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**DISTRICT II**

October 2, 2024

To:

Hon. Lloyd V. Carter  
Circuit Court Judge  
Electronic Notice

Monica Paz  
Clerk of Circuit Court  
Waukesha County Courthouse  
Electronic Notice

Brian Patrick Mullins  
Electronic Notice

Jennifer L. Vandermeuse  
Electronic Notice

Dawson W. Kurer  
2449 S. 64th Street  
West Allis, WI 53219

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

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2023AP677-CRNM      State of Wisconsin v. Dawson W. Kurer (L.C. #2021CF94)

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).**

Dawson W. Kurer appeals a judgment convicting him of one count of resisting an officer causing soft tissue injury and one count of THC possession with intent to deliver. Appellate counsel, Brian Patrick Mullins, 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). Kurer has received a copy of the report, was advised of his right to file a response, and has not responded. We have independently reviewed the Record and the no-merit report, as mandated by *Anders*, and we

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

conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm.

In January 2021, the State charged Kurer with one count of resisting an officer causing soft tissue injury to an officer, as a repeater; one count of THC possession, as a second or subsequent offense; one count of possession of a controlled substance, as a repeater; and one count of possession of drug paraphernalia, as a repeater. According to the complaint, law enforcement was dispatched to the scene of a car accident in Waukesha County where a car was reported to be in a ditch. Officers approached the car and encountered a visibly intoxicated Kurer. Officers also “observed a large marijuana pipe in plain view in the cup holder” on the center console. They also seized a clear plastic baggie that contained a green leafy substance, thirteen THC cartridges, five pills, and a digital scale with marijuana residue on it. Law enforcement later determined that the substance in the plastic baggie was eighteen and one-half grams of marijuana, and the thirteen cartridges contained one gram each of marijuana for a total of thirteen grams. The pills were identified as Lisdexamphetamine, a Schedule II non-narcotic drug that requires a prescription. A total of \$2,832 in cash, as well as Kurer’s cell phone, were also seized at the time of Kurer’s arrest.

Upon Kurer’s arrest, law enforcement transported Kurer to a local hospital. In the transport process, Kurer slipped his handcuffs from behind his body to the front of his body. Upon his escort into the hospital, Kurer resisted officers, grabbed one officer’s wrist, struggled with that officer, and knocked him to the ground, causing injury to the officer.

An amended complaint later amended count two (THC possession) to one count of THC possession with intent to deliver. The complaint alleged that Kurer used the Facebook

messenger account on his phone to coordinate a marijuana transaction. The amended complaint also alleged that, upon conviction, Kurer shall forfeit \$2,832 to the State. The complaint did not allege that Kurer's phone was subject to forfeiture, though the phone was seized upon Kurer's arrest.

In February 2021, per defense counsel's request, the circuit court ordered a competency assessment of Kurer. The examiner found Kurer competent. Neither the State nor defense counsel contested the examiner's conclusion. The court found Kurer competent to proceed.

Kurer ultimately entered a plea agreement with the State whereby Kurer would plead no-contest to resisting an officer causing soft tissue injury (count one) and possessing THC with intent to deliver (count two). The State would move to dismiss all of the repeater enhancements and the remaining charges. The State would also recommend an unspecified prison sentence on count one and two years of probation on count two. The State would also request the forfeiture of the \$2,832 associated with count two and seek \$1,049.33 for the injured officer's worker's compensation claim.

The circuit court conducted a colloquy with Kurer and accepted his pleas. The court sentenced Kurer to thirty months of initial confinement and three years of extended supervision on count one and eighteen months of initial confinement and two years of extended supervision on count two. The sentences were to run concurrent to each other and another case.

Following sentencing, the circuit court held a hearing regarding the State's requests for restitution and forfeiture of the phone and \$2,832. The court ordered \$1,049.33 for the injured officer's worker's compensation claim, but found that the State did not meet its burden of proving that the \$2,832 found on Kurer at the time of his arrest was the result of a drug

transaction. The court also found that Kurer's phone was used to facilitate a drug transaction and was properly subject to forfeiture. The judgment of conviction stated "Court orders CELL PHONE seized at time of arrest to be forfeited per Sec 961.555(2m), Wis. Stats. for Waukesha County Metro Drug Unit."

Kurer filed a postconviction motion to amend the judgment of conviction to remove the provision ordering that his phone was subject to forfeiture. He argued that the circuit court did not have authority to order his phone forfeited because the State did not allege in the charging documents that the phone was subject to forfeiture, as required by WIS. STAT. § 961.555(2m)(b). The State conceded that the phone was not properly seized under § 961.555(2m), but that the phone was nonetheless subject to forfeiture under WIS. STAT. § 968.20(2), which authorizes the State to seize "contraband." The court agreed and amended the judgment of conviction to reflect that the phone was seized pursuant to § 968.20 as a contraband item. This no-merit report follows.

Appellate counsel's no-merit report addresses four issues: (1) whether Kurer's no-contest pleas were entered knowingly, intelligently and voluntarily; (2) whether the circuit court erroneously exercised its sentencing discretion; (3) whether the court erroneously exercised its discretion in ordering restitution; and (4) whether the State established that Kurer's phone was contraband within the meaning of WIS. STAT. § 968.20(2).

Our review of the Record—including the plea questionnaire/waiver of rights form and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking no-contest pleas, pursuant to WIS. STAT. § 971.08, *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d

906. Any challenge to the entry of Kurer’s no-contest pleas would lack arguable merit for appeal. Moreover, Kurer’s no-contest pleas waived “all nonjurisdictional defects and defenses.” *State v. Popp*, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471 (citation omitted).

With regard to the circuit court’s sentencing decision, we note that sentencing is a matter for the court’s discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It must also determine which objective or objectives are of greatest importance. *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider additional factors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the court’s discretion. *Id.*

Our review of the Record confirms that the circuit court appropriately considered the relevant sentencing objectives and factors. The resulting sentence was within the potential maximum authorized by law, see *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public’s sentiment, see *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Appellate counsel’s no-merit report also addresses the circuit court’s restitution order. A request for restitution is addressed to the circuit court’s discretion. *State v. Anderson*, 215 Wis. 2d 673, 677, 573 N.W.2d 872 (Ct. App. 1997). While the court must consider a

defendant's ability to pay, WIS. STAT. § 973.20(13)(a), it must order restitution "unless [it] finds substantial reason not to do so and states the reason on the record," § 973.20(1r); see *State v. Borst*, 181 Wis. 2d 118, 121-22, 510 N.W.2d 739 (Ct. App. 1993).

In the framework of these legal principles, the no-merit report comprehensively analyzes the restitution order. We concur with appellate counsel's analysis and his conclusion that no issue of arguable merit could be raised.

Appellate counsel also addresses whether the State established, by the greater weight of credible evidence, that Kurer's phone was "contraband" within the meaning of WIS. STAT. § 968.13(1). As stated, neither the criminal complaint nor the amended charging documents stated that Kurer's phone was subject to forfeiture. The State argued that the phone was nonetheless subject to forfeiture as it was considered "contraband" within the meaning of § 968.13(1). The circuit court agreed.

Property seized by law enforcement and not required for evidence or use in further investigation may be returned to its owner unless the property is "contraband." WIS. STAT. § 968.20(2). "Contraband" includes any item "which is the fruit or has been used in the commission of any crime." WIS. STAT. § 968.13(1)(b). The State must establish by the greater weight of the credible evidence that property constitutes "contraband." *State v. Jones*, 226 Wis. 2d 565, 600, 594 N.W.2d 738 (1999).

We agree with appellate counsel that the Record supports the circuit court's finding that Kurer's phone constituted contraband. Kurer's phone contained the Facebook messenger application, which showed Kurer's communication with a third party regarding a drug transaction. Kurer also admitted that he sold marijuana to the buyer with whom he

communicated via Facebook messenger. Any argument that Kurer's phone was improperly seized would be frivolous.

Our independent review of the appellate Record prompts us to address one issue that counsel addresses but does not discuss in the no-merit report. Early in the proceedings, the circuit court ordered a competency evaluation of Kurer. A licensed psychiatrist evaluated Kurer and found that Kurer did not lack substantial capacity to understand court proceedings or to assist in his own defense. Neither Kurer, nor the State, opposed the examiner's findings and the court found Kurer competent to proceed.

Under WIS. STAT. § 971.14(4)(b), when “the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency ... on the basis of the report filed [by the court-appointed expert].” Therefore, the Record reveals no basis to challenge Kurer's competency to proceed.

Our independent review of the Record reveals no other potential issues of arguable merit.

Upon the foregoing therefore,

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 Brian Patrick Mullins is relieved of further representation of Dawson W. Kurer 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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*Samuel A. Christensen*  
*Clerk of Court of Appeals*