

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

June 5, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 97-0032-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEFFERY L. WARE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. On August 13, 1991, Jeffery L. Ware pled no contest to one count of operating a motor vehicle without the owner's consent (OMVWOC). Two bail jumping charges were dismissed as part of a plea bargain. On November 21, 1991, the court withheld sentence and placed Ware on probation for five years. Ware did not appeal that judgment of conviction.

Ware absconded and was convicted of armed robbery in Illinois. Upon the completion of his Illinois sentence, he was not returned to Wisconsin despite the existence of an extradition request. Eventually, however, Ware was arrested in Wisconsin on another OMVWOC charge, and his probation was revoked. On April 5, 1996, the court sentenced Ware to fifty-four months' imprisonment on the 1991 matter.

Ware's appellate counsel, Attorney Paula K. Doyle, has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Ware received a copy of the report and was advised of his right to file a response. He has done so. Upon our independent review of the record,<sup>1</sup> we conclude that no arguable appellate issues exist. Therefore, we summarily affirm the judgment of conviction. *See* RULE 809.21, STATS.

In her no merit report, appellate counsel addresses whether there would be arguable merit to an appeal from the November 21, 1991 judgment of conviction. Counsel examines both the August 13, 1991 plea proceedings and the November 21, 1991 sentencing. Those matters, however, are not properly before this court. *See State v. Drake*, 184 Wis.2d 396, 399-400, 515 N.W.2d 923, 924-25 (Ct. App. 1994). We do not address them further.<sup>2</sup>

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<sup>1</sup> The appellate record originally transmitted to this court did not contain the April 5, 1996 judgment of conviction or any other material relating to the imposition of sentence after revocation. On our own motion, we ordered the supplementation of the record to include that judgment of conviction and related materials.

<sup>2</sup> In his response, Ware argues that his trial counsel was constitutionally ineffective when the attorney advised Ware to waive his preliminary hearing. Under *Drake*, that issue must have been raised in an appeal from the November 21, 1991 judgment. No such appeal was taken, and Ware cannot raise the matter at this late date.

Counsel also discusses whether an appeal from the sentence imposed after revocation would lack arguable merit. That matter is properly before this court. We agree with counsel that further appellate proceedings would lack arguable merit.

Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. See *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. See *id.*

The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given the various factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The transcript of the April 5, 1996 sentencing shows that the court considered the appropriate factors. The court considered Ware's character and prior record, including Ware's drug addiction and his failure to successfully complete the previously-imposed term of probation. The court noted that after Ware absconded, "there were [sic] repeated use of illegal drugs, specifically, cocaine, [he] did not have a stable residence or employment, and about two weeks after he escaped from DIS, he was arrested in Chicago for armed robbery." The court properly exercised its sentencing discretion.

We also conclude that none of the matters raised by Ware in his response constitute grounds for an arguable appeal. Ware argues that he could not

be re-sentenced because he was never extradited from Illinois. The failure of Illinois authorities to extradite Ware to Wisconsin after the completion of his Illinois sentence does not preclude sentencing after his probation was revoked.

Ware also argues that he did not waive a revocation hearing for this probation term, but only for his parole on another matter. The scope of Ware's waiver is not reviewable in this appeal from the judgment of conviction. *See State ex rel. Shock v. DHSS*, 77 Wis.2d 362, 365, 253 N.W.2d 55, 57 (1977) (review of probation revocation is by certiorari to the court of conviction). The record of the revocation proceeding is not before this court, and Ware cannot challenge those proceedings in this fashion.<sup>3</sup>

Ware challenges the effectiveness of the attorney who represented him during the revocation proceeding. As above, the validity of the revocation order is not directly before this court. Moreover, claimed ineffectiveness of counsel is not within the scope of certiorari review of a revocation order. *See State v. Ramey*, 121 Wis.2d 177, 182, 359 N.W.2d 402, 405 (Ct. App. 1984).

Ware also contends that his attorney was ineffective at sentencing. Ware describes counsel as "not prepared." Ware's subjective opinion of counsel's state of readiness is not supported by any factual assertions, and therefore, it is legally insufficient. *See State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). The transcript shows that counsel adequately represented

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<sup>3</sup> Ware attached some documents from the revocation proceeding to his response. Ware's argument rests upon a distinction between the revocation of his parole and the revocation of his probation. We observe that the Notice of Violation, Revocation Information Request, and Revocation Hearing Request that Ware has provided this court pertain both to Ware's parole and probation. Thus, those documents suggest that the revocation proceeding encompassed both Ware's parole and probation.

Ware's interests at sentencing. Ware's use of drugs the night before sentencing was thoroughly explored by counsel and the court. While Ware told the court that his ability to concentrate was "kind of interrupt[ed]," he also advised the court that the drugs were not affecting his ability to understand the proceedings. The court did not err by proceeding to sentencing, and counsel was not ineffective for not requesting a continuance.

Finally, Ware asserts that he received an incorrect amount of sentence credit. The State and Ware's attorney stipulated that Ware should receive forty-five days of credit. Other periods of confinement that Ware describes in his response appear to have been the subject of sentence credit granted in other files that were handled with this case. Ware may file an application with the circuit court for any sentence credit that he believes has been improperly denied. However, in light of the stipulation at sentencing, this court cannot further address Ware's claims.

Based on an independent review of the record, this court finds no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of *Anders* and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and appellate counsel is relieved of any further representation of the defendant on this appeal.

*By the Court.*—Judgment affirmed.

