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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (608) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

March 27, 2014

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
210 W. Center St.
Juneau, WI 53039

Kurt F. Klomberg
District Attorney
Dodge County
210 W. Center Street
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

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

Suzanne L. Hagopian
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Brandin L. McConochie 488723
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2012AP2291-CRNM State of Wisconsin v. Brandin L. McConochie (L.C. #2005CF347)

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

Brandin McConochie appeals a judgment sentencing him to prison following the revocation of his probation on one count of felony bail jumping, and an order denying his postconviction motion. Attorney Andrew Hinkel has filed a no-merit report, and was subsequently replaced by Attorney Suzanne Hagopian, who has not withdrawn the report. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State***

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

ex rel. McCoy v. Wisconsin Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429. The no-merit report addresses the legality of the sentence and the circuit court's exercise of its discretion. McConochie was sent a copy of the report, but did not file a response. Upon reviewing the entire record, as well as the no-merit report, 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. *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 circuit court's imposition of sentence following revocation.

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 complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that McConochie was afforded the opportunity to address the circuit court prior to sentencing, both through counsel and in person. 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 severity of the offense, the court agreed with the prosecutor that it was extremely serious to have violated the conditions of a sexual assault charge by having additional sexual relations with the same fourteen-year-old victim. With respect to the

defendant's character and rehabilitative needs, the court acknowledged that McConochie was still young, demonstrated an appropriate demeanor in court, and had already received a substantial sentence for the conduct underlying the revocation, which could go a fair way to addressing his rehabilitative needs. Therefore, the court concluded that a modest prison term would be sufficient punishment for the present offense. The court then sentenced McConochie to one year of initial confinement and two years of extended supervision, to be served consecutively to any previously imposed sentences. The court found that McConochie was not eligible for a risk reduction sentence or the Challenge Incarceration and Earned Release Programs.

The components of the bifurcated sentence were within the applicable penalty ranges, and constituted 50% of the maximum exposure McConochie faced. *See* WIS. STAT. §§ 946.49(1)(b) (classifying bail jumping, where the underlying charged offense is a felony, as a Class H felony); 939.50(3)(h) (providing maximum imprisonment term of six years for Class H felonies). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

McConochie filed a postconviction motion seeking to vacate his sentence on the grounds of laches or that he had been denied his right to a speedy sentencing by a four-year delay between the time of his revocation and his sentencing. In the alternative, he requested nine days of sentence credit. The circuit court noted that it was unable to determine the cause of the delay,

other than a scheduled sentencing hearing had been taken off the calendar and then apparently forgotten by both parties and the court. However, the court concluded that McConochie was not prejudiced by the delay, because the time he had already spent in custody by the time of sentencing was a "substantial factor that this Court considered in giving him a sentence that this Court felt was on the very low end for a crime that I felt the gravity and nature was very serious." The court's analysis of the delayed sentencing represents a reasonable exercise of discretion, and the court granted the requested sentence credit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. 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 sentencing McConochie after revocation is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Suzanne Hagopian is relieved of any further representation of McConochie in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane Fremgen
Clerk of Court of Appeals