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October 15, 2013

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

2013AP1297-CRNM State of Wisconsin v. Daniel J. Marinko, Jr. (L.C. # 2010CF34)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Daniel Marinko filed a no-merit report concluding there is no arguable basis for Marinko to challenge the sentences imposed after revocation of his probation, or for appealing an order denying his postconviction motion for sentence modification. Marinko was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

In 2010, Marinko was charged with battery by prisoner. The complaint alleged he kicked another inmate in the face while incarcerated in the Columbia County Jail. Marinko entered a no contest plea and was placed on probation for two years. His probation was later extended for an additional year. In June 2012, his probation was revoked and he was returned to court for sentencing. He represented himself at the sentencing hearing. The court imposed a sentence of three years' initial confinement and three years' extended supervision.

Marinko filed a postconviction motion for sentence modification, arguing his ineligibility for the Earned Release Program constituted a new factor justifying a shorter sentence. After conducting a hearing, the circuit court denied the motion.

Neither the 2010 court proceedings nor the probation revocation is the subject of this appeal. Our review is limited to the August 2012 sentencing proceedings, the sentence imposed, and the postconviction motion. See *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994).

The record discloses no arguable basis for challenging the circuit court's decision to allow Marinko to represent himself at the sentencing hearing. As required by *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997), the court determined that Marinko was deliberately choosing to represent himself and was aware of the disadvantages of self-representation. The record shows Marinko was aware of the maximum sentence the court could impose. He had rejected an offer negotiated by his counsel for a global resolution of this matter and other pending charges.

The record discloses no arguable basis for challenging the sentence. The court could have imposed a sentence totaling eight years' imprisonment and a \$10,000 fine based on

Marinko's status as a repeat offender. The court appropriately considered the seriousness of the offenses, Marinko's character, and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). While on probation, Marinko tested positive for THC, absconded from a medical facility, and committed additional criminal offenses. The court considered no improper factors and the six-year sentence is not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Marinko's postconviction motion alleged that his ineligibility for the Earned Release Program was a new factor justifying sentence modification. Review of a "new factor" claim is a two-step process. *State v. Harbor*, 2011 WI 28 ¶¶36-38, 333 Wis. 2d 53, 797 N.W.2d 828. First, the court must consider whether the new fact was highly relevant to the sentence imposed. Then the court must consider whether a modification of the sentence is in order. The circuit court agreed its belief that Marinko was eligible for the program was "a factor" that entered into its decision about the sentence. However, the court further stated it would have imposed the same sentence had it known of Marinko's ineligibility for the program. The court indicated it was willing to allow Marinko to "earn" a reduced sentence if he could complete the program, but concluded the six-year sentence was necessary if Marinko could not benefit from the substance abuse program. Therefore, eligibility for the Earned Release Program was not highly relevant to Marinko's sentence and even if it was, the court properly exercised its discretion by not modifying the sentence.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Andrew Hinkel is relieved of his obligation to further represent Marinko in this matter. WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals