COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-0458-CR-NM, 98-0459-CR-NM,
98-0460-CR-NM, 98-0858-NM,
98-0859-NM, 98-0860-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JERRY LEE COX,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Jerry L. Cox appeals from judgments imposing sentences after probation revocation and from orders denying his sentence

modification motion.[1] Cox's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Cox received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders***, we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we affirm the judgments and orders.

Cox was convicted in 1994 of two counts of felony bail jumping and three counts of misdemeanor bail jumping, and two counts of physical abuse of a child. Sentence was withheld and Cox was placed on probation for three years on each count, to be served concurrently. Thereafter, Cox's probation was revoked and he appeared with counsel in January 1997 for sentencing. The court sentenced Cox to a total of eight years and four months in prison.

In July 1997, Cox moved the court to modify his sentence based on alleged new factors, i.e., that the trial court was not aware that he was better able to control his behavior when on medication and that his probation agent had stated she would recommend a five-year prison term if Cox waived the probation revocation hearing. Cox claimed that if the court had been aware of his abilities while medicated and the probation agent's view that a shorter sentence would protect the public, the court might have imposed a lesser sentence. After an evidentiary hearing, the court denied the motion.

The no merit report addresses whether the circuit court misused its discretion in sentencing after revocation. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate

[1] These cases were consolidated for disposition by previous order of this court.

interference with that discretion. *See* ***State v. Haskins,*** 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). 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 protection of the public. *See* ***State v. Harris,*** 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given to these factors is within the trial court's discretion. *See* ***Cunningham v. State,*** 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

Our review of the sentencing transcript reveals that the trial court considered the appropriate factors. The court considered the amount and nature of Cox's previous criminal activity and that probation had been ineffective. The court noted Cox's character, his drug use and his attitude toward his conduct and its consequences. The court also considered the gravity of the offenses and the need to protect the public. The sentences did not exceed the statutory maximum. We agree with counsel that the trial court properly exercised its sentencing discretion.

The no merit report also correctly concludes that there would be no arguable merit to challenge Cox's status as a repeat offender. The sentence imposed in the case in which that status was at issue did not exceed the maximum sentence without the penalty enhancer. *See* ***Harris,*** 119 Wis.2d at 619, 350 N.W.2d at 637 (the repeater statute is not invoked when the sentence imposed is within the term authorized for the prescribed crime).

The no merit report also correctly concludes that there would be no merit to a challenge to the order denying Cox's sentence modification motion based on new factors. As new factors, Cox cited the effects of medication on his conduct and the probation officer's intention to recommend a five-year term. The court

stated that its sentencing decisions are independent of the recommendations of the probation officer and the prosecutor and that even if the court had been aware of the effect of medication, the court would have given Cox the same sentence based upon the offenses he committed. The court did not agree that these claims were new factors because they were not relevant to the imposition of the sentence, *see* ***State v. Kaster,*** 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989), and did not frustrate the sentencing court's intent. *See* ***State v. Michels,*** 150 Wis.2d 94, 100, 441 N.W.2d 278, 281 (Ct. App. 1989).

Finally, we note that Cox does not and may not challenge the underlying convictions in this appeal from sentencing after revocation of probation. *See* ***State v. Drake,*** 184 Wis.2d 396, 399, 515 N.W.2d 923, 924 (Ct. App. 1994). Cox also may not challenge the validity of the probation revocation decision. *Cf.* ***State ex rel. Flowers v. DHSS,*** 81 Wis.2d 376, 384, 260 N.W.2d 727, 732 (1978) (probation revocation is independent from the underlying criminal action); *see also* ***State ex rel. Johnson v. Cady,*** 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971) (judicial review of probation revocation is by way of certiorari to the court of conviction).

Our independent review of the record discloses no arguable merit to any other issue that could be raised on appeal. Accordingly, we affirm the judgments and orders and relieve Attorney Randi L. Othrow of further representation of Jerry L. Cox in these matters.

By the Court.—Judgments and orders affirmed.