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DISTRICT II

March 22, 2023

To:

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Circuit Court Judge
Electronic Notice

Sarah Adjemian
Clerk of Circuit Court
Washington County Courthouse
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Branden Donta Harris #443476
Prairie Du Chien Correctional Inst.
P.O. Box 9900
Prairie du Chien, WI 53821

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

2020AP1708-CRNM State of Wisconsin v. Branden Donta Harris (L.C. #2019CF420)

Before Gundrum, P.J., Neubauer and Lazar, 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).

Branden Donta Harris appeals a judgment of conviction for fleeing or eluding an officer. Harris's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Harris was advised of his right to file a response to the no-merit report, but he has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by *Anders* and

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Harris and two other men took various items from a Walmart store without paying for them and then drove away in a vehicle with a Florida license plate. A Walmart employee contacted law enforcement, and a police officer encountered the vehicle in question while he was driving to the store. The officer activated his squad car's emergency lights and siren in an attempt to stop the vehicle. Harris, who was driving the vehicle, did not stop and instead led the officer on a 1.4-mile pursuit. During the pursuit, Harris maneuvered between lanes, disregarded traffic control signals, and exceeded the posted speed limit.

The State charged Harris with misdemeanor retail theft (as a party to the crime), fleeing or eluding an officer, and misdemeanor bail jumping. In exchange for Harris's plea to the fleeing or eluding charge, the State agreed that the remaining counts would be dismissed and read in. The plea agreement further provided that the State would recommend one year of initial confinement followed by one year of extended supervision, consecutive to any other sentence. The defense was free to argue at sentencing.

Following a plea colloquy, supplemented by a signed plea questionnaire and waiver of rights form, the circuit court accepted Harris's guilty plea to the fleeing or eluding charge, finding that the plea was freely, voluntarily, and intelligently entered. Harris agreed that the facts alleged in the criminal complaint were "basically true and correct," and the court found that the complaint established an adequate factual basis for Harris's plea. The court sentenced Harris to one year of initial confinement followed by one year of extended supervision, consecutive to

any other sentence. Harris later filed a pro se motion for sentence modification, which the court denied.

The no-merit report addresses the following potential issues: whether Harris’s guilty plea was knowingly, intelligently, and voluntarily entered; whether there was an adequate factual basis for Harris’s plea; whether the circuit court erroneously exercised its sentencing discretion; and whether Harris’s trial attorney was constitutionally ineffective. This court is satisfied that the no-merit report properly analyzes the issues it raises as without arguable merit, and we will not discuss them further.

The no-merit report does not address the circuit court’s denial of Harris’s pro se motion for sentence modification. Harris asked the circuit court to modify his sentence “to a concurrent sentence with 81 days credit.” Harris cited his “good behavior” as a reason to modify his sentence. Harris also noted that he was enrolled in the Earned Release Program. He asserted, however, that there had been “no programing or program facil[it]ators” because of the COVID-19 pandemic. The circuit court denied Harris’s motion for sentence modification, concluding that Harris had not established the existence of a new factor under *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

There would be no arguable merit to a claim that the circuit court erred by denying Harris’s motion for sentence modification. A new factor is a fact or set of facts that is “highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (citation omitted). As a matter of law, a defendant’s post-sentencing conduct “does not constitute a new factor for the

purposes of modification of the length of a prison sentence.” *State v. Ambrose*, 181 Wis. 2d 234, 240, 510 N.W.2d 758 (Ct. App. 1993). Consequently, Harris’s good behavior while in prison does not qualify as a new factor.

The lack of programing or program facilitators for the Earned Release Program also fails to qualify as a new factor under the circumstances of this case because the record shows that Harris’s participation in the Earned Release Program was not “highly relevant” to the circuit court’s imposition of his sentence. *See Harbor*, 333 Wis. 2d 53, ¶40 (citation omitted). Although the court stated at sentencing that Harris was statutorily eligible for the Challenge Incarceration Program and the Substance Abuse Program (sometimes called the Earned Release Program), the court noted that it was “entirely up to the Department of Corrections whether you get in ... one of those Early Release Programs.” The court further stated that it was “not going to interfere” with the Department of Corrections’ decision as to whether Harris participated in those programs. The court’s comments show that Harris’s ability to participate in the Earned Release Program was not highly relevant to the court’s sentencing decision.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report and discharges appellate counsel of the obligation to represent Harris further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved of further representation of Branden Donta Harris 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