



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 II/IV

December 20, 2013

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

W. Richard Chiapete
Assistant District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Gregg H. Novack
2575 N. Oakland Ave.
Milwaukee, WI 53211

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

Nicholas M. Gimino 400766
Oakhill Corr. Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2012AP2246-CRNM State of Wisconsin v. Nicholas M. Gimino (L.C. # 2009CF1492)

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

Nicholas Gimino appeals a judgment sentencing him after revocation of probation. Attorney Gregg Novack 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); and *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses Gimino's sentencing after revocation.

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

Gimino was sent a copy of the report and has filed multiple responses challenging his underlying conviction and sentence. Upon review of the entire record, as well as the no-merit report and responses, we conclude that there are no arguably meritorious appellate issues.

Gimino was convicted, following a court trial, of two counts of child abuse, contrary to WIS. STAT. § 948.03(3)(b). The circuit court withheld sentence and placed Gimino on probation for a period of three years on each count. We upheld the conviction in an opinion dated March 7, 2013, in appeal no. 2012AP1498. Gimino petitioned the supreme court for review, and the petition was denied. Gimino's probation was revoked after he was charged with OWI as a fourth offense within five years.

We first note that an appeal from a sentence following revocation does not bring an underlying conviction before this court. See *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 trial court's imposition of sentence following revocation. Accordingly, Gimino's numerous arguments regarding his underlying conviction are not properly before us.

Our review of a sentence determination begins "with the presumption that the [circuit] 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 Gimino was afforded the opportunity, through his counsel, to review the revocation materials. Gimino's counsel commented on and asked for correction of inaccuracies in the PSI. There is no indication in the sentencing transcript that the court relied on any of the inaccuracies in the PSI when sentencing Gimino. Gimino was given the opportunity to address, and did address, the court prior to sentencing. The court did not find Gimino's version of the facts credible.

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. Regarding the gravity of the offense, the court noted that Gimino's young daughter suffered severe road rash after falling off a go-cart while in Gimino's care, and that Gimino was negligent in failing to get her the proper medical attention. The court also considered Gimino's character and criminal history, noting his repeated OWIs and noncompliance with institutional rules while in jail. Regarding the need for rehabilitation, the court noted that Gimino had a need for the type of correctional treatment available only in a confined setting. Finally, the court stated that confinement was necessary to protect Gimino's children and to protect the public from further criminal activity.

The court then sentenced Gimino as follows: one year and six months of initial confinement and two years of extended supervision on count one, and one year of initial confinement and one year of extended supervision on the other count, to be served consecutively. The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. § 948.03(3)(b) (classifying the offense as a class I felony), § 973.01(2)(b)9 and (d)6 (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony). 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 committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 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 judgment, 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 counsel is relieved of any further representation of the appellant in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals