



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

November 7, 2023

To:

Hon. J. Michael Bitney
Circuit Court Judge
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

Brady M. Tulgren 430724
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Andrew Hinkel
Electronic Notice

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

2021AP1617-CRNM State of Wisconsin v. Brady M. Tulgren (L. C. No. 2019CF160)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Brady Tulgren has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),¹ concluding there is no basis for challenging the sentences imposed after revocation of Tulgren's probation. Tulgren has filed a response that appears to challenge his underlying conviction and the sentence imposed. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

On June 26, 2020, Tulgren pled no contest to possession of methamphetamine, as a repeater, contrary to WIS. STAT. § 961.41(3g)(g). The circuit court withheld sentence and placed Tulgren on probation for two years. Tulgren’s probation was later revoked based on allegations that Tulgren consumed alcohol, used tetrahydrocannabinol, possessed “an electronic weapon, a taser” (hereafter “taser”), and used the taser on an individual, causing that person bodily harm. Out of a maximum possible sentence of five and one-half years, the court imposed a four and one-half-year term consisting of two and one-half years of initial confinement followed by two years of extended supervision, consecutive to any other sentence Tulgren was then serving.²

To the extent Tulgren’s response challenges his underlying conviction, an appeal from a judgment imposing a sentence after probation revocation does not bring the underlying conviction before us. *See State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Additionally, the validity of the probation revocation is not the subject of this appeal. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (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 (1971) (judicial review of probation revocation is by petition for certiorari in the circuit court). This court’s review is therefore limited to issues arising from the sentencing after Tulgren’s probation revocation.

² Although the circuit court initially imposed two and one-half years of initial confinement followed by two and one-half years of extended supervision, the extended supervision term was reduced to two years consistent with WIS. STAT. § 973.01(2)(d)6. (stating that the term of extended supervision for a Class I felony may not exceed two years).

The no-merit report addresses whether the circuit court properly exercised its discretion when imposing the sentence after revocation. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that any challenge to Tulgren's sentence after revocation would lack arguable merit. Tulgren's response does nothing to change our conclusion. In imposing a sentence authorized by law, the court considered the seriousness of the offense, the need to protect the public, and Tulgren's character, including his criminal history. See *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis.2d 535, 678 N.W.2d 197. Tulgren's sentence was within the maximum allowed by law, and it cannot reasonably be argued that Tulgren's sentence is so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Tulgren suggests that he was sentenced based on inaccurate information because he neither possessed nor used a taser on anyone. Defendants have a due process right to be sentenced on the basis of accurate information. *State v. Coffee*, 2020 WI 1, ¶2, 389 Wis. 2d 627, 937 N.W.2d 579. That Tulgren disputes the allegation, however, does not establish that it is inaccurate. Further, “[t]he [circuit] court considers a variety of factors because it has a responsibility ‘to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.’” *State v. Salas Gayton*, 2016 WI 58, ¶23, 370 Wis. 2d 264, 882 N.W.2d 459 (citation omitted). Therefore, the scope of the information a court may consider includes “not only ‘uncharged and unproven offenses’ but also facts related to offenses for which the defendant has been acquitted.” *Id.* (citation omitted). Here, the court recognized that the taser allegations were not yet proven, but it properly considered them as evidencing a pattern of negative behavior.

Tulgren also intimates that his completion of prison programs after sentencing is a new factor justifying sentence modification. A circuit court may modify a defendant’s sentence upon a showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶36-38. However, “post-sentencing conduct, including favorable progress in a prison rehabilitation system, does not constitute a new factor for the purposes of modification of the length of a prison sentence.” *State v. Scaccio*, 2000 WI App 265, ¶15, 240 Wis. 2d 95, 622 N.W.2d 449.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Andrew Hinkel is relieved of his obligation to further represent Brady Tulgren in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals