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September 18, 2013

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

2013AP262-CRNM State of Wisconsin v. Alvaro Cano Oyarzabel (L.C. # 2009CF46)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Alvaro Cano Oyarzabel appeals from a judgment imposing a ten-year bifurcated sentence after the revocation of his probation. Oyarzabel's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738 (1967). The no-merit report addresses whether the trial court erroneously exercised its sentencing discretion. Oyarzabel received a copy of the report, was advised of his right to file a response,

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2009, following Oyarzabel's no contest plea to one count of delivering between five and fifteen grams of cocaine in violation of WIS. STAT. § 961.41(1)(cm)2., the trial court withheld sentence and ordered a three-year term of probation with nine months of conditional jail time. After completing his conditional jail time, Oyarzabel was deported to Mexico. In June 2012, Oyarzabel was arrested in connection with new charges of delivering controlled substances and resisting or obstructing a law enforcement officer. He was placed in custody on a probation hold, his probation was revoked, and he was returned to court for sentencing. On September 6, 2012, following the revocation of Oyarzabel's probation, the trial court imposed a ten-year bifurcated sentence, with five years of initial confinement and five years of extended supervision. The court awarded 354 days of sentence credit pursuant to WIS. STAT. § 973.155.

Because this matter is before us following sentencing after probation revocation, Oyarzabel's underlying conviction is not before us. *See State v. Drake*, 184 Wis. 2d 396, 399-400, 515 N.W.2d 923 (Ct. App. 1994). In addition, Oyarzabel cannot challenge the probation revocation decision. *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978). Our review is limited to the trial court's sentencing discretion. Sentencing after probation revocation is reviewed "on a global basis, treating the latter sentencing as a continuum of the" original sentencing hearing. *State v. Wegner*, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289. Thus, at sentencing after probation revocation, we expect the court will consider many of the same objectives and factors that it is expected to consider at the original sentencing hearing. *See id.*

In fashioning the sentence, the trial court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court explained that the defendant had the chance to avoid prison but instead “engaged in behaviors that are more elaborate and more serious than what [he was] charged with in this particular case.” The trial court determined that confinement was necessary to control Oyarzabel's behavior. The trial court considered protecting the public to be its primary sentencing objective, *see State v. Gallion*, 2004 WI 42, taking into account the defendant's character and background. The court stated:

You may look at this and say why that period of confinement, but that is the minimum necessary to send the lessons that need to be learned. You have engaged in very dangerous activities, very harmful activities, and your movement from place to place demonstrates extreme levels of mobility. And therefore, confinement as indicated is necessary in this case.

During his allocution, Oyarzabel asserted that after his deportation, he returned to the United States and sold drugs out of necessity, in response to threats made to his family members. The trial court reminded Oyarzabel that he was presently being sentenced in connection with his “decisions in April of 2009 to sell cocaine.” The trial court noted that perhaps the asserted facts, if proven, would constitute a “duress defense” to his pending charges. The court stated that if Oyarzabel established the asserted facts and prevailed in his pending case, perhaps there would exist grounds for a new factor sentence modification motion in the present case. In imposing its sentence, the trial court examined the relevant facts and factors, and applied the proper standards. This was a proper exercise of discretion.

Further, the maximum possible sentence Oyarzabel could have received was fifteen years of imprisonment. The ten-year sentence is well within the range authorized by law, *see State v.*

Scaccio, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with appellate counsel's analysis and his ultimate conclusion that there is no arguably meritorious challenge to the sentencing court's exercise of discretion.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Oyarzabel further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney John C. Bachman is relieved of further representation of Alvaro Cano Oyarzabel in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals