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**DISTRICT II**

July 26, 2023

To:

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Shawnrell K. Simmons  
924 E. Juneau Ave. #262  
Milwaukee, WI 53202

Winn S. Collins  
Electronic Notice

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

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2020AP1369-CRNM      State of Wisconsin v. Shawnrell K. Simmons (L.C. #2018CF1201)

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

Shawnrell K. Simmons appeals from a judgment, entered following a guilty plea, convicting him of operating while intoxicated as a fourth offense and operating while revoked. 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). Simmons was advised of his right to file a response to the no-merit report and has filed two responses. Appellate counsel then filed a supplemental

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

no-merit report. Upon consideration of the reports, Simmons' responses, and an independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude, with one exception, there are no issues of arguable merit for appeal. Given the supreme court's recently issued opinion in *State v. Williams-Holmes*, 2023 WI 49, 408 Wis. 2d 1, 991 N.W.2d 373, we cannot say it would be frivolous to pursue a postconviction motion to amend the judgment of conviction to transfer approval power on one of Simmons' conditions of extended supervision from the circuit court to the department of corrections (DOC).<sup>2</sup> Therefore, for the reasons discussed below, we will dismiss the appeal and extend the time for counsel to file a postconviction motion to amend the judgment of conviction. In the event that a second no-merit appeal is filed after a decision on a postconviction motion, the no-merit review will be limited to issues raised by the postconviction motion.<sup>3</sup> Cf. *State v. Scaccio*, 2000 WI App 265, ¶8, 240 Wis. 2d 95, 622 N.W.2d 449 (the logic behind the rule that a postrevocation appellant cannot challenge the original conviction is that the appellant already had an opportunity to raise any issues relating to the conviction in a first direct appeal).

At approximately 3:30 a.m., law enforcement was dispatched to respond to an impaired driver who was driving a vehicle with heavy body damage and a tire that was down to its rim.

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<sup>2</sup> As one of Simmons' conditions of supervision, the court ordered Simmons not to have any contact with any minor child not related by blood *without permission of the court*. Simmons' judgment of conviction, in turn, provided that he "[m]ay not have contact with minor children except related by blood, unless otherwise permitted by the court."

<sup>3</sup> We recognize that we are conducting a partial no-merit review. Although an appellant is not entitled to a partial no-merit review, this court conducts partial no-merit reviews in some cases. *State ex rel. Ford v. Holm*, 2006 WI App 176, ¶¶6, 9-12, 296 Wis. 2d 119, 722 N.W.2d 609. A partial no-merit review is appropriate in this case because the court reviewed the record, Simmons' two responses, and counsel's supplemental no-merit report before determining that it would not be frivolous to pursue a postconviction motion to amend the judgment of conviction. A partial no-merit review in this circumstance promotes judicial economy.

The 911 caller remained on the line with dispatch and, when the reported vehicle stopped, stayed on scene to wait for officers. Officers arrived and observed Simmons, who the 911 caller identified as the driver. Simmons smelled of intoxicants, had slurred speech, and bloodshot/glassy eyes. Simmons told officers his girlfriend had been driving, she had already left the scene, and she had hit a cement guard in the center of the interstate. An amended information charged Simmons with operating while intoxicated as a fourth offense, operating while revoked, and operating with a prohibited blood alcohol concentration as a fourth offense. All counts were charged as a repeater.

After the jury was sworn in, Simmons and the State reached a plea agreement. The State agreed to dismiss the repeater enhancer, and Simmons pled guilty to operating while intoxicated and operating after revocation. The prohibited alcohol concentration charge was dismissed.

In fashioning its sentence, the court first focused on Simmons' lengthy criminal record. The court observed the plea agreement was very favorable to Simmons because by removing the repeater enhancer, "you more than halved your exposure." The court stated that, based on Simmons' criminal record, he "would be a candidate for a sentence much longer than you are going to get today because of the deal that you made, so more power to you in that sense." The court elaborated that it had a full understanding of Simmons' criminal record "because the [presentence-investigation] agent did such a good job of summarizing ... your criminal behavior[.]" Simmons was not simply an intoxicated driver; he had "crimes all over the landscape, and some of them are really totally disgusting, and some of them are very, very dangerous." As relevant to this no-merit appeal, one of Simmons' previous convictions was for three counts of felony pimping/pandering. The presentence-investigation (PSI) report described how that case involved a victim who was a minor.

The sentencing court also focused on community protection, observing that drunk drivers routinely kill or maim innocent bystanders “because of the selfish indulgence of people who put their own personal pleasure in celebrating their birthday<sup>[4]</sup> over the lives and safety of other people.” The court continued, “You have shown your disregard for the safety of others in your prior DWI cases and in your pandering and pimping for which you were sentenced to prison, so I think this is a very aggravated case.”

The court sentenced Simmons to three years’ initial confinement and three years’ extended supervision on the operating while intoxicated count, and twelve months’ jail, consecutive, on the operating after revocation count. As one of Simmons’ conditions of supervision, the court ordered Simmons not to have any contact with any minor child not related by blood without permission of the court. The court expressed hope that the consequences the court imposed would lead Simmons to turn his life around. This no-merit appeal follows.

The no-merit report first addresses whether a basis exists to challenge the validity of Simmons’ pleas. We are satisfied the no-merit report properly analyzes this issue as without arguable merit, and this court will not discuss it further.

The no-merit report then addresses whether the circuit court erroneously exercised its discretion or relied on inaccurate information when sentencing Simmons. Simmons filed two responses to the no-merit report that focus on the sentencing hearing.

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<sup>4</sup> Simmons advised the presentence-investigation writer he was celebrating his birthday the night of the incident.

Simmons asserts there is an issue of arguable merit as to whether he was sentenced on inaccurate information. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis.2d 179, 717 N.W.2d 1 (A defendant who requests resentencing based on inaccurate information “must show both that the information was inaccurate and that the court actually relied on the inaccurate information.”). Simmons contends the PSI report included information on charges that were dismissed outright from his pandering/pimping case (as opposed to simply dismissed and read in). He asserts the PSI report incorrectly listed one of the victims, S.G., as a minor and he points out he did not plead to any offenses involving S.G. He contends he was never convicted in relation to an offense regarding a minor. According to Simmons, the circuit court relied on a mistaken belief that he had been convicted of an offense involving a minor because one of Simmons’ conditions for extended supervision is that he have no contact with unrelated minors.

Counsel filed a supplemental no-merit report, explaining the PSI writer included all of the facts from the criminal complaint underlying Simmons’ three convictions for pimping/pandering and did not differentiate between the conduct Simmons pled to and the counts that were dismissed. Counsel agreed that Simmons did not plead to any conduct involving S.G. and that the PSI report inaccurately stated S.G. was a minor. However, counsel attached the pleadings from the pimping/pandering case, which showed that Simmons pled to pimping/pandering of E.C., who at the time of the offense, was a minor. Counsel explained Simmons’ assertion that he had never been convicted of an offense involving a minor was incorrect. Counsel asserted there is no arguable merit to claim Simmons was sentenced on inaccurate information. *See Tiepelman*, 291 Wis. 2d 179, ¶26. We agree.

Simmons also argues there is an issue of arguable merit as to whether the prosecutor’s sentencing argument was improper. Specifically, Simmons points out that at sentencing the

prosecutor advised the court that this may have actually been Simmons' fifth operating-while-intoxicated offense because the PSI report referenced an additional first offense. Simmons contends the prosecutor's argument "inflamm[e]d" the circuit court. We disagree. The prosecutor simply highlighted information from the PSI report, and the plea agreement contemplated both sides freely arguing for an appropriate sentence. Further, as Simmons concedes, the sentencing court never commented on this issue in fashioning its sentence. See *Tiepelman*, 291 Wis. 2d 179, ¶26. There is no basis to challenge the prosecutor's sentencing argument.

Finally, with regard to the circuit court's sentencing discretion, our review of the record confirms that the court appropriately considered the relevant sentencing objectives and factors, focusing particularly on Simmons' history and criminal record as well as the danger Simmons posed to the community by repeatedly driving while intoxicated. 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. Although the court sentenced Simmons to the maximum, taking into account the plea agreement, which cut his exposure considerably, the sentence is not "so disproportionate to the offense committed as to shock public sentiment." See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, we agree with counsel there would be no arguable merit to a challenge to the court's sentencing discretion.

As stated previously, our independent review of the record disclosed one potential issue of arguable merit. The court ordered Simmons not to have any contact with any minor child not related by blood *without permission of the court*. "Wisconsin law empowers circuit courts to impose conditions of extended supervision and probation and to modify those conditions through a formal statutory process. However, actual administration of the sentence and conditions is entrusted to DOC." *Williams-Holmes*, 408 Wis. 2d 1, ¶2.

In *Williams-Holmes*, the supreme court considered a condition of supervision that prohibited the defendant from living “with any women or unrelated children without the permission of the Court.” *Id.*, ¶4. The defendant moved for postconviction relief, asking the circuit court to transfer the approval power from the circuit court to the DOC. *Id.*, ¶1. The circuit court denied the motion, suggesting it had the power to supervise the defendant. *Id.* The supreme court, however, observed the legislature entrusted the DOC—not the courts—with supervision and the administration of imposed conditions. *Id.*, ¶¶2, 14. The court reversed and remanded with directions to the circuit court “to either clarify how the condition imposed is consistent with the law or to modify its order accordingly.” *Id.*, ¶14

Here, based on *Williams-Holmes*, we cannot conclude that it would be frivolous to pursue a postconviction motion to amend the judgment of conviction to transfer approval power from the circuit court to the DOC on Simmons’ condition that he not have contact with unrelated minor children without permission. Therefore, we will accept the no-merit report in part, reject the no-merit report conclusion in part, dismiss this appeal, and extend the time to file a postconviction motion. Although we will not conduct a second and subsequent no-merit review of the plea and sentencing issues discussed in the no-merit report and this opinion, appointed counsel is not precluded from raising any other issue in the postconviction motion that counsel may conclude has arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is accepted in part and rejected in part, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to forty-five days after remittitur.

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*