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October 24, 2013

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

2012AP1619-CRNM State of Wisconsin v. Danny D. Alexander (L.C. # 2008CF970)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Danny Alexander appeals a judgment sentencing him after the revocation of his probation on four counts of failure to pay child support. He also appeals an order denying his motion for sentence modification. Attorney Donna Hintze has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403

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

N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the circuit court's exercise of its sentencing discretion and its denial of Alexander's motion for sentence modification. Alexander was sent a copy of the report and has filed a response, which challenges the validity of his plea and the circuit court's denial of his motion for sentence modification. Upon reviewing the entire record, as well as the no-merit report and response, we conclude 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. 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); *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 circuit court's imposition of sentence following revocation. Accordingly, Alexander's arguments regarding the validity of his plea are not properly before us.

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 Alexander was afforded the opportunity to review the revocation materials and to address the court prior to sentencing. The circuit 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. The court stated that the child support offenses were serious felonies and that the opportunity given to Alexander to live

in the community had not been successful because of Alexander's violations of the conditions of probation. The court stated that Alexander had not paid child support during the time he was on probation. The court also considered Alexander's criminal history and failure to take responsibility for his actions. The court concluded that a prison sentence was necessary, given the seriousness of the offenses.

The court then sentenced Alexander as follows: on count one, an initial confinement period of one year, six months and extended supervision of two years; on count two, initial confinement of one year, six months and extended supervision of two years; on count three, initial confinement of one year and extended supervision of two years; and on count four, initial confinement of one year and extended supervision of two years. The sentences were to be served consecutive to one another and consecutive to any other sentences. The court awarded ninety days of sentence credit.

The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 948.22(2) (classifying failure to support as a Class I felony); 939.50(3)(i) (providing maximum prison term of three years and six months for Class I felonies); and 973.01(2)(b)9., (c), and (d)6. (explaining bifurcated sentence structure) (all 2005-06). Counts three and four were repeaters, for which Alexander faced an increased term of imprisonment of up to four years on each count. *See* WIS. STAT. § 939.62(1)(b) (2005-06). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

We turn next to Alexander's assertion that the circuit court erred when it denied his motion for sentence modification. We conclude that any such argument on appeal would be without merit. The record indicates that six probation violations were originally alleged. Of those six violations, the disorderly conduct charges in Violation #1 were dismissed, he was acquitted of the sexual assault conduct alleged in Violation #2, and an administrative law judge determined that the Department of Corrections had failed to prove that Alexander had committed Violation #4, which alleged that he had provided false information to his probation agent about drug use. The circuit court recognized that these factors were new sentencing factors, but concluded that modification of Alexander's sentence was not warranted because none of the factors were considered by the court in imposing Alexander's sentence. The court specifically stated that it was not reaching any conclusion on the pending charges and stated, "[W]hat I need to do today is focus in on the child support case." In his motion for sentence modification, Alexander conceded that he had not paid child support.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment or order, and we conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Donna Hintze is relieved of any further representation of Danny Alexander in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals