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**DISTRICT I**

April 18, 2023

*To*:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Lauren Jane Breckenfelder
Electronic Notice

Winn S. Collins
Electronic Notice

Toh Toh Lay 674178
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

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2021AP2179-CRNM State of Wisconsin v. Toh Toh Lay (L.C. # 2018CF643)

Before Brash, C.J., Donald, P.J., and White, J.

**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).**

Toh Toh Lay appeals a judgment of conviction entered after he pled guilty to one count of second-degree sexual assault with the use of force. His appellate counsel, Lauren Jane Breckenfelder, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Lay was advised of his right to file a response and has not responded. Upon consideration of the no-merit report and an independent review of the

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

record as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. We therefore summarily affirm. *See* WIS. STAT. RULE 809.21.

On February 9, 2018, the State charged Lay with four crimes: false imprisonment, second-degree sexual assault, third-degree sexual assault, and misdemeanor battery, all with domestic abuse assessments. According to the complaint, the charges stemmed from a multitude of violent crimes Lay committed against his wife.

Pursuant to a plea agreement, Lay pled guilty to one count of second-degree sexual assault. The remaining charges, along with a charge in a second case, were dismissed and read in. With the assistance of a Karen-language interpreter, the circuit court conducted a colloquy with Lay and accepted his guilty plea. The circuit court sentenced Lay to nine years of initial confinement and six years of extended supervision.

Following sentencing, Lay's postconviction counsel moved for a competency evaluation, expressing concern over Lay's ability to assist her in postconviction matters. The postconviction court ordered a competency evaluation. Dr. Deborah Collins performed the evaluation and found Lay to be competent to assist in any postconviction proceedings. At a hearing addressing the motion, Lay, with the assistance of an interpreter, stipulated to his competency. This no-merit report follows.

Appellate counsel's no-merit report first addresses whether Lay's guilty plea was knowing, intelligent, and voluntary. We agree with counsel's analysis and conclusion that any challenge to the plea colloquy would lack arguable merit. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). While the circuit court's colloquy was relatively brief, the court, with the assistance of an interpreter, established that Lay understood the nature of the

charge, the maximum penalty he faced pursuant to his plea, the rights he was waiving, and that the court was not bound by any recommendations.

The circuit court did not expressly inquire of Lay whether any promises, agreements, or threats were made in connection with the plea. *See* ***id.*** at 262. However, not "every small deviation from the circuit court's duties" will warrant relief. *See* ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64. A defendant who seeks plea withdrawal based on a circuit court's failure to fulfill a mandatory obligation must not only make a *prima facie* showing that the plea was accepted without conformance with WIS. STAT. § 971.08 or other mandatory procedures, but he or she must also allege that, in fact, he or she did not know or understand the information that should have been provided at the plea colloquy. Here, appellate counsel notes that Lay reviewed the plea colloquy/waiver of rights form with his defense counsel, which specifically states, "I have not been threatened or forced to enter this plea; no promises have been made to me other than those contained in the plea agreement."[2] Based upon our independent review of the record, we agree with appellate counsel's analysis and conclude that there is no arguable merit to a claim that Lay's plea was anything other than knowing, intelligent, and voluntary.

[2] We note that Lay did not sign the plea questionnaire/waiver of rights form; however, counsel's markings on the form, as well as her signature, indicate that she reviewed its contents with Lay. Indeed, counsel told the circuit court that she had reviewed the plea questionnaire/waiver of right form with Lay with the assistance of Karen interpreters. The lack of Lay's signature does not affect our analysis because a plea questionnaire is not an essential component of the plea procedure; rather, the questionnaire is a tool that the circuit court may use in conducting a plea colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794. In this case, our review of the record confirms appellate counsel's assessment that the plea colloquy satisfied the circuit court's obligations when accepting a guilty plea.

With regard to the circuit court's sentencing decision, our review of the record confirms that the circuit court, with the assistance of an interpreter, appropriately considered the relevant sentencing objectives and factors, focusing particularly on the "chamber of horrors" Lay imposed on the victim. *See* ***State v Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court acknowledged Lay's traumatic background and gave him credit for cooperating with law enforcement, but ultimately stated that his conduct caused the victim "to hurt all the time." The resulting sentence was within the maximum authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and was not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Although appellate counsel's no-merit report does not address the issue of Lay's competency postconviction, we conclude that there would be no meritorious argument as to this issue. Our review of the record indicates that Lay himself stipulated to the results of Dr. Collins's evaluation. With the assistance of an interpreter, the circuit court conducted a colloquy with Lay to confirm his stipulation. In short, the record does not support a contention that Lay was not competent to assist his counsel postconviction.

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 Lauren Jane Breckenfelder is relieved of further representation of Toh Toh Lay in this matter.[3] *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*

[3] Although appointed counsel is discharged from further representation, it remains counsel's obligation to notify Lay of this decision and to inform Lay of his right to petition the Wisconsin Supreme Court for review. *See* WIS. STAT. RULE 809.32(3). The record reflects that Lay does not speak English, and it is unclear whether he can read or write in either English or Karen.