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DISTRICT IV

May 2, 2024

To:

Hon. Guy D. Dutcher
Circuit Court Judge
Electronic Notice

Katrina Rasmussen
Clerk of Circuit Court
Waushara County Courthouse
Electronic Notice

Kathleen A. Lindgren
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Cole Joseph Vigo 605731
Columbia Corr. Inst.
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Portage, WI 53901-0900

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

2023AP867-CRNM State of Wisconsin v. Cole Joseph Vigo (L.C. # 2021CF64)

Before Kloppenburg, P.J., Blanchard, and Nashold, 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).

Cole Joseph Vigo appeals a circuit court judgment imposing sentence after the revocation of his probation, as well as an order denying his motion for postconviction relief. Attorney Kathleen Lindgren has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967). The single issue addressed in the no-merit report is whether the circuit court erroneously exercised its discretion when it sentenced Vigo after probation. Vigo was sent a copy of the report and advised of his right to file a response. He has not done so. Upon reviewing the record, as well as the no-merit report, this court concludes that there are no arguably meritorious appellate issues.

Vigo was convicted of one count of arson and one count of disorderly conduct, both as a repeater and as an act of domestic abuse pursuant to WIS. STAT. §§ 968.075(1) and 939.62(1) (2021-22).[1] The circuit court withheld sentence and imposed four years of probation, with six months of jail time as a condition of probation. Vigo's probation was later revoked and he returned to court for sentencing. The court sentenced Vigo to two years of initial confinement and two years of extended supervision on the arson count, and imposed nine months of jail time on the disorderly conduct count, to run concurrently. Vigo filed a postconviction motion, requesting resentencing on grounds that the circuit court relied on inaccurate information at sentencing or, in the alternative, requesting sentence modification. The circuit court denied the motion, and this appeal follows.

An appeal from a sentence following revocation does not bring an underlying conviction before this court. ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Nor can an appellant challenge the validity of any probation revocation decision in this proceeding. *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). On appeal, our review is limited to the circuit court's imposition of sentence following revocation.

The no-merit report discusses the circuit court's exercise of discretion in sentencing Vigo after the revocation of his probation. The record shows that Vigo was afforded the opportunity to address the circuit court prior to sentencing, and that he did so. The court considered the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the nature of the

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

offenses, the court stated that there was a need to protect the public and address the severity of what happened. Specifically, the court stated that Vigo had gotten angry at his girlfriend, with whom he has a child, and "trashed the car" and set it on fire such that his girlfriend "couldn't get away from the situation." The court stated that the conduct was made worse because there were children present who saw Vigo set the fire. With respect to Vigo's character, the court discussed his lengthy criminal history and his problems with anger management. The court also noted that Vigo had a history of noncompliance with the terms of his probation. The court concluded that a prison term was necessary in light of the severity of the offenses.

The sentences imposed were demonstrably proper exercises of discretion with which we will not interfere. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶17-18. The sentences imposed were within the applicable penalty ranges, taking into account the increased penalties for habitual criminality under WIS. STAT. § 939.62(1). It cannot reasonably be argued that the sentences were so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel's conclusion that there would be no arguable merit to challenging the circuit court's exercise of discretion in sentencing Vigo after the revocation of his probation.

We next examine whether there would be any arguable merit to challenging the circuit court's denial of Vigo's postconviction motion. Vigo argued in the postconviction motion that he was sentenced based on inaccurate information. A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. The burden is on the defendant to show by clear and convincing evidence that the information was inaccurate and that the court actually relied on the inaccurate information at sentencing. ***Id.***, ¶2.

Vigo argued in his postconviction motion that comments made by the circuit court at sentencing indicate that the court relied on inaccurate information. Specifically, Vigo argued that the court's comments that Vigo "trashed the car, smashed out the windows, disabled the control mechanisms on the steering column, and then set it on fire" and did so "with younger kids around" show that the court relied on inaccurate information. Vigo argued in his postconviction motion that, in fact, it was not the entire steering column but, rather, a directional selector that was disabled. Vigo further asserts that, from the court's comments, it appears that the court believed the entire car was lit on fire and could not be driven when, in fact, it was only a section of the seat and a blanket inside the vehicle that had burned. Additionally, Vigo asserts that the court's comments about "younger kids" being around indicates that the court thought very young children were present when, in fact, it was a seventeen year-old child who observed the incident.

The circuit court rejected all of Vigo's arguments and denied the postconviction motion. The court stated:

> Whether the steering column was actually disabled to the point where the vehicle could not have been operated or whether, simply, what had happened is that the turn-indicator wand that extends off of the steering column had been torn off and was dangling is of not of consequence any more than the magnitude of the fire that was set in the backseat of the vehicle and how much damage it did, nor how old the children were who had been forced to witness what it is transpired. Now, so that somebody doesn't misinterpret what I just said, I should say "child" rather than "children" because someone may infer that I mistook the … circumstances present to mean that there were more than one young person present, when, in fact, there was a single young person present who apparently observed what … transpired.
>
> The Court declines to find there are any circumstances that even could conceivably be contemplated as a new sentencing factor. I sentenced based upon accurate information and imposed the sentence I thought was appropriate based upon that

> information, and I do not accept Mr. Vigo's contention to the contrary.

Having conducted an independent review of the record, we conclude that there would be no arguable merit to challenging the circuit court's decision on the postconviction motion. Vigo did not demonstrate by clear and convincing evidence that the circuit court relied on inaccurate information in imposing his sentence. Additionally, there is nothing in the record or the no-merit report to suggest the existence of a new factor that would warrant sentence modification.

Upon our independent review of the record, we have found no arguable basis for reversal. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Kathleen Lindgren is relieved of any further representation of Cole Joseph Vigo in this matter pursuant to 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