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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  
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**DISTRICT IV**

March 23, 2023

To:

Hon. Karl Hanson  
Circuit Court Judge  
Electronic Notice

Leonard D. Kachinsky  
Electronic Notice

Jacki Gackstatter  
Clerk of Circuit Court  
Rock County Courthouse  
Electronic Notice

Gerald A. Urbik  
Electronic Notice

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

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2022AP1081-CR

State of Wisconsin v. Earl Dewayne Phiffer (L.C. # 2020CF198)

Before Blanchard, P.J.<sup>1</sup>

**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).**

Earl Dewayne Phiffer appeals a judgment of conviction for disorderly conduct and an order denying his postconviction motion. On this court's own motion this appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1), under the authority provided in WIS. STAT. RULE 809.83(2).<sup>2</sup>

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

<sup>2</sup> WISCONSIN STAT. RULE 809.21 provides in subsection (1): "The court upon its own motion or upon the motion of a party may dispose of an appeal summarily."

(continued)

On July 7, 2021, a jury found Phiffer guilty of disorderly conduct and the court entered a conviction. He was sentenced on July 26, 2021.

Phiffer filed a motion for postconviction relief, which the circuit court denied on June 10, 2022. Phiffer timely filed a notice of appeal on June 28, 2022. On September 19, 2022, Phiffer timely filed an appellant's brief in this court, challenging both his conviction and the order denying his postconviction motion.

On October 26, 2022, this court sent a notice of delinquent brief to the parties, noting that the State's brief as respondent had not been filed as required under WIS. STAT. RULES 809.19 and 809.83(2). This court ordered that, "unless within five days of the date of this order, the Brief of Respondent(s) is served and filed or an extension is requested under Rule 809.14, with good cause shown why the brief has not been timely filed, the judgment or order appealed from will be disposed of summarily and may be summarily reversed under Rule 809.83(2)."

On November 10, 2022, after the State continued in its failure to file a brief even after the delinquency order, this court issued an order requiring the clerk to submit the appeal to this court to determine whether the appeal may be decided based solely on Phiffer's brief and the record. The November 10 order noted the following:

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WISCONSIN STAT. RULE 809.83(2) provides in pertinent part:

NONCOMPLIANCE WITH RULES. Failure of a person to comply with a court order or with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for ... summary reversal ....

The “[f]ailure to file a respondent’s brief tacitly concedes that the trial court erred,” *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993) (quoted source omitted), and allows this court to assume that the respondent concedes the issues raised by the appellant, *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). Summary reversal is therefore a potential sanction for a respondent’s failure to file a brief. *Blackdeer*, 176 Wis. 2d at 259-60. However, other judicial interests may not be served by summarily reversing on procedural grounds an order that the record plainly shows to be correct.

On November 22, 2022, having continued to receive no filings of any kind from the State, this court issued an order reciting the history related above and advising the State if it did not file a brief “within fifteen days of the date of this order,” this court “will summarily reverse the judgment and order appealed from.” We cited authority that includes *Raz v. Brown*, 2003 WI 29, 260 Wis. 2d 614, 660 N.W.2d 647.

Despite this court’s repeated notices and warnings, as of the date of this order the State has not filed a respondent’s brief, nor has it requested an extension of time to do so. Based on this history I conclude, consistent with all of the orders summarized above and the failures of the State to respond to any of them, that the State has abandoned this appeal. *See Raz*, 260 Wis. 2d 614, ¶18 (“[T]he court of appeals may not grant summary reversal of a circuit court order on appeal as a sanction without a finding of bad faith, egregious conduct, or a litigant’s abandonment of the appeal.” (emphasis added)); *id.*, ¶36 (when “the court of appeals elects to impose the drastic sanction of summary reversal for failure to file a response brief, it may do so only after unequivocally ordering the filing of a brief and clearly stating the consequences for failure to comply”).

This court may not abandon its neutrality and serve as the State’s advocate by independently attempting to develop arguments for the State in response to Phiffer’s arguments

on appeal. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (“We cannot serve as both advocate and judge.”); *Gardner v. Gardner*, 190 Wis. 2d 216, 239 n.3, 527 N.W.2d 701 (Ct. App. 1994) (we will not independently develop litigant’s arguments).

Therefore,

IT IS ORDERED that the judgment of conviction and the order denying the postconviction motion are summarily reversed pursuant to WIS. STAT. RULE 809.83(2) and the cause is remanded to the circuit court with directions to vacate the judgment and the order.

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*