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**DISTRICT IV**

August 25, 2022

To:

Hon. Bernard N. Bult  
Circuit Court Judge  
Electronic Notice

Brian J. Juech  
Electronic Notice

Shari Rudolph  
Clerk of Circuit Court  
Marquette County Courthouse  
Electronic Notice

Patricia Sommer  
Electronic Notice

Winn S. Collins  
Electronic Notice

Brandon J. Smits 644322  
Green Bay Correctional Inst.  
P.O. Box 19033  
Green Bay, WI 54307-9033

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

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2021AP1092-CRNM      State of Wisconsin v. Brandon J. Smits (L.C. # 2018CF43)

Before Blanchard, P.J., Fitzpatrick, and Nashold, 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 Patricia Sommer, appointed counsel for Brandon Smits, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Smits was sent a copy of the report and has not filed a response. In an order dated July 15, 2022, this court identified one potential issue relating to Smits' no-contest plea and, as discussed further below, counsel filed a response to our order

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

stating that Smits does not want to pursue this potential issue. Upon consideration of the report, counsel's response to this court's order, and an independent review of the record, we conclude that there is no arguable basis to pursue any further postconviction or appellate proceedings. Accordingly, we affirm.

The State initially charged Smits with first-degree sexual assault of a child under age twelve, contrary to WIS. STAT. § 948.02(1)(b) (2015-16). The charge carried a mandatory minimum term of twenty-five years of initial confinement in prison. *See* WIS. STAT. § 939.616(1r) (2015-16). Smits pled no contest to a different type of child sexual assault charge that had no mandatory minimum. *See* §§ 948.02(1)(e) and 939.616 (2015-16). The circuit court accepted Smits' no-contest plea and sentenced Smits to a twenty-five-year term of imprisonment consisting of twenty years of initial confinement and five years of extended supervision.

The no-merit report addresses whether Smits could seek plea withdrawal on grounds that his no-contest plea was not entered knowingly, intelligently, and voluntarily. We agree with counsel that there is no arguable basis to pursue plea withdrawal. With the potential exception that we discuss below, the circuit court's plea colloquy, including the court's references to the plea questionnaire and waiver of rights form, complied with the requirements of WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, relating to the nature of the charge, the constitutional rights Smits was waiving, and other matters.

The potential exception relates to the circuit court's duty to inform a defendant of the punishment the defendant faces by entering a guilty or no-contest plea. During Smits' plea hearing, the circuit court orally informed Smits of the correct maximum prison term of sixty years. *See* WIS. STAT. §§ 948.02(1)(e) and 939.50(3)(b) (2015-16). However, the plea

questionnaire and waiver of rights form that the court referenced incorrectly stated there was also a \$100,000 maximum fine. *See* § 939.50(3)(b) (2015-16).

In this court's July 15, 2022 order, the court stated that it might not be frivolous to argue that there was a plea colloquy defect on the basis of the incorrect fine information. The court's order also noted, however, that it was not apparent whether Smits could allege that he did not know or understand the correct information, and that such an allegation is required to pursue plea withdrawal. *See State v. Hampton*, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. Our order also explained that, even when there is a plea colloquy defect and the defendant can allege a lack of understanding, there may be good reasons why the defendant may not want to pursue plea withdrawal.

In counsel's response to this court's order, counsel states that she consulted with Smits and that Smits does not want to pursue the potential issue identified in the order. We see no other potential issues relating to Smits' no-contest plea. Accordingly, we proceed to discuss sentencing.

The no-merit report addresses whether Smits could challenge the circuit court's exercise of its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The court considered the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence that Smits received was well within the maximum, and Smits could not make a non-frivolous argument that his sentence was unduly harsh or so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other basis on which Smits could challenge his sentence.

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

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patricia Sommer is relieved of any further representation of Brandon Smits 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*