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September 29, 2014

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

2014AP608-CRNM State of Wisconsin v. Robert T. Dawson (L.C. #2012CF607)

Before Curley, P.J., Kessler and Brennan, JJ.

Robert T. Dawson appeals a judgment of conviction entered after revocation of his probation. He pled guilty on June 18, 2013, to one count of identity theft to avoid a penalty. *See* WIS. STAT. § 943.201(2)(b) (2011-12).[1] The trial court dismissed and read in two crimes charged in case No. 2013CF168, namely, two counts of incorrect self-identification while registered as a sex offender. The trial court withheld sentence and imposed an eighteen-month term of

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

probation. Dawson did not appeal the original judgment of conviction. The Department of Administration, Division of Hearings and Appeals, revoked Dawson's probation four months after his conviction, and he returned to the trial court on November 5, 2013, for a sentencing hearing. The trial court imposed a four-year term of imprisonment, evenly bifurcated between initial confinement and extended supervision. Dawson appeals.

Appellate counsel, Attorney Donna L. Hintze, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Dawson did not respond. This court has considered the no-merit report, and we have independently reviewed the record. We conclude that there are no arguably meritorious issues for appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

We note preliminarily that Dawson may not, in an appeal from a judgment entered after revocation of probation, raise challenges either to the validity of his underlying conviction or to the decision made at the original sentencing hearing to impose probation. *See* ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). Further, any challenge to the probation revocation decision must be raised by petition for *certiorari* review directed to the trial court. ***State ex rel. Reddin v. Galster***, 215 Wis. 2d 179, 183, 572 N.W.2d 505 (Ct. App. 1997). Thus, we turn to the November 2013 sentencing proceeding.

Dawson could not raise an arguably meritorious challenge to his sentence. Sentencing decisions lie within the trial court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a

consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The same legal principles apply at sentencing after revocation of probation as govern the original sentencing. ***State v. Wegner***, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289. Thus, the trial court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** Further, a sentencing court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

The trial court considered appropriate sentencing factors here. The trial court discussed the seriousness of the offense, which involved Dawson using his brother's name during a traffic stop. The trial court noted that Dawson's brother, Milton D., had submitted a victim impact statement reflecting that the incident was part of a pattern of similar acts that caused substantial difficulty for Milton D., who had to "always clean up the mess." In considering Dawson's character, the trial court observed that, leaving aside the offenses Dawson committed more than ten years earlier, he had "a 2006 operating a motor vehicle without owner's consent[, a] 2006 sex offender registry violation, [and a] 2009 criminal damage to property." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record is evidence of character). The trial court considered the need to protect the public, emphasizing Dawson's inability to comply with the rules of probation for any meaningful length of time before

revocation. The trial court indicated that public protection was the primary sentencing goal, taking into account both the problems that Dawson's behavior caused for Milton D. and the risk to the community at large flowing from a sex offender's failure to properly identify himself.

The trial court declared Dawson eligible for the Wisconsin substance program but ineligible for the challenge incarceration program.[2] Dawson could not mount an arguably meritorious challenge to his ineligibility for the latter program. The trial court explained that he is more than forty years old and therefore statutorily ineligible to participate in the challenge incarceration program.[3] *See* WIS. STAT. § 302.045(2)(b).

The trial court identified the factors that it considered in fashioning the sentence. The factors are proper and relevant. Further, the sentence is not unduly harsh. A sentence is unduly harsh "'only where the sentence 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Dawson faced six years of imprisonment and a $10,000 fine upon his conviction for identity theft. *See* WIS. STAT.

[2] The Wisconsin substance abuse program and the challenge incarceration program are both prison programs that, upon successful completion, permit an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.05(3)(c)2.a & 302.045(3m)(b)1. The total length of the sentence remains unchanged. *See* §§ 302.05(3)(c)2.b. & 302.045(3m)(b)2.

[3] In June 2013, Dawson disclosed on the guilty plea questionnaire and waiver of rights form that he was forty years old, and documents in the record reveal that his date of birth is July 3, 1972. When the trial court asked Dawson his age at the November 2013 sentencing hearing, however, he responded that he was forty-two years old. Regardless of this discrepancy, the record shows that he is over forty years old, and therefore he exceeds the age limit for entry into the challenge incarceration program. *See* WIS. STAT. § 302.045(2)(b).

§§ 943.201(2)(b), 939.50(3)(h). The four-year term of imprisonment is well within the limits of the statutory maximum penalties. Such a sentence is presumptively not unduly harsh. *See* ***Grindemann***, 255 Wis. 2d 632, ¶32. We cannot say that the sentence imposed in this case is disproportionate or shocking. A challenge to the trial court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

Based on an independent review of the record, we conclude that no additional issues warrant discussion. Any further proceedings would be without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Donna L. Hintze is relieved of any further representation of Robert T. Dawson on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals