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**DISTRICT II**

April 16, 2014

To:

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

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2013AP2689-CRNM      State of Wisconsin v. Phillip A. Lopez (L.C. #2010CF290)

Before Brown, C.J., Reilly and Gundrum, JJ.

Phillip A. Lopez appeals from a judgment of conviction after the revocation of his probation. Lopez's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Lopez was served with a copy of the report, but has not exercised his right to file a response. Based upon an independent review of the report and the record as required by *Anders* and RULE 809.32, we conclude that no

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

issue of arguable merit could be raised on appeal. We affirm the judgment of conviction and relieve Attorney Eric R. Pangburn of further representing Lopez in this matter.

In 2010, Lopez was convicted of second-degree sexual assault of a child. He was sentenced to five years' probation and given a withheld sentence. Two years later, his probation was revoked for having "drive-by" contact with the victim's residence in an admitted attempt to intimidate the victim and the victim's family, whom he blamed for his legal troubles. The circuit court imposed a twenty-three-year sentence, comprised of eight years' initial incarceration and fifteen years' extended supervision. This no-merit appeal followed.

The no-merit report identifies one potential issue: whether the court sentenced Lopez too harshly after his probation was revoked. We first note that Lopez's twenty-three-year sentence is presumptively not unduly harsh, as it is well within the limits of the forty years and \$100,000 fine that he faced. See *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. A sentence is unduly harsh only if its length "is 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." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Sentencing after revocation, like the original sentencing, is reviewed under an erroneous exercise of discretion standard. See *State v. Brown*, 2006 WI 131, ¶20, 298 Wis. 2d 37, 725 N.W.2d 262. To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence. *State v. Gallion*, 2004 WI 42, ¶39, 270 Wis. 2d 535, 678 N.W.2d 197. The court "must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public." *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The court also

should consider the defendant's conduct on probation. *Brown*, 298 Wis. 2d 37, ¶34. Where, as here, the same judge presides over the initial and the post-revocation sentencings, the latter is treated as a continuation of the former. *Id.*, ¶21.

The circuit court amply explained why it imposed the sentence that it did. It noted that in view of the “extremely serious conduct” underlying his conviction, Lopez’s original sentence was “extremely lenient.” The court explained, with some dismay, that it earlier had given Lopez “every benefit of every reasonable doubt” because, based on the many testimonials on his behalf, it had “fully believed ... that [he was] an extremely good candidate for probation.” Observing that Lopez now had “certainly demonstrated ... that [he is] a danger to the community,” the court concluded that an appropriate sentence was one long enough to protect the public, to punish and rehabilitate Lopez, and to try to address the harm suffered by the victim of his repeated sexual assaults. Lopez’s sentence is not so excessive or unusual as to shock public sentiment. *See Ocanas*, 70 Wis. 2d at 185. No basis exists to disturb it. Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Eric R. Pangburn is relieved of any further representation of Lopez on appeal.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*