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October 29, 2014

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

2014AP39-CRNM State of Wisconsin v. Stuart E. Clawson (L.C. #2008CF295)

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

Stuart E. Clawson appeals from a judgment imposing sentence after the revocation of his probation. Clawson's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Clawson filed a response. Upon consideration of the no-merit report, Clawson's response and an independent review of the

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

record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2010, upon Clawson's guilty pleas to five counts of felony failure to pay child support contrary to WIS. STAT. § 948.22(2), the trial court withheld sentence and ordered a six-year term of probation. In September 2010, Clawson's agent discovered that he had moved from his residence and could not be located. The agent issued an apprehension request and Clawson's whereabouts remained unknown until April 18, 2012, when he was placed in custody following a traffic stop in Illinois. Clawson's probation was revoked and on October 25, 2012, the trial court imposed on each count a three and one-half year bifurcated sentence comprised of one and one-half years of initial confinement and two years of extended supervision. The trial court ordered that counts one, three, four and five be served concurrently, and that count two run consecutive to the others, for an aggregate bifurcated sentence totaling seven years, with three years of initial confinement followed by four years of extended supervision.

Appellate counsel's no-merit report addresses whether the trial court properly exercised its discretion at the sentencing hearing after revocation. Because this matter is before us following sentencing after probation revocation, Clawson's underlying convictions are not before us. *See* ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). In addition, Clawson cannot challenge the probation revocation decision. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978). Our review is limited to the trial court's sentencing discretion.

Sentencing after probation revocation is reviewed "on a global basis, treating the latter sentencing as a continuum of the" original sentencing hearing. *See* ***State v. Wegner***, 2000 WI

App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289. Thus, at sentencing after probation revocation, we expect the court will consider many of the same objectives and factors that it is expected to consider at the original sentencing hearing. *See* ***id.*** Where, as here, different judges presided over the original sentencing and the sentencing after revocation hearings, the record should reflect that the new judge familiarized him or herself with the entire record. *See* ***State v. Walker***, 2008 WI 34, ¶3, 308 Wis. 2d 666, 747 N.W.2d 673; ***State v. Reynolds***, 2002 WI App 15, ¶9, 249 Wis. 2d 798, 643 N.W.2d 165.

We agree with appellate counsel's analysis and conclusion that there is no arguably meritorious challenge to the sentence imposed after revocation. Though it appears that there was no transcript of the original sentencing hearing in the record, there is no per se rule requiring that the new judge obtain and review the original sentencing transcript. ***Walker***, 308 Wis. 2d 666, ¶26. In this case, the original sentencing court adopted the parties' joint recommendation and the resultant transcript is very short. As explained in counsel's no-merit report, the sentencing after revocation court demonstrated its familiarity with the entire record by referencing pre-revocation documents and proceedings.

Additionally, the record reveals that the post-revocation court's discretionary sentence had a rational and explainable basis. ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing its sentence, the trial court considered the seriousness of the offense, Clawson's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In determining that prison was appropriate, the trial court considered that Clawson had quickly absconded and made himself unavailable for probation supervision. The court explained that "[t]he public has an expectation that individuals placed on community supervision [are] being supervised [,]" and determined that Clawson put the

community at risk because he failed to make himself available for treatment and "no one was monitoring his whereabouts." The court further reasoned that long-term supervision was necessary to ensure Clawson paid his support because "if he's placed on extended supervision he can be returned to prison for shorter periods of time, longer periods of time."

Further, the maximum possible sentence Clawson could have received was fifteen years. The global sentence totaling seven years of imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguably meritorious challenge to the sentencing after revocation court's exercise of discretion.

Clawson's response to the no-merit focuses almost entirely on the merits of his underlying case. Again, Clawson cannot challenge the original judgment on direct appeal following a sentencing after probation revocation. *See* ***Scaccio***, 240 Wis. 2d 95, ¶10; ***Drake***, 184 Wis. 2d at 399. As relevant to his sentencing after revocation, Clawson asserts that trial counsel informed him he did not have to make a statement because the parties had a joint recommendation.[2] The transcript from the post-revocation sentencing hearing demonstrates that the trial court clearly afforded Clawson the right of allocution:

> [The Court]: All right. Mr. Clawson, you have the right to make a statement at this juncture; it's called your right of allocution. You may attempt to explain why you don't pay child support, why you

[2] At the sentencing after revocation, the parties jointly recommended that the trial court impose five concurrent one-year jail sentences. The trial court rejected the recommendation as inadequate to ensure that Clawson would be held accountable for paying his support obligation.

> absconded, why your arrearage is significant, or you need not. But if you want to make a statement, you may.
>
> [Mr. Clawson]: I will decline on making a statement right now, Your Honor.

While perhaps Clawson now wishes he had made a statement, his hindsight regret does not constitute grounds for a new sentencing hearing.

Our review of the record discloses no other potential issues for appeal.[3] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Clawson further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney John R. Breffeilh is relieved from further representing Stuart E. Clawson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] Based on the record, we agree with the trial court's conclusion that Clawson was entitled to 307 days of sentence credit pursuant to WIS. STAT. § 973.155.