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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT IV/III**

January 15, 2013

To:

Hon. Maryann Sumi  
Circuit Court Judge  
Dane County Courthouse  
215 South Hamilton, Br 2, Rm 7105  
Madison, WI 53703

Carlo Esqueda  
Clerk of Circuit Court  
Room 1000  
215 South Hamilton  
Madison, WI 53703

Matthew Moeser  
Asst. District Attorney  
Dane County District Attorney's Office  
Rm. 3000  
215 South Hamilton  
Madison, WI 53703

Mark A. Schoenfeldt  
Attorney at Law  
135 W. Wells St., Ste. 604  
Milwaukee, WI 53203

Gregory M. Weber  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Michael E. Mulcahy  
226 Crystal Lane  
Madison, WI 53714-2507

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

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2012AP2306-CRNM      State of Wisconsin v. Michael E. Mulcahy (L.C. #2011CF76)

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

Counsel for Michael Mulcahy has filed a no-merit report concluding there is no basis to challenge Mulcahy's conviction for recklessly causing bodily harm to a child, and manufacturing THC. Mulcahy was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

Police were dispatched to a residence occupied by Mulcahy and his long-time girlfriend concerning an alleged domestic dispute. The complainant called 911 indicating she had received a phone call from her niece, stating that her father was “throwing her and her mother around the house.” Dispatch advised officers that, on a previous occasion, a safety alert had been placed on that address indicating Mulcahy may possess a 9 mm handgun.

When officers approached the residence, they could hear a female voice yelling inside the residence. When an officer knocked on the door, the yelling stopped and the residence became quiet, but no one came to the door. The officer knocked again loudly and eventually a female voice said, “Just a minute.” A female subsequently came to the door and officers could see a juvenile female standing in the living room a few feet from the door, red-eyed and visibly upset. Officers also smelled a strong odor of marijuana coming from inside the residence. When asked what was going on, the adult female replied “nothing.” She then said that she and her daughter had been in an argument. When officers asked if they could speak to the daughter, the female said she did not wish them to enter the residence.

The officers advised they needed to check on the welfare of her daughter because of the complaint alleging the daughter was the victim of violence. They reiterated the child’s aunt had called stating the child had been harmed by her father. The female responded that her boyfriend, the father of the child, was gone, having left the residence that morning. Officers were able to speak to the child with her mother standing next to her. The child initially denied violence and stated she simply had a temper tantrum.

Officers then re-contacted the aunt, who maintained the child said her father had been violent toward her and her mother. The mother agreed at one point to step outside again to talk

to officers. She also said the officers could go inside the house but then said they could not, and stated she would have the daughter come out to talk to them. Officers advised they needed to make a protective sweep of the residence to check the welfare of the daughter to make sure there had been no violence, and also because of concerns Mulcahy had a handgun in the residence.

The female and the child were advised they needed to step out of the residence while police conducted a protective sweep. At that point, the child stated she “needed to get her grandma here” before this could happen and started running into the back of the residence. Police followed her down a hallway and into a back bedroom where another female was standing with her coat on. She was identified as Mulcahy’s mother, and stated she had “come here at first to settle these issues.” Mulcahy’s mother claimed not to know of any argument.

Officers could smell a strong odor of marijuana in the bedroom and observed on the floor a clear plastic bottom of a Tupperware-type container with green matter that smelled and looked consistent with marijuana. There was a glass bong on the nightstand and multiple marijuana pipes in an open drawer. A marijuana grow operation was found in the basement in two portable ice shanties. Officers also observed a scissors that appeared to be used to remove marijuana buds from stems, together with a bowl of buds and a bowl of stems.

An Information subsequently charged Mulcahy with reckless child abuse – bodily harm; manufacture/delivery of THC, as party to a crime; maintaining a drug trafficking place, as party to a crime; child neglect, as party to a crime; and disorderly conduct. The circuit court denied a motion to suppress. Mulcahy pleaded no contest to recklessly causing bodily harm to a child and manufacturing THC. The State agreed to recommend dismissal and read in of the remaining

counts. The circuit court accepted the parties' joint sentencing recommendation. Sentence was withheld and Mulcahy was placed on three years' probation as a condition.

There is no arguable merit to any issue concerning suppression. Testimony at the suppression hearing established the aunt had called police stating the child had called her, hysterically informing her there was an altercation at the home, and her father was throwing her and her mother around the house, "hurting them." Before authorizing the entry into the home, officers called the aunt back and gathered more information. Among other things, the aunt informed police that Mulcahy was known to have a gun. This information was consistent with information law enforcement had already obtained independently. The aunt also informed police that there was a high probability that Mulcahy would be in the residence, despite contradictory statements by Mulcahy's girlfriend that he left that morning.

Further, when the officers initially knocked on the door, the noise they heard abruptly ceased. When the mother eventually came to the door, the officers observed a child visibly upset. The mother and child provided inconsistent information as to Mulcahy's whereabouts. They both stated Mulcahy was not home, but the mother said he left in the morning and the child said he left moments ago. In addition, the police smelled the strong odor of marijuana. The court also found the reason for entry into the home was to assure the safety of persons and police. The court appropriately concluded the totality of the circumstances justified an exigency search. There is no basis to challenge the court's denial of the suppression motion.

There is no manifest injustice upon which Mulcahy could withdraw his pleas. *See State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, buttressed by the plea questionnaire and waiver of rights form, informed Mulcahy of the

constitutional rights he waived by pleading no contest, the elements of the offenses, and the potential penalties. An adequate factual basis supported the convictions.<sup>1</sup> The record shows the pleas were knowingly, voluntarily and intelligently entered. See *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Entry of a valid no contest plea constitutes a waiver of nonjurisdictional defects and defenses. *Id.* at 265-66.

The record also discloses no basis for challenging the court's sentencing discretion. The court adopted the joint plea and sentencing recommendation. Mulcahy is therefore estopped from challenging the sentence on appeal. See *State v. Sherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. See WIS. STAT. RULE 809.21 (2009-10).

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<sup>1</sup> The circuit court did not specifically advise Mulcahy that it was not bound by the parties' agreement and could impose the maximum penalties. However, Mulcahy advised the court that he had completely read the plea questionnaire and waiver of rights form prior to signing it. In that form, Mulcahy confirmed that he understood the court was not bound by the parties' agreement and could impose the maximum penalties. In addition, Mulcahy failed to file a response to the no-merit report indicating he did not know or understand the information at issue, and the court adopted the parties' joint agreement in any event. Accordingly, any procedural error in this regard would be harmless.

IT IS FURTHER ORDERED that attorney Mark Schoenfeldt is relieved of further representing Mulcahy in this matter.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*