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July 23, 2014

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

2014AP186-CRNM State of Wisconsin v. Freddie D. Manns III (L.C. #2009CF453)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Freddie D. Manns III appeals from a judgment sentencing him after revocation of his probation. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Manns was advised of his right to file a response, but has not exercised his right to do so. Instead, he communicated two concerns to counsel, who included them in the no-merit report. Upon consideration of the report and our independent review of the record as required by ***Anders*** and RULE 809.32, we conclude that there

is no arguable merit to any issue that could be raised on appeal and that this appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgment, accept the no-merit report, and relieve Attorney Cheryl A. Ward of further representing Manns in this matter.

In April 2009, Manns was in a vehicle police stopped for speeding. Discovering that Manns had a warrant in a Racine county case and was absconding from supervision, police arrested and searched him, and found marijuana. Manns pled guilty to possession of THC, second or subsequent. In August 2009, the trial court withheld sentence and ordered three years' probation. In September 2013, he was revoked for, among other things, failing to report his whereabouts to his agent and to the Wisconsin Sex Offender Registry for a three-month period.

The report correctly states that Manns may not challenge the underlying convictions in this appeal from sentencing after revocation of probation. *See* ***State v. Tobey***, 200 Wis. 2d 781, 784, 584 N.W.2d 95 (Ct. App. 1996). He also may not challenge the validity of the probation revocation decision. *See* ***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 report therefore examines whether the trial court erroneously exercised its discretion in sentencing Manns after his probation was revoked.[2]

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

[2] Although the no-merit report refers to Mann's sentencing as a "reconfinement hearing," he was not being *re*confined on this offense because his sentence had been withheld. The imprecise name does not change the analysis, however. The report correctly recites the law governing a court's sentencing discretion, which is the same whether the sentencing follows a plea or verdict, revocation of extended supervision, or as here, probation revocation, to impose a withheld sentence.

Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The original sentencing and the sentencing after revocation are reviewed on a global basis, treating the latter as an extension of the first, especially where the same judge presides over both proceedings. ***State v. Wegner***, 2000 WI App 231, ¶¶7, 9, 239 Wis. 2d 96, 619 N.W.2d 289. When a proper exercise of discretion has been demonstrated, this court has a strong policy against interference with that discretion and we presume the sentencing court acted reasonably. ***Gallion***, 270 Wis. 2d 535, ¶18.

The court observed that, in withholding Manns's sentence and placing him on probation, it had given him the chance "to be what you like to say you are, which is a great father," but instead he returned with "a record replete with offenses," some still pending; that a CHIPS petition alleged he had not seen one of his several children in four years; that he violated while on probation and got revoked on this and other cases; and that the one probation he completed was while he was in custody on another matter. In light of Manns's conduct while on probation, the court ordered him to serve one and a half years' initial confinement and two years' extended supervision, in line with the higher of two Department of Corrections (DOC) agents' recommendations, in hopes that he then could "meet his obligations as a community citizen, parent, and … extended supervision candidate." The court thus addressed the gravity of the offense, Mann's character and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409.

The report indicates that one of Manns's issues involves the two DOC recommendations. DOC agent Mark Caccioti, who wrote a letter to the court outlining the revocation decision, recommended the prison term that the court found most appropriate. DOC agent Anthony

Collins, who was Manns's agent and wrote the multi-page revocation summary, recommended twelve months in jail. Defense counsel argued at sentencing that Collins's opinion should be given greater weight, as he was "the agent who actually monitored Mr. Manns and is much more familiar with [him] and his history," and Caccioti, who never spoke to Manns, was "obviously upset that Mr. Manns didn't follow his probation rules." Manns apparently believes the court misused its discretion in rejecting his own agent's recommendation.

This point does not alter our conclusion that no arguable challenge could be made to the sentence. The court was made aware of the agents' opinions. It went on to properly explain its reasons for the sentence it imposed. Beyond that, DOC recommendations are simply that: recommendations. As with the sentencing recommendations DOC agents make in PSIs, the recommendation may be helpful and should be considered, but they are not binding. *See* ***State v. Washington***, 2009 WI App 148, ¶17, 321 Wis. 2d 508, 775 N.W.2d 535, and ***Ocanas v. State***, 70 Wis. 2d 179, 188, 233 N.W.2d 457 (1975).

The no-merit report also states that Manns wanted to address an issue related to the absconding that led to the arrest leading to his revocation. The report describes the issue in two ways: "Manns states that he was under the care of Detective Sorenson and that is why he absconded," and "Manns states that he was under the care of Investigator Sorenson when he absconded and that that information should have been provided to the court." The report also states that "[t]rial counsel spoke with Investigator Sorenson and this information was not confirmed by Investigator Sorenson and therefore could not be provided to the court."

We have combed the record in an effort to decipher this claim. We found a single Sorenson reference. It arose at the revocation sentencing hearing during one of many exchanges

at both of the sentencing hearings in which the court, as well as the parties, struggled to navigate the maze of Manns's correctional background. The reference, with our emphasis added, follows:

> THE DEFENDANT: When I committed the 2012 charge, I was out on—I got out on bail, but I discharged off of the 2012 charge and started, I mean—
>
> THE COURT: 2004.
>
> THE DEFENDANT: I discharged off the 2004 charge.
>
> THE COURT: And then you were on mine, but they were already revoking you.
>
> THE DEFENDANT: No, I didn't. No. I was out on bail, but your probation didn't start till January—didn't start me off on it till January 22nd.
>
> THE COURT: But then you must have been on somebody else's probation.
>
> THE DEFENDANT: I was still in the—I was still in jail. I didn't get bailed out till January 22nd of this year.
>
> THE COURT: Okay. So you didn't get out and then you absconded.
>
> THE DEFENDANT: Yeah. *I was in the care while I was out, I was under the care of Investigator Sorenson ... during the time.*
>
> THE COURT: *Except that you had absconded.*
>
> THE DEFENDANT: *Yes.*
>
> THE COURT: *Uh-huh. So you weren't too much in the care of them, right?*
>
> THE DEFENDANT: *Yeah. No. I can't say—*

At that point, the court went on to explain its sentencing rationale, which, once again, is unassailable.

Manns could have provided to the court whatever information he believes it should have had: who Sorenson is, why or how he was under Sorenson's "care," or why that status had

anything to do with absconding. We can discern no possible legal issue of any arguable merit in regard to this cryptic claim.

Our review of the record discloses no other potential issues for appeal.

For the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Cheryl A. Ward is relieved of further representing Manns in this matter.

Diane M. Fremgen
Clerk of Court of Appeals