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**DISTRICT III**

July 18, 2023

To:

Hon. James M. Peterson  
Circuit Court Judge  
Electronic Notice

Winn S. Collins  
Electronic Notice

Katie Schalley  
Clerk of Circuit Court  
Dunn County Judicial Center  
Electronic Notice

Dennis Schertz  
Electronic Notice

Derek L. Cook  
760 River Heights Road  
Menomonie, WI 54751

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

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2021AP1900-CRNM      State of Wisconsin v. Derek L. Cook (L. C. No. 2017CF154)

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).**

Derek Cook appeals from a theft conviction entered following the revocation of a deferred acceptance of plea agreement (DAGP). Attorney Dennis Schertz has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22).<sup>1</sup> This court informed Cook of his right to respond to the no-merit report, but Cook has not filed a response. Having independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), we conclude that there are no arguably meritorious issues for appeal.

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

The State charged Cook with three counts of theft and one count of bail jumping based upon allegations that, while on bond, Cook had stolen and pawned three firearms from family members. Cook agreed to plead no contest to one of the theft counts in exchange for a deferred acceptance of his plea, the dismissal of the other charges, and the State's agreement to also dismiss the theft count to which Cook entered a plea if Cook complied with the terms of a thirty-six-month DAGP. After conducting a plea colloquy and reviewing Cook's signed plea questionnaire, the circuit court found that Cook's plea was knowing, voluntary, and intelligent and that it was supported by a factual basis. The court then deferred acceptance of the plea in accordance with the DAGP.

The State moved to revoke the DAGP two days before it was scheduled to expire. Cook failed to appear at the review hearing. The circuit court revoked the DAGP based upon the filing of a new criminal complaint charging Cook with a drug offense, and it accepted Cook's previously offered plea to the theft charge and found him guilty.

The circuit court subsequently held a sentencing hearing at which Cook waived his right to personally appear and appeared virtually by Zoom. After hearing from the parties, the court briefly discussed the severity of the offenses as well as Cook's character and rehabilitative needs—noting that Cook had victimized his own family members as a result of his addiction. The court then imposed a three-year term of probation; imposed and stayed 180 days of conditional jail time that could be released by the court upon the request of Cook's probation agent; ordered Cook to apply to the Dunn County Treatment Court (and to participate in the

program if found eligible)<sup>2</sup> as a condition of his probation; and ordered Cook to pay agreed-upon amounts of restitution and court costs.

The no-merit report addresses the revocation of Cook's DAGP, the validity of Cook's plea and sentence, and his trial counsel's performance. Upon reviewing the record, we agree with counsel's conclusion that there is no arguable basis to pursue any of these issues.

Although counsel does not discuss it, we note that due process guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure." *State v. Alexander*, 2013 WI 70, ¶20, 349 Wis. 2d 327, 833 N.W.2d 126 (citation omitted). In addition, a defendant has a statutory right to be physically present during certain criminal proceedings, including at trial and at the pronouncement of judgment and the imposition of sentence. WIS. STAT. § 971.04(1)(b) and (g). The acceptance of a plea encompasses a pronouncement of judgment and is a critical proceeding. *State v. Soto*, 2012 WI 93, ¶¶17-18, 343 Wis. 2d 43, 817 N.W.2d 848. A defendant's right to be present during critical proceedings may be affirmatively waived but cannot be forfeited by mere absence. *Id.*, ¶¶42-44. It is therefore arguable that the circuit court violated Cook's right to be present when it revoked the DAGP, accepted Soto's guilty plea, and adjudged him guilty in absentia. We conclude, however, that the record establishes any such error was harmless in this case. See *State v. Anderson*, 2017 WI App 17, ¶56, 374 Wis. 2d 372,

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<sup>2</sup> Because participation in treatment court is voluntary, it is not clear whether a court can order participation as a condition of probation. However, docket entries show that Cook was accepted into the treatment court and informed the circuit court at a subsequent hearing that he wished to continue his participation. Therefore, we see no factual basis to challenge the treatment court condition of probation as being involuntary.

896 N.W.2d 364 (the harmless error doctrine applies to a defendant's right to be present during a critical stage of his or her criminal proceeding).

Cook does not dispute that he violated the terms of the DAGP or assert that his presence at the review hearing would have altered the outcome of that proceeding. The DAGP explicitly provided that: "For purposes of this agreement, a violation will be found if a court of law finds probable cause from a criminal complaint to believe that the defendant has committed a criminal offense." There is no question that a judge found probable cause to support the new criminal complaint issued against Cook. Cook's presence at the review hearing therefore could have had no effect on the revocation of the DAGP. We further note that the defendant's plea forfeited the right to raise other nonjurisdictional defects and defenses, including claimed violations of constitutional rights other than a double jeopardy issue that could be resolved based upon the record. *See State v. Kelty*, 2006 WI 101, ¶18 & n.11, 34, 294 Wis. 2d 62, 716 N.W.2d 886; *see also State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders*. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Derek Cook on Count 1 of Dunn County case No. 2017CF154, pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*