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**DISTRICT III**

November 25, 2014

To:

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

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2014AP93-CRNM      State of Wisconsin v. Matthew S. Johnston (L. C. #2013CM497)

Before Hruz, J.<sup>1</sup>

Counsel for Matthew Johnston has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12), concluding there is no basis for challenging the sentence imposed after revocation of Johnston's probation. Johnston was informed of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

In April 2013, Johnston pleaded no contest to disorderly conduct, as a repeater. The circuit court withheld sentence and placed Johnston on probation for twelve months. Johnston's probation was later revoked and, out of a maximum possible two-year sentence, the court imposed twenty-two months, consisting of fourteen months' initial confinement and eight months' extended supervision.<sup>2</sup>

An appeal from a judgment imposing sentence after probation revocation does not bring the underlying conviction before us. *See State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Additionally, the validity of the probation revocation itself is not the subject of this appeal. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation independent from 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 petition for certiorari in circuit court). This court's review is therefore limited to whether the circuit court properly exercised its sentencing discretion.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Johnston's character; the need to protect the public; and the mitigating circumstances Johnston raised. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678

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<sup>2</sup> In *State v. Lasanski*, 2014 WI App 26, ¶11, 353 Wis. 2d 280, 844 N.W.2d 417, the court clarified that for a misdemeanor crime enhanced by a repeater penalty, the enhancement transforms the misdemeanor sentence into a sentence to the state prison, which then must be bifurcated.

N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Johnston's sentence is so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

Therefore,

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

IT IS FURTHER ORDERED that attorney Martha K. Askins is relieved of further representing Johnston in this matter. See WIS. STAT. RULE 809.32(3).

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