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DISTRICT I

August 2, 2022

To:

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Circuit Court Judge
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Annice Kelly
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Mark Aaron Duncan
5533 W. National Ave. - Apt. 3
Milwaukee, WI 53214

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

2020AP1791-CRNM State of Wisconsin v. Mark Aaron Duncan (L.C. # 2018CT2118)

Before Donald, J.¹

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).

Mark Aaron Duncan appeals from a judgment, entered on his guilty plea, convicting him of one count of operating a motor vehicle while under the influence of an intoxicant as a second offense. Appellate counsel, Annice Kelly, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Duncan was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

mandated by *Anders*, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On August 19, 2018, slightly before 2 a.m., Milwaukee Police Officer Brandon Maksouske observed a vehicle traveling at a high rate of speed. He performed a traffic stop and observed the driver, Duncan, to have slurred speech and an odor of intoxicants being masked with chewing gum. Duncan admitted he had been drinking and had just left a club. Duncan refused to perform field sobriety tests, but was conveyed to the hospital for a blood draw, which revealed a blood-alcohol concentration of .188. Duncan was charged with one count of operating a motor vehicle while intoxicated (OWI) as a second offense and one count of operating a motor vehicle with a prohibited alcohol concentration (PAC) as a second offense.

Duncan initially declined to be interviewed by the State Public Defender for an eligibility determination. On November 7, 2018, at his first appearance in front of a judge, Duncan expressed a desire to represent himself. Although the circuit court told Duncan it "would feel better" about allowing him to represent himself if he had "been appointed a lawyer ... and had an opportunity to actually talk about the case with that lawyer," Duncan was insistent. Ultimately, the circuit court engaged Duncan in a waiver colloquy and allowed him to represent himself.

By December 20, 2018, Duncan had obtained representation. On March 20, 2019, that attorney moved to withdraw. A new attorney was appointed by May 9, 2019; that attorney moved to withdraw on June 27, 2019. A third attorney was on the case by July 12, 2019, and moved to withdraw on August 29, 2019. Duncan requested a fourth attorney, but the circuit court refused to refer the case again. Duncan replied, "Well, then I'll represent myself." The circuit court engaged Duncan in a waiver colloquy and authorized him to proceed *pro se*, but

appointed the now-withdrawn attorney as standby counsel. Both Duncan and counsel objected, but the circuit court overruled the objections. Duncan asked if he could get a new judge, but the circuit court replied that the time for substitution had expired.

The matter was set for trial, but Duncan decided to resolve the case with a plea. In exchange, the State was willing to “cap its recommendation at 80 days in jail and the minimum fine.” The circuit court engaged Duncan in a plea colloquy and accepted his guilty plea to OWI-2nd. The circuit court later imposed fifty days in the House of Correction with work release and a \$350 fine. Duncan appeals.

The no-merit report addresses the potential issues of whether: (1) the circuit court erred in denying Duncan’s request for a fourth attorney; (2) Duncan made a “voluntary and knowing decision to proceed *pro se*”; (3) the circuit court violated Duncan’s rights by appointing standby counsel; (4) Duncan’s plea was knowing and voluntary; and (5) the circuit court erroneously exercised its sentencing discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

Appellate counsel did not specifically address whether the circuit court properly refused Duncan’s request for judicial substitution. However, our review of the record satisfies us that the circuit court properly concluded that substitution request was untimely and could not be honored. *See* WIS. STAT. § 971.20(5).

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Annice Kelly is relieved of further representation of Duncan 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