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**DISTRICT IV**

September 18, 2014

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

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2012AP2682-CRNM      State of Wisconsin v. Timothy W. Markling (L.C. # 2009CF1732)

Before Lundsten, Sherman and Kloppenburg, JJ.

Timothy Markling appeals a judgment sentencing him to prison following the revocation of his probation, as well as an order denying his motion for sentence credit. Attorney Martha Askins has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);<sup>1</sup> *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.

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

429 (1988). The no-merit report addresses the legality of the sentence and whether the circuit court erred in denying Markling's motion for sentence credit. Markling was sent a copy of the report, but has not filed 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." *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Markling was afforded the opportunity to comment on the revocation materials and to address the court prior to sentencing. 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 discussed Markling's prior convictions for OWI and stated that Markling's substantial alcohol problem presented a threat to public safety. With respect to the defendant's character and rehabilitative needs, the court stated that Markling showed resentment about

following rules and also that he had not been successful with probation in the past. The court concluded that a significant prison term was necessary to protect the public.

The court then sentenced Markling to two years of initial confinement and two years of extended supervision. It also ordered AODA treatment as recommended, imposed standard costs and conditions of supervision, found Markling eligible for the Earned Release Program and awarded 409 days of sentence credit. The sentence imposed was within the applicable penalty range. There is a presumption that a sentence “well within the limits of the maximum sentence” is not unduly harsh, and the sentence imposed here is 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.

Markling filed a postconviction motion seeking additional sentence credit. Markling argued that he previously had been ordered to serve one year in jail as a condition of probation, and had actually served 228 days in jail. He argued that he had received good time for being an inmate worker and, therefore, was released 137 days early. He sought credit for those 137 days. The circuit court denied the motion, reasoning that Markling was entitled to credit only for those days actually served in custody. The court’s reasoning behind denying the motion for sentence credit represents a reasonable exercise of discretion, such that we agree with counsel’s assessment that there would be no merit to challenging the circuit court’s ruling on the sentence credit issue.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment or order. 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 and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Martha Askins is relieved of any further representation of Timothy Markling in this matter pursuant to WIS. STAT. RULE 809.32(3).

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