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**DISTRICT II**

August 16, 2023

To:

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Circuit Court Judge  
Electronic Notice

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Clerk of Circuit Court  
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David L. Wells  
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Elkhorn, WI 53121

Winn S. Collins  
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You are hereby notified that the Court has entered the following opinion and order:

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2021AP171-CRNM      State of Wisconsin v. David L. Wells (L.C. #2019CF303)

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).**

David L. Wells appeals a judgment of conviction for one count of possession of a short-barreled shotgun and one count of disorderly conduct. Wells' appointed appellate counsel has 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). Wells was informed of his right to file a response to the no-merit report, but he has not done so. Upon consideration of the no-merit report and an independent review of

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

the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The State charged Wells with three counts: possession of a short-barreled shotgun, discharging a firearm within 100 yards of a building, and disorderly conduct. Wells entered pleas of not guilty to all three counts, and the case proceeded to a jury trial. Prior to trial, Wells' appointed attorney moved to withdraw, on the grounds that Wells wanted to represent himself. During a subsequent hearing, the circuit court conducted a colloquy with Wells regarding his decision to represent himself, supplemented by a "Waiver of Right to Attorney" form that Wells had completed and signed. Following the colloquy, the court granted Wells' request to represent himself and allowed his attorney to withdraw.

At trial, D.R. testified that she was driving back from her sister's house with her father and step-nephew on the morning of June 16, 2019. The group was in a pickup truck with a grill in the back, and while they were driving the grill "started moving around a lot." To avoid an accident, they pulled over to the side of the road to secure the grill. After they pulled over, Wells approached them from a farm and told them to get off his property. D.R. told Wells that she and her family members were fixing their grill and would leave as soon as they were finished. After arguing with D.R., Wells got into his tractor and left, but he soon returned with a shotgun and "started shooting up into the air." D.R. testified that she was "[v]ery scared," and she and her family members immediately got back into the truck and drove to a nearby church, where they called the police.

Walworth County Sheriff's Deputy Alex Torres testified that he responded to the church parking lot and subsequently drove to the farm where D.R. had encountered Wells. Torres spoke with Wells, who denied shooting at D.R. and her family but admitted shooting into the air above them.

Walworth County Sheriff's Deputy Brandon Beecroft testified that he also responded to the farm and spoke with Wells, who admitted discharging a shotgun into the air three times. Wells told Beecroft that the shotgun was located in an office on the farm, and Beecroft subsequently located the shotgun inside the office. The shotgun was introduced into evidence at trial without any objection from Wells. Beecroft testified that there were "saw striation marks" on the end of the shotgun's barrel, which indicated that "a cutting tool was applied to the barrel" postproduction. Beecroft testified that the shotgun's barrel measured fourteen inches from the breech of the shotgun to the end of the muzzle. The circuit court later instructed the jury that a "short-barreled shotgun" means "a shotgun having one or more barrels having a length of less than 18 inches measured from closed breech or bolt face to muzzle."

Following a colloquy with the circuit court, Wells elected to testify in his own defense. The jury ultimately found Wells guilty of possession of a short-barreled shotgun and disorderly conduct, but not guilty of discharging a firearm within 100 yards of a building. The court withheld sentence on the shotgun possession charge and placed Wells on probation for three years. On the disorderly conduct charge, the court sentenced Wells to thirty days in jail, with two days of sentence credit.

The no-merit report addresses three potential issues: (1) the sufficiency of the evidence to support Wells' convictions; (2) whether Wells was competent to stand trial; and (3) whether

the circuit court erroneously exercised its sentencing discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without arguable merit, and we will not discuss them further.

In the context of discussing Wells' competency, the no-merit report also asserts that "the personal colloquy between the court and Wells, combined with his signed written waiver form, establishes that Wells freely, voluntarily, and intelligently waived his right to counsel." To establish a valid waiver of the right to counsel, a circuit court must

conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

*State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). "If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel." *Id.* "When an adequate colloquy is not conducted, and the defendant makes a motion for a new trial or other postconviction relief from the circuit court's judgment, the circuit court must hold an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent, and voluntary." *Id.* at 206-07.

After reviewing the record, we noted that the circuit court's colloquy with Wells regarding self-representation did not address the seriousness of the charges or the general ranges of penalties for the charged offenses, as required by *Klessig*. Although the "Waiver of Right to Attorney" form that Wells signed contained handwritten notations stating that one of the charges against Wells was a felony and the other two charges were misdemeanors, those notations were

crossed out. In addition, the form did not provide any information about the general penalty ranges for the charged offenses.

Because the appellate record did not clearly indicate whether Wells was aware of the seriousness of the offenses and the general penalty ranges when he waived his right to counsel, and because the no-merit report did not provide any information from outside the record demonstrating that Wells had the requisite awareness, we ordered appellate counsel to review this potential issue and consult with Wells. Appellate counsel has now informed this court that he “discussed this issue with Mr. Wells on two occasions,” and Wells informed counsel that “he did not want to pursue the issue of valid waiver of the right to counsel.” Because Wells does not want to pursue a claim that his waiver of the right to counsel was invalid, we will not address this potential issue further.

The no-merit report does not address whether any of the circuit court’s pretrial rulings were erroneous; whether any errors occurred during the selection of the jury; whether the court properly instructed the jury; whether the court erred when ruling on objections at trial; whether Wells knowingly, intelligently, and voluntarily waived his right not to testify at trial; and whether any improprieties occurred during the parties’ opening statements or closing arguments. Having independently reviewed the record, however, we conclude that any challenge to Wells’ convictions on these grounds would lack arguable merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report and discharges appellate counsel of the obligation to represent Wells further in this appeal.

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 Nicholas C. Zales is relieved from further representing David L. Wells in this appeal. *See* 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*