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**DISTRICT II**

October 4, 2017

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

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2016AP1258-CRNM      State of Wisconsin v. Rickey J. Collier (L.C. #2009CF1159)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

**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).**

Rickey Collier appeals from a judgment sentencing him after revocation of his probation for a 2010 felony bail jumping conviction. Collier's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967).

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Collier received a copy of the report and filed two responses. Upon consideration of the report, Collier's responses and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal.<sup>2</sup> WIS. STAT. RULE 809.21.

The no-merit report addresses: (1) whether the circuit court misused its discretion in sentencing Collier after revocation of his probation, (2) whether Collier's counsel was ineffective at the sentencing after revocation, and (3) whether the circuit court erred when it did not grant Collier sentence credit on the sentence imposed after revocation of his probation. We agree with appellate counsel that these issues do not have arguable merit for appeal.

In 2010, Collier was convicted of two counts of felony bail jumping. On count one, Collier received confinement and extended supervision. On count four, the circuit court withheld sentence and placed Collier on probation for three years. In May 2015, Collier's count one extended supervision and count four probation were revoked because he allegedly committed a new drug offense while in the community. On count one, Collier was reconfined, and he received sentence credit for his hold time. On count four, the court sentenced Collier in June 2015 to sixteen months in prison and twenty-four months of extended supervision, consecutive to his count one reconfinement period.

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<sup>2</sup> Any challenge to the underlying conviction for felony bail jumping is outside the scope of this appeal. *State ex rel. Marth v. Smith*, 224 Wis. 2d 578, 582 n.5, 592 N.W.2d 307 (Ct. App. 1999). Review of probation revocation is by way of certiorari review to the court of conviction. *Id.* at 583. For this reason, we do not address any issues relating to the plea colloquy for the felony bail jumping conviction.

Collier's count four sentence after revocation of his probation is before us in this appeal. There would be no arguable merit to a challenge to this forty-month sentence (sixteen months of initial confinement and twenty-four months of extended supervision).

The discretion of the sentencing judge must be exercised on a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In fashioning Collier's sentence on count four, the circuit court considered the seriousness of the underlying offense and that Collier allegedly committed a new drug offense while on probation. The court considered that Collier failed on probation because he was not able to refrain from criminal conduct. The court considered appropriate sentencing factors. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.<sup>3</sup> The weight to be given the various factors was within the circuit court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The circuit court found Collier eligible for the Substance Abuse Program. We agree that there would be no arguable merit to a challenge to the circuit court's exercise of sentencing discretion.

The no-merit report discusses whether Collier's counsel was ineffective at the sentencing after revocation. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *State v. Machner*, 92

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<sup>3</sup> The circuit court's duty at sentencing after probation revocation is the same as its duty at the original sentencing. *State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289. When, as here, the same judge presided over the original sentencing and the sentencing after revocation, the judge does not need to restate the reasons supporting the original sentencing. *Id.*, ¶9. We "consider the original sentencing reasons to be implicitly adopted." *Id.*

Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Collier's ineffective assistance claim has sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing. *State v. Allen*, 2010 WI 89, ¶88, 328 Wis. 2d 1, 786 N.W.2d 124 (broad scope of no-merit review suggests that we "should identify issues of arguable merit even if those issues were not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal"). The no-merit report notes that counsel advocated for Collier at sentencing. In his response, Collier does not offer any allegation that his counsel was ineffective at sentencing. The record does not demonstrate that this issue has arguable merit for appeal.

The no-merit report addresses whether the circuit court erred when it did not grant Collier sentence credit on the sentence imposed after revocation of his probation. In his response, Collier also seeks sentence credit. The record does not support a claim that the circuit court erroneously denied Collier sentence credit. When Collier's extended supervision was revoked and he was reconfined in relation to count one, he received credit against that reconfinement period for the days he was in custody relating to his new March 13, 2015 drug offense until he was reconfined on count one. Thereafter, Collier received a consecutive count four sentence. Credit in relation to consecutive sentences is allowed on only one sentence, and credit is applied to the first sentence imposed (here, the count one reconfinement period). *State v. Boettcher*, 144

Wis. 2d 86, 100, 423 N.W.2d 533 (1988). No additional sentence credit is due in this case.<sup>4</sup> Therefore, a challenge to sentence credit would lack arguable merit for appeal.

In his response, Collier argues that the circuit court interrupted his allocution. At allocution, Collier disputed the drug offense for which he had been arrested and which formed the basis for his probation revocation. The court observed that Collier was presumed innocent as to that drug offense. Collier did not indicate that he had anything else to say during allocution. The record does not support Collier's claim that he was deprived of his right of allocution.

In his response, Collier alleges that he was sentenced on the basis of inaccurate information because the circuit court mistakenly described the 2010 sentencing structure as concurrent rather than consecutive. Collier's claim is not supported in the record. The record reveals that count four's 2010 probation term was consecutive to a prior sentence, and the circuit court accurately described the 2010 sentence structure at the 2015 sentencing after revocation. This issue lacks arguable merit for appeal.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Andrew Jarmuz of further representation of Collier in this matter.

Upon the foregoing reasons,

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<sup>4</sup> In Collier's direct appeal, we addressed sentence credit at the time of Collier's 2010 sentencing and concluded that Collier was not due any additional credit. *State v. Collier*, No. 2011AP273-CRNM, unpublished slip op. and order at 6 (WI App Nov. 9, 2011).

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

IT IS FURTHER ORDERED that Attorney Andrew Jarmuz is relieved of further representation of Rickey Collier in this matter.

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

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