



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

September 9, 2013

To:

Hon. James Miller
Circuit Court Judge
Columbia County Courthouse
400 DeWitt St., P.O. Box 587
Portage, WI 53901-2157

Susan K. Raimer
Clerk of Circuit Court
Columbia County Courthouse
400 DeWitt St., P.O. Box 587
Portage, WI 53901-2157

Linda Hoffman
Assistant District Attorney
515 Oak Street
Baraboo, WI 53913

William E. Schmaal
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Erik Robert Grote
Columbia County Jail
P.O. Box 132
Portage, WI 53901

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

2012AP85-CRNM	State of Wisconsin v. Erik Robert Grote (L.C. #2007CF407)
2012AP86-CRNM	State of Wisconsin v. Erik Robert Grote (L.C. #2007CM632)

Before Higginbotham, J.¹

Erik Grote appeals two judgments of conviction sentencing him to jail following the revocation of his probation on Class A misdemeanors. Attorney William Schmaal 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); and *State ex rel. McCoy v. Wisconsin Court of Appeals*,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the trial court's exercise of its sentencing discretion. Grote was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

We first note that an appeal from a sentence following revocation does not bring an underlying conviction before this court. *State v. Bush*, 2004 WI App 193, ¶13, 276 Wis. 2d 806, 688 N.W.2d 752. 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); *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 way of certiorari to the court of conviction). The only potential issue for appeal is the trial court's imposition of sentence following revocation.

Our review of a sentence determination begins “with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Grote was afforded an opportunity to comment on the revocation materials and to address the court prior to sentencing. The trial court considered the standard sentencing factors and explained their application to these cases in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court put them into the context of a continuing pattern of being unable to follow the rules. Regarding Grote's rehabilitative needs, the court

noted that jail was unlikely to change Grote's behavior any more than prison had, but that the sentences had to be significant enough to get his attention.

The court then sentenced Grote to consecutive terms of nine months in jail. It also ordered that any outstanding restitution be converted to a civil judgment at the end of confinement; and awarded 259 days of sentence credit, 257 days to be applied to the first case and 2 days to be applied to the second, subject to revision if the parties provided the court with more information. The court granted Huber privileges and a five-day stay of the sentence in order to allow Grote to pursue a job opportunity, which the court felt could be beneficial to his rehabilitation.

The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 946.49(1)(a) (classifying violation of the conditions of release on a misdemeanor case as a Class A misdemeanor); 943.20(3)(a) (classifying the theft of less than \$2500 as a class A misdemeanor); and 939.51(3)(a) (providing maximum jail term of nine months for Class A misdemeanors). The sentences were not "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances," particularly given the grant of Huber privileges. *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507.

Upon our independent review of the record, we have found no other arguable basis for reversing the sentences imposed following the revocation of Grote's probation. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of WIS. STAT. RULE 809.32 and *Anders*.

IT IS ORDERED that the judgments sentencing the defendant after revocation are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney William Schmaal is relieved of any further representation of the defendant in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals