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**DISTRICT III**

June 2, 2020

To:

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

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2019AP431-CRNM      State of Wisconsin v. Kevin A. Westphal (L. C. No. 2018CF6)

Before Stark, P.J., Hruz and Seidl, 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).**

Attorney Leonard Kachinsky, appointed counsel for Kevin Westphal, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)<sup>1</sup>; *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

would be arguable merit to a challenge to Westphal's pleas or sentencing. Westphal was sent a copy of the report, but he has not filed a response. We issued an order identifying potential issues of arguable merit related to Westphal's pleas and sentencing, directing counsel to review those issues, consult with Westphal, and file a response. Counsel has now filed a response informing us that, after consultation regarding the risks involved with seeking plea withdrawal or resentencing, Westphal has made a knowing and voluntary decision not to pursue plea withdrawal or resentencing. Upon independently reviewing the entire record, as well as the no-merit report and counsel's response to our order, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we summarily affirm.

Westphal was charged with five counts of failure to pay child support. Pursuant to a plea agreement, Westphal pled no contest to three counts, and the other two were dismissed and read in for sentencing purposes. The State limited its sentencing recommendation to a total of three years of initial confinement and three years of extended supervision. The circuit court sentenced Westphal to three years of initial confinement and four years of extended supervision.

First, the no-merit report addresses whether there would be arguable merit in challenging Westphal's pleas. Upon our review of the no-merit report and the record, we questioned whether there would be arguable merit to a postconviction motion for plea withdrawal based on the ineffective assistance of counsel in connection with Westphal's decision to enter pleas. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (holding that if a defendant's decision to enter a plea is a result of erroneous advice from his or her counsel, and that erroneous advice rises to the level of ineffective assistance, there is a manifest injustice warranting plea withdrawal). We noted that statements made by defense counsel at sentencing appeared to indicate that counsel believed that the fact of Westphal's failure to pay, regardless of his ability

to pay, was sufficient to support the pleas. *See* WIS. STAT. § 948.22(6) (providing that inability to pay is an affirmative defense to a charge of failure to pay child support). However, counsel has now informed us that after a consultation on this issue, Westphal has made an informed decision not to pursue plea withdrawal. We agree with the assessment in the no-merit report that no other basis exists to challenge the pleas.

Next, the no-merit report addresses whether there would be arguable merit to challenging Westphal's sentences. Upon our review of the no-merit report and the record, we questioned whether there would be arguable merit to a claim of ineffective assistance of counsel at sentencing for failing to object to possible inaccurate information provided to the circuit court as to Westphal working for cash payments. However, counsel has now informed us that after a consultation on this issue, Westphal has made an informed decision not to pursue resentencing. We agree with the assessment in the no-merit report that there are no other issues of arguable merit related to sentencing.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of WIS. STAT. RULE 809.32 and *Anders*.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Leonard Kachinsky is relieved of any further representation of Kevin Westphal 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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*Sheila T. Reiff*  
*Clerk of Court of Appeals*