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**DISTRICT II**

April 26, 2023

To:

Hon. Mary Kay Wagner  
Circuit Court Judge  
Electronic Notice

Rebecca Matoska-Mentink  
Clerk of Circuit Court  
Kenosha County Courthouse  
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Winn S. Collins  
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Michael D. Graveley  
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Annice Kelly  
Electronic Notice

Sidney L. Graham, #393753  
Chippewa Valley Correctional  
P.O. Box 189  
Phoenix, MD 21131

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

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2021AP104-CRNM      State of Wisconsin v. Sidney L. Graham (L.C. #2019CF552)

Before Gundrum, P.J., Neubauer and Grogan, 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).**

Sidney L. Graham appeals from a judgment, following a jury trial, convicting him of two counts of felony bail jumping as a repeater. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Graham filed a response. After reviewing the Record, counsel's report, and Graham's response,

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

we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Graham was released on bond in two pending criminal matters—Kenosha County Circuit Court case Nos. 2017CF1362 and 2018CF459. In both cases, conditions of bond included that he not possess or consume alcohol. On May 21, 2019, while Graham was on bond in the above-referenced cases, officers were dispatched to an apartment complex based on a report that two males were knocking on windows. Police made contact with Graham and his brother. An officer advised Graham that he smelled of intoxicants and asked Graham how much alcohol he had consumed. Graham advised the officer he had one beer. The officer arrested Graham for violating conditions of his bond in each case. A jury convicted Graham of two counts of felony bail jumping, and he stipulated to the repeater enhancement. He was sentenced to an imposed but stayed sentence of three years' initial confinement and three years' extended supervision on each count in favor of two years' probation.

The no-merit report addresses whether the evidence was sufficient to support Graham's conviction and whether the circuit court properly exercised its discretion at sentencing. This court is satisfied that the no-merit report properly analyzes the issues it raises as without arguable merit, and this court will not discuss them further.

Graham filed a response to the no-merit report. Graham first asserts there is an issue of arguable merit as to whether his constitutional rights were violated at his preliminary hearing because the court's probable cause determination was based on hearsay evidence. However, WIS. STAT. § 970.038(2) permits a probable cause determination at a preliminary examination to be based entirely on hearsay evidence. *See also State v. O'Brien*, 2014 WI 54, ¶3, 354 Wis. 2d

753, 850 N.W.2d 8 (holding that § 970.038 is constitutional, there is no constitutional right to confrontation at a preliminary examination, and due to the limited scope of preliminary examinations, the admission of hearsay evidence does not violate rights to compulsory process, effective assistance of counsel, or due process). Graham also argues that as applied to him, § 970.038 is an ex post facto law; however, § 970.038 became effective on April 27, 2012, which was before Graham violated his conditions of bond. *See* 2011 Wis. Act 285. A challenge to the preliminary hearing would lack arguable merit.

Graham next contends there is an issue of arguable merit as to whether his conviction should be reversed because the arresting officer purportedly failed to advise him of his *Miranda*<sup>2</sup> rights after he was arrested.<sup>3</sup> However, before Graham was arrested, the officer observed Graham smelled of intoxicants, and Graham admitted to drinking a beer. *See State v. Bartelt*, 2018 WI 16, ¶30, 379 Wis. 2d 588, 906 N.W.2d 684 (“*Miranda* safeguards apply only to custodial interrogations” (citation omitted)). A challenge to his conviction based on a purported *Miranda* violation would lack arguable merit.

Graham then argues there is an issue of arguable merit that the circuit court erred by requiring his defense counsel to disclose its witnesses to the State prior to trial. Defense counsel argued the witnesses were rebuttal witnesses and therefore not subject to disclosure. *See* WIS. STAT. § 971.23(2m)(a). Graham intended to call his brother to testify that Graham was not drinking and an employee from the jail who would purportedly testify that Graham did not smell

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> Graham asserts the officer never testified at trial that he advised Graham of his *Miranda* rights.

of intoxicants (he did not call the latter witness at trial). The circuit court required disclosure on the basis that these were not rebuttal witnesses. We agree. See *State v. Novy*, 2013 WI 23, ¶34, 346 Wis. 2d 289, 827 N.W.2d 610 (The definition of bona fide rebuttal evidence is evidence that “(1) was not necessary to the State’s (or plaintiff’s) case-in-chief, and (2) which became necessary and appropriate when the defense made its case.”). There is no arguable merit to challenge the court’s decision to require the defense to disclose these two witnesses prior to trial.

Graham then objects to the clerk of the circuit court’s testimony. Specifically, Graham objects to the clerk’s testimony that he had pending charges in Kenosha County Circuit Court case Nos. 2017CF1362 and 2018CF459 and that he was released on bond in both cases. The clerk did not discuss the specific charges in either underlying case. However, Graham contends the fact that the jury knew he had pending charges in other cases impacted his right to a fair trial. Graham overlooks that he was charged with two counts of felony bail jumping and the State needed to prove, in part, that he was charged in another case and released from custody on bond. See WIS. STAT. § 946.49(1); see also WIS JI—CRIMINAL 1795 (July 2018). There is no arguable merit to challenge the clerk’s testimony relating to the pending charges or that he was released on bond.

Graham next argues there is arguable merit to a claim that the State violated his right to a fair trial by failing to disclose its trial exhibits. Specifically, during the clerk’s testimony, defense counsel objected to the State’s use of the certified bond forms (one for each pending case) signed by Graham where he agreed to the conditions of his release, including that he not possess or consume alcohol. Counsel argued the State was prohibited from relying on the bond forms as exhibits because they were not provided to the defense in discovery. The State argued the defense had access to the bond forms because they were part of each court file and available

on the court's electronic filing system. The court agreed, denied defense counsel's motion, admitted the forms into evidence, and redacted the forms, so the jury would not see the specific pending charges. The State's use of these two exhibits did not violate Graham's right to a fair trial.

Finally, Graham argues there is arguable merit to challenge his conviction on the basis that, at one point during the trial, an officer mentioned that Graham had a previous case involving a firearm. Specifically, when explaining how an officer became involved in the incident, the officer stated "Officer Sevey ran out Sidney Graham over the radio, so that's when I responded over there, because I knew that Sidney Graham had some case involving a firearm." Defense counsel objected, and the court instructed the jury to ignore the answer. The court also later instructed the jury to disregard any stricken testimony. *See State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780 (we presume a jury follows the court's instructions). Further pursuit of this issue would lack arguable merit.

Our independent review of the Record does not disclose any potentially meritorious issue for appeal.<sup>4</sup> Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Annice Kelly of further representation in this matter.

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<sup>4</sup> To the extent Graham's response includes assertions not specifically addressed in this opinion, we have considered those assertions and conclude they would not support any issues of arguable merit.

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 Annice Kelly is relieved of further representation of Sidney L. Graham 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*