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DISTRICT III

February 11, 2014

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

2013AP1673-CRNM State of Wisconsin v. David M. Gouge
2013AP1674-CRNM (L. C. Nos. 2007CF7, 2007CF17)

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

Counsel for David Gouge has filed a no-merit report concluding there is no arguable basis for Gouge to challenge the sentences imposed following revocation of his probation, or for challenging an order denying his motion for sentence modification. Gouge filed a response stating his belief that the imposition of probation concurrent with a sentence means that any sentence imposed after revocation must also be concurrent. Gouge indicates he would not have entered guilty pleas and would not have waived his revocation hearing if he had known a

consecutive sentence could be imposed. 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 2008, Gouge entered guilty pleas to two counts of burglary in Sawyer County and one count of felony theft that was consolidated from Washburn County. On the Sawyer County burglary charges, the court withheld sentence and placed Gouge on probation. On the Washburn County theft charge, the court imposed and stayed a sentence of five years' initial confinement and five years' extended supervision, and placed Gouge on probation for five years concurrent with the Sawyer County cases. After Gouge's probation was revoked, Gouge waived his revocation hearing and was returned to court for sentencing on the Sawyer County convictions. The court imposed a sentence of three years' initial confinement and three years' extended supervision concurrent with the Washburn sentence for one of the burglaries, and four years' initial confinement and three years' extended supervision consecutive to the Washburn sentence for the second burglary.

Gouge filed a motion for sentence modification arguing that the 2008 sentencing court indicated the sentences would be concurrent.¹ The court reviewed the transcript of the 2008 sentencing hearing and concluded it was not the court's intention to make the sentences concurrent if Gouge's probation were revoked. The 2008 sentencing court's reference to concurrent sentences referred to the concurrent probation periods, and did not suggest consecutive sentences would not be imposed if Gouge's probation were revoked.

¹ Judge Norman Yackel presided over the 2008 sentencing. His successor, Judge Gerald Wright, presided over the sentence after revocation and the postconviction motion hearing.

In an appeal from a judgment imposing sentence after revocation of probation, neither the underlying conviction nor the probation revocation can be the subject of the appeal. *State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996); *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978). Therefore, issues raised by Gouge in his response to the no-merit report regarding his misunderstanding of the plea agreement and his waiver of the revocation hearing are not properly before this court. This court's jurisdiction is limited to the sentences imposed after revocation.

The record discloses no arguable basis for challenging the sentences. The court could have imposed consecutive sentences totaling twenty-five years in prison and a \$50,000 fine. The court appropriately considered the seriousness of the offenses, Gouge's character and the need to protect the public. See *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Gouge had several probation holds for violating the conditions of his probation, and was returned to court for sentencing based on additional serious felonies. In his two and one-half years of probation, he had made only \$800 in restitution of the \$36,589 owed. The court also considered Gouge's need for substance abuse treatment. The court considered no improper factors and the sentences imposed are not arguably so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The court also properly denied Gouge's motion to modify the sentence. Gouge's alleged misunderstanding of the 2008 sentencing court's reference to concurrent sentences does not constitute a new factor. The court also stated if Gouge had presented a new factor, that would not cause the court to change the sentence.

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

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

IT IS FURTHER ORDERED that attorney Steven Grunder is relieved of his obligation to
further represent Gouge in these matters. WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals