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**DISTRICT II**

February 12, 2025

To:

Hon. Michael J. Aprahamian  
Circuit Court Judge  
Electronic Notice

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Clerk of Circuit Court  
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Dayvon A. Lewis  
4751 North 77th Street Lower  
Milwaukee, WI 53218

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

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2024AP1678-CRNM      State of Wisconsin v. Dayvon A. Lewis (L.C. #2022CF1572)

Before Neubauer, Grogan 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).**

Dayvon A. Lewis, appeals from a judgment of conviction, entered following a jury trial, for fleeing from an officer, possession of methamphetamine, possession of THC, and resisting an officer.<sup>1</sup> On November 18, 2024, Lewis's appellate counsel filed a no-merit report pursuant to

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<sup>1</sup> Lewis was acquitted of a second count of resisting an officer.

WIS. STAT. RULE 809.32 (2021-22)<sup>2</sup> and *Anders v. California*, 386 U.S. 738 (1967). Lewis received a copy of the report, was advised of his right to file a response, and has elected not to do so. The no-merit report is rejected because the report is incomplete and, in any event, based on our limited review of the Record, an issue of arguable merit exists as to Lewis's conviction for possession of THC.

First, the no-merit report is incomplete. The report only discussed the sufficiency of the evidence. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial rulings, jury selection, evidentiary objections during trial, whether the defendant's waiver of the right to testify is voluntary and knowing, use of proper jury instructions, and propriety of opening statements and closing arguments. The no-merit report fails to give any indication that appointed counsel considered whether those parts of the process give rise to potential appellate issues. The no-merit report also did not discuss sentencing.

Based on the incomplete no-merit report filed in this case, this court lacks confidence that appointed counsel performed the requisite review and conscientiously determined there are no arguably meritorious issues for appeal. We reject the no-merit report as currently filed. However, we cannot give counsel an opportunity to file a new no-merit report because, as explained below, we conclude an issue of arguable merit exists as to Lewis's conviction for possession of THC.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

An information charged Lewis with possession of tetrahydrocannabinols (THC), contrary to WIS. STAT. § 961.41(3g)(e). That statute prohibits a person from possessing “tetrahydrocannabinols included under [WIS. STAT. §] 961.14(4)(t).” WISCONSIN STAT. § 961.14(4)(t), in turn, provides that tetrahydrocannabinols do not include the substances listed in § 961.14(4)(t)(1)-(4). As relevant for this case, § 961.14(4)(t)(3) excludes the “Tetrahydrocannabinols contained in hemp, as defined in [WIS. STAT. §] 94.55(1).” Pursuant to § 94.55(1), hemp is a substance “with a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent.”

Here, Lewis allegedly possessed THC on October 2, 2022, and his trial occurred in June 2023. During the State’s case-in-chief, it called a trace evidence examiner from the State Crime Laboratory to establish that the plant material found in Lewis’s vehicle was THC. The analyst testified, “I was able to conclude that Delta 9 THC was present in Item B.” On cross-examination, the analyst testified that “hemp ... can contain a percentage of Delta 9 THC.” She agreed that “if a certain substance has less than 0.3 percent THC, then it’s considered hemp” and “hemp is legal under Wisconsin statutes.” She then admitted that her laboratory does not perform quantification. The following exchange took place:

Q. So when you tested Item B and it identified the presence of Delta 9 THC, we don’t know whether that’s less than .3 percent THC or more than .3 THC; right?

A. That’s correct.

Q. So you -- you know only that Item B contained some amount of Delta 9 THC?

A. That’s correct.

The State did not attempt to rehabilitate this testimony on redirect examination.

At trial, at the close of the State’s case-in-chief, Lewis moved for a directed verdict on the possession of THC charge. In support, Lewis argued, in part, the State failed to prove that the plant material had a Delta-9 THC concentration of above 0.3 percent. Counsel pointed to the analyst’s testimony, who stated she could only confirm that Delta-9 THC was present but that the laboratory did not do quantification. The circuit court denied Lewis’s motion. Lewis then testified in his defense, and he was ultimately convicted of this charge.

We also observe that, in September 2024, the Criminal Jury Instruction committee revised WIS JI—CRIMINAL 6030, the possession of a controlled substance instruction, which was the instruction used in this case. The Committee included a substitute paragraph on one of the elements that should be used if the substance possessed was tetrahydrocannabinol. WIS JI—CRIMINAL 6030 at 2 (Sept. 2024). The substitute element paragraph reads: “The substance was tetrahydrocannabinol. Tetrahydrocannabinol with a Delta-9 THC concentration above 0.3 percent is a controlled substance whose possession is prohibited by law.” *Id.*

However, in a comment to this substitute paragraph, the Committee cautioned:

The Committee has concluded that the bracketed language concerning whether the substance was a tetrahydrocannabinol under [WIS. STAT. § 961.14(4)](t)(3) is an accurate statement of the law .... However, the law appears to be unsettled with regard to [WIS. STAT. §] 961.56(1), which provides the following:

(1) It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.

[WISCONSIN STAT. §] 961.56(1) was enacted prior to the enactment of 2019 Wisconsin Act 68, which amended [WIS. STAT.] § 961.14(4)(t) to state that tetrahydrocannabinols do not include the substances listed in subs. 961.14(4)(t)(1)-(4). As of 2024, the Committee could not locate any opinions involving

§ 961.56(1) in relation to § 961.14(4)(t). The few opinions found pertain to forfeitures and the return of property.

*Id.* at 7.

Based on the lack of evidence in this case regarding whether the Delta-9 THC concentration exceeded 0.3 percent and who bears the burden of proof on that issue, we conclude an issue of arguable merit exists as to Lewis's possession of THC conviction. Therefore, we reject the no-merit report, dismiss the appeal, and extend the time to file a postconviction motion or notice of appeal. We also refer this matter to the Office of the State Public Defender for the possible appointment of new counsel.<sup>3</sup> The Public Defender shall have twenty days within which to determine whether new counsel will be appointed. Once that determination is made, counsel shall have sixty days to file a notice of appeal or postconviction motion.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected, Attorney Michael J. Herbert's motion to be relieved of further representation of Dayvon A. Lewis is denied, and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender for the possible appointment of new counsel, any such appointment to be made within twenty days of the date of this order. The Public Defender shall also notify this court within twenty days as to whether it will appoint new counsel.

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<sup>3</sup> Counsel's conclusion that the appeal lacked arguable merit may conflict with the advocacy to which Lewis is entitled. Appointment of new counsel, therefore, may be appropriate. Additionally, because we have identified an issue of arguable merit, we do not discuss other potential issues. Counsel is free to address, or not address, any issues of arguable merit as he or she sees fit.

IT IS FURTHER ORDERED that the time for filing a postconviction motion or notice of appeal under WIS. STAT. RULES 809.30(2) or 809.32 is extended to sixty days after the Public Defender notifies this court as to whether it will appoint new counsel.

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*