAT. § 757.19(2) sets forth seven circumstances in which a circuit court judge must disqualify himself or herself. The circumstances in § 757.19(2)(a)-(f) are plainly inapplicable here. Under § 757.19(2)(g), disqualification is required when “a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.” Given that the circuit court judge continued to preside over Dolecki’s case, he clearly did not believe that he could not act in an impartial manner or that the circumstances gave rise to the appearance of bias. Moreover, there is nothing in the record to suggest that the judge was biased against Dolecki as a result of any information that he had learned about Dolecki in another case. When sentencing Dolecki, the judge did not rely on—or even mention—any allegations that were made against Dolecki in the case involving Dolecki’s girlfriend. On this record, there would be no arguable merit to a claim that the judge should have recused himself.

Dolecki also contends that his trial attorney was constitutionally ineffective in five ways.<sup>4</sup> First, Dolecki asserts that his trial attorney was ineffective by failing to “direct the [circuit court] to the [r]ecord where the [c]ourt had raised the issue of granting a plea deal if [Dolecki] had paid

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<sup>4</sup> The no-merit report notes that Dolecki “was concerned with ineffective assistance of counsel in regards to his appeal.” The no-merit report further asserts that appellate counsel “investigated” this issue, “and no basis was found to appeal.” The no-merit report does not, however, discuss the specifics of Dolecki’s concerns regarding ineffective assistance. Instead, the no-merit report states that “[b]ecause this issue contains confidential information outside of the record, the details will not be discussed further in this brief.”

We are cognizant of appellate counsel’s reluctance to reveal confidential information in the no-merit report. However, after Dolecki raised multiple ineffective assistance claims in his response to the no-merit report, it was incumbent upon counsel to file a supplemental no-merit report addressing those claims. Counsel’s failure to do so has significantly hindered our review of this no-merit appeal. We ultimately determine, even absent a supplemental no-merit report, that Dolecki’s ineffective assistance claims lack arguable merit. Nevertheless, we caution appellate counsel that in future no-merit appeals, when the defendant files a response to the no-merit report raising ineffective assistance claims, the better practice would be to file a supplemental no-merit report addressing those claims and explaining why counsel believes they lack arguable merit.

full restitution.” As noted above, however, the court never promised that it would follow the parties’ joint recommendation if Dolecki paid his restitution obligation in full. As such, trial counsel’s failure to bring that issue to the court’s attention was neither deficient nor prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on an ineffective assistance claim, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense).

Second, Dolecki contends that his trial attorney was ineffective by failing to move for recusal based on the circuit court judge’s knowledge of allegations made against Dolecki in his girlfriend’s case. Again, though, nothing in the record indicates that recusal was warranted under WIS. STAT. § 757.19(2), and there is no evidence that the judge relied on any information that he may have learned in the other case when sentencing Dolecki. Under these circumstances, Dolecki cannot establish either deficient performance or prejudice stemming from his trial attorney’s failure to seek recusal. *See Strickland*, 466 U.S. at 687.

Third, Dolecki asserts that his trial attorney was ineffective by failing to correct the circuit court’s mistaken belief that Dolecki “had been given 13 past opportunities at rehabilitation.” The sentencing transcript reflects, however, that the court’s statements about Dolecki’s criminal record and past rehabilitative opportunities were accurate. During its sentencing remarks, the court observed that Dolecki had been convicted of crimes in thirteen prior cases.<sup>5</sup> The court stated that Dolecki “should have learned something” from those prior cases, but “[he] didn’t.” The court then observed that Dolecki had previously failed on extended

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<sup>5</sup> The PSI actually reflects that Dolecki had been convicted of crimes in fourteen prior cases.

supervision four times. In light of Dolecki's record, the court rejected the PSI's recommendation of probation, stating, "[W]hat are they going to do the 14th time they didn't do the other 13 times? What are they going to do ... this time that they didn't do four times on extended supervision?"

Dolecki does not dispute the accuracy of the circuit court's comments regarding the number of prior cases in which he was convicted of crimes and the number of times he failed on extended supervision. In light of Dolecki's prior record, the court appropriately reasoned that Dolecki had been given many opportunities to "learn[] something" and change his behavior, but he had not done so. Under these circumstances, the court reasonably concluded that the PSI's recommendation of probation was inappropriate. The court's decision was not based on an inaccurate belief regarding Dolecki's past rehabilitative opportunities. As such, there would be no arguable merit to a claim that Dolecki's trial attorney performed deficiently by failing to correct the court's remarks.

Fourth, Dolecki contends that his trial attorney was ineffective by failing to argue at sentencing that Dolecki would suffer significant financial loss if the circuit court imposed a prison sentence. More specifically, Dolecki contends that because he was sentenced to prison, rather than to jail with Huber privileges, he has been unable to work and has therefore lost his job, his home, his furniture, his clothing, and his personal property. This claim lacks arguable merit. The court would necessarily have been aware when it sentenced Dolecki to prison that he would be unable to work during his period of initial confinement, which would lead to adverse financial consequences. Nothing in the record suggests that it is reasonably probable the court would not have sentenced Dolecki to prison had his trial attorney specifically brought these financial consequences to the court's attention. Accordingly, Dolecki cannot show that he was

prejudiced by counsel's failure to do so. See *Strickland*, 466 U.S. at 694 (explaining that, to demonstrate prejudice, a defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Fifth, Dolecki argues that his trial attorney was ineffective by failing to present mitigating factors at sentencing. Specifically, Dolecki contends that he made "meaningful efforts to mitigate the circumstances" with the victim, "including extensive efforts to resolve the case on more than one occasion." Dolecki asserts that he realized "within days of receiving the first payment of \$3500" from the victim "that he was in a significant and unexpected financial bind." He contends that he contacted the victim shortly thereafter, and during a meeting with the victim several weeks later, he apologized and asked the victim to allow him to "'work through' this dilemma." Dolecki asserts that he asked the victim to purchase the materials himself, to store them on site, and to allow Dolecki to complete the job. He contends, however, that the victim rejected that offer and instead gave him eight months to pay back the \$3,500. Dolecki asserts that he was subsequently hospitalized due to a workplace injury, which prevented him from earning the money necessary to repay the victim.

Dolecki argues that his trial attorney was ineffective at sentencing by failing to draw the circuit court's attention to his workplace injury and his attempts to work with the victim to reach a solution. In particular, Dolecki faults his trial attorney for failing to present text messages between himself and the victim, which he contends would have shown that he did not merely take the victim's money and "run," as the court believed. Dolecki further asserts that his counsel should have emphasized that Dolecki used the victim's funds "for family," not for drugs or criminal activity.

These claims lack arguable merit. Contrary to Dolecki's assertion, the record shows that his trial attorney *did* highlight his workplace injury during the sentencing hearing. Counsel expressly told the circuit court that after the victim hired Dolecki, "there was an injury, Mr. Dolecki became unable to work, and then the conflict that we have here is that the remaining work, Mr. Dolecki did not complete, and that the money that he had owed back to [the victim] had not been paid timely." Counsel later elaborated:

Mr. Dolecki had been running his own contracting business for quite some time, and as he acknowledges in the PSI, things got out of hand and it became overwhelming and he became, frankly, unable to manage all the expenses that came with it. Then, when he had the medical injury that effectively took him out of commission and out of work that's discussed later in the PSI, I think he very quickly went in over his head. He could not repay the amounts that he had been given, that those funds had been repurposed, and then it became very, very, very difficult for him to pay that back.

Thus, the record shows that Dolecki's trial attorney *did* raise Dolecki's workplace injury as a mitigating factor at sentencing. As such, there would be no arguable merit to a claim that counsel performed deficiently by failing to do so.

As for Dolecki's claim that his trial attorney was ineffective by failing to emphasize Dolecki's efforts to work with the victim and by failing to present text messages corroborating those efforts, we conclude Dolecki cannot establish that he was prejudiced by those failures. When Dolecki entered his guilty plea to the theft by contractor charge, he stipulated that the facts alleged in the criminal complaint were true and that the circuit court could use those facts as the factual basis for his plea. The complaint alleges that after Dolecki informed the victim in September 2017 that he had misappropriated the victim's \$3,500 payment, Dolecki was in communication with the victim about resolving the situation until approximately May 2018. The

PSI similarly notes that Dolecki “stayed in contact” with the victim “about trying to refund his money” over a period of several months. Thus, the court would have been aware at the time of sentencing that Dolecki had attempted to work with the victim for some time after misappropriating the victim’s \$3,500 payment. Under these circumstances, it is not reasonably probable that Dolecki’s sentence would have been different had his trial attorney specifically emphasized Dolecki’s efforts to work with the victim or presented text messages corroborating those efforts.<sup>6</sup>

Finally, Dolecki cannot show that his trial attorney was ineffective by failing to argue that Dolecki used the misappropriated funds “for family,” rather than for drugs or criminal activity. The circuit court would have been aware, based on the allegations in the criminal complaint, that Dolecki had used the funds for “unforeseen personal expenses.” In addition, Dolecki told the PSI author that the \$3,500 he received from the victim “went out to other subcontractors he had working for him[,] so he was unable to purchase materials for [the victim’s] job.” Consistent with that statement, Dolecki’s trial attorney argued at sentencing that Dolecki had misappropriated the victim’s funds because he was overwhelmed by his business obligations, was unable to manage his expenses, and “very quickly went in over his head.” Counsel did not perform deficiently by arguing, consistent with Dolecki’s statement to the PSI

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<sup>6</sup> Dolecki emphasizes that the circuit court “said [Dolecki] took the money and ran.” Dolecki suggests that his efforts to work with the victim over a period of months show that the court’s comment in that regard was inaccurate. The criminal complaint alleged, however, that after initially making efforts to resolve the situation, Dolecki stopped responding to the victim’s attempts to contact him in May 2018. Dolecki does not assert that this allegation is incorrect. Moreover, Dolecki does not dispute the assertion in the victim impact statement that the victim “[m]ade several special trips to [Marinette County] to receive payments promised by Dolecki[,] but every occasion was a no show on [Dolecki’s] part.” These facts support the court’s statement that the victim “kept coming here and trying to talk to you, you just ignored him, you avoided him. You got the money and you ran.”

author, that Dolecki had used the victim's funds to pay other business expenses, rather than arguing that Dolecki had used the victim's funds "for family."

To the extent Dolecki claims that his trial attorney should have specifically argued that Dolecki did not use the victim's funds for drugs or criminal activity, there was nothing in the record to suggest that Dolecki used the funds for those purposes. As such, it is not reasonably probable that Dolecki's sentence would have been different absent counsel's failure to raise that argument. Accordingly, Dolecki cannot show that he was prejudiced by counsel's failure to do so.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Brittany Running is relieved of further representing David Dolecki 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*