



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 IV

December 7, 2023

To:

Hon. Todd J. Hepler
Circuit Court Judge
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Julie Kayartz
Clerk of Circuit Court
Columbia County Courthouse
Electronic Notice

Daivon Hansome Miller
c/o Joseph Miller
7817 N. 60th Street, Unit D
Milwaukee, WI 53223

Thomas Brady Aquino
Electronic Notice

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

2023AP507-CRNM State of Wisconsin v. Daivon Hansome Miller
(L.C. # 2016CF489)

Before Kloppenburg, P.J., Blanchard, and Taylor, 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 Thomas Aquino, appointed counsel for Daivon Miller, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Miller was sent a copy of the report and has not filed a response. Upon consideration of the report and an independent review of the record, we

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

conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Miller pled no contest to and was convicted of one count of felon in possession of a firearm and one count of second-degree endangering safety. The circuit court withheld sentence and ordered five years of probation. Miller's probation was later revoked, and he was returned to court for sentencing after revocation. The court imposed concurrent prison terms consisting of four years of initial confinement and four years of extended supervision.

By counsel, Miller filed a postconviction motion for sentence modification or resentencing, arguing that the circuit court lacked a complete record of the revocation proceedings and sentenced Miller based on inaccurate information. The court held a resentencing hearing and imposed concurrent prison terms consisting of three years of initial confinement and four years of extended supervision.

As the no-merit report explains, an appeal from a revocation sentence 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). The validity of the probation revocation is also not before us. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent of underlying criminal action); *see also State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (review of probation revocation is by petition for certiorari in circuit court). Additionally, as the no-merit report explains, any issue arising from the initial revocation sentence is now moot because that sentence is no longer in place. Thus, the only potential issues at this point are those relating to Miller's current revocation sentences.

The circuit court's duty at a sentencing after revocation is the same as its duty at the original sentencing. *State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d

289. The no-merit report addresses whether the court erred in exercising its sentencing discretion in imposing the current revocation sentences. We agree with counsel that there is no arguable merit to this issue or any other issues relating to these sentences. The court considered the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. See *State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. Miller’s sentence was within the maximum allowed and could not be challenged as unduly harsh or so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Finally, we see no other arguable basis on which Miller might challenge his sentences.²

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas Aquino is relieved of any further representation of Daivon Miller 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

² The record shows that Miller filed a pro se petition for sentence adjustment pursuant to WIS. STAT. § 973.195(1r)(g), and that the circuit court denied the petition. Any issue with respect to the petition for sentence adjustment is moot because Miller has served the confinement portion of his sentence. See § 973.195(1r)(g) (allowing the circuit court to adjust a sentence by reducing the confinement period).