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DISTRICT III

April 11, 2023

To:

Hon. Kendall M. Kelley
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Jefren E. Olsen
Electronic Notice

Alexander Josef Napieralla 705957
Gordon Corr. Center
10401 E. Cty. Rd. G
Gordon, WI 54838

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

2022AP2017-CRNM State of Wisconsin v. Alexander Josef Napieralla
(L. C. No. 2019CF1954)

Before Stark, P.J., Hruz and Gill, 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).

Alexander Josef Napieralla appeals from a judgment, entered upon his no-contest pleas, convicting him of second-degree sexual assault of a child under sixteen and capturing an intimate representation without consent. He also appeals from a postconviction order denying sentence modification. His appellate counsel, Jefren E. Olsen, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).¹ Napieralla

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

received a copy of the no-merit report and was advised of his right to respond, but he did not file a response.

We entered an order directing Attorney Olsen to file a supplemental no-merit report addressing Napieralla's sentence credit award. Attorney Olsen filed a supplemental no-merit report and appendix reflecting that he successfully pursued a claim for additional sentence credit after reviewing our order. Upon consideration of the no-merit report, the supplemental no-merit report and appendix, and following an independent review of the record as required by *Anders*, we conclude that no arguably meritorious basis exists for further postconviction or appellate proceedings. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Avery,² a fifteen-year-old girl, reported to police that on November 28, 2019, she spent the night at Napieralla's home. Avery also reported that Napieralla, who was twenty-six years old at the time, showed her pictures of nude women and discussed the sexual relationship that he had with his girlfriend. As the evening progressed, Napieralla put his hand on Avery's breast. When she pushed his hand away, Napieralla slid his hand into her pants, groped her buttocks, then moved his hand toward her vaginal area. Avery said she again nudged Napieralla's hand away and stated that she was going to go to sleep. Avery further said that while she was pretending to sleep, Napieralla pulled her shirt down, pushed her bra aside, and then stepped back. She believed that he was taking pictures. A subsequent examination of Napieralla's cell phone revealed images of Avery's breasts. The State charged Napieralla with four felonies: second-degree sexual assault of a child under

² Pursuant to the policy underlying WIS. STAT. RULE 809.86, we refer to the victim using a pseudonym.

sixteen years of age; capturing an intimate representation without consent; possessing child pornography; and exposing a child to harmful descriptions.

Napieralla decided to resolve the charges with a plea agreement. Pursuant to the agreement, Napieralla would enter pleas to the charges of second-degree sexual assault of a child under sixteen years of age and capturing an intimate representation without consent; the remaining charges would be dismissed and read in. At sentencing, both sides would be free to argue for the sentences that each party felt were appropriate for the two convictions.

Napieralla entered no-contest pleas consistent with the terms of the plea agreement, and the case thereafter proceeded to sentencing. For the sexual assault conviction, the circuit court imposed a fifteen-year term of imprisonment bifurcated as three years of initial confinement followed by twelve years of extended supervision.³ For the capturing an intimate representation conviction, the court imposed a consecutive, evenly bifurcated, two-year term of imprisonment.⁴ The court also granted Napieralla thirty-six days of sentence credit.

Napieralla filed a postconviction motion alleging that a new factor warranted sentence modification. Specifically, he alleged that the Department of Corrections had found him ineligible to receive sex offender treatment while he is confined in prison and determined that he

³ For second-degree sexual assault of a child under sixteen years of age, Napieralla faced maximum penalties of a \$100,000 fine and forty years of imprisonment. *See* WIS. STAT. §§ 948.02(2), 939.50(3)(c) (2019-20).

⁴ For capturing an intimate representation without consent, Napieralla faced maximum penalties of a \$10,000 fine and three years and six months of imprisonment. *See* WIS. STAT. §§ 942.09(2)(am)1., 939.50(3)(i) (2019-20).

would become eligible for such treatment only after he is released from confinement and begins serving his terms of extended supervision. The circuit court denied sentence modification.

In the no-merit report, appellate counsel examines whether Napieralla entered his no-contest pleas knowingly, intelligently and voluntarily; whether the circuit court properly exercised its sentencing discretion; whether the court relied on inaccurate information at sentencing; and whether the court erred by concluding that Napieralla failed to establish a new factor warranting sentencing modification. This court concludes that the no-merit report reflects a proper and thorough analysis of those issues demonstrating that they do not present arguably meritorious grounds for further postconviction or appellate proceedings. We need not discuss those issues further.

In the supplemental no-merit report, appellate counsel discusses the original award of thirty-six days of sentence credit for the period from the date that Napieralla was arrested on December 19, 2019, until he posted bail on January 24, 2020. Counsel explains that Napieralla was entitled to thirty-seven days of sentence credit for that period. *See* WIS. STAT. § 973.155(1)(a); *State v. Johnson*, 2018 WI App 2, ¶¶7-8, 379 Wis. 2d 684, 906 N.W.2d 704 (2017). Counsel then shows that the circuit court awarded Napieralla one additional day of sentence credit while this appeal was pending.⁵ *See* WIS. STAT. § 808.075(4)(g)4. This court agrees with counsel's conclusion that further proceedings to address sentence credit would lack arguable merit.

⁵ Appellate counsel moves this court to take judicial notice of the adjudicative fact that the circuit court has entered an amended judgment of conviction for additional sentence credit. *See* WIS. STAT. § 902.01(2)(b), (4). In support, appellate counsel has provided this court with conformed copies of the circuit court's order to amend the judgment of conviction in this case and the amended judgment of conviction. This court grants the motion.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Upon the foregoing,

IT IS ORDERED that the judgment and postconviction order denying sentence modification are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jefren E. Olsen is relieved of any further representation of Alexander Napieralla in this matter pursuant to 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