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**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT III/II**

December 17, 2014

To:

Hon. Nancy J. Krueger  
Circuit Court Judge  
Outagamie County Courthouse  
320 S. Walnut Street  
Appleton, WI 54911

Lonnie Wolf  
Clerk of Circuit Court  
Outagamie County Courthouse  
320 S. Walnut Street  
Appleton, WI 54911

Carrie A. Schneider  
District Attorney  
320 S. Walnut Street  
Appleton, WI 54911

Christina C. Starner  
P.O. Box 8808  
Green Bay, WI 54308-8808

Gregory M. Weber  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Bret J. Dorton 173925  
Chippewa Valley Corr. Treatment Facility  
2909 E. Park Avenue  
Chippewa Falls, WI 54729

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

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2014AP1658-CRNM      State of Wisconsin v. Bret J. Dorton (L.C. # 2012CF585)

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

Bret Dorton appeals from a judgment sentencing him after revocation of his probation for possession of narcotic drugs. Dorton's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Dorton filed a response. After reviewing the record, counsel's report, and Dorton's response, we conclude that

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

there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

Dorton was convicted following a plea of no contest to one count of possession of narcotic drugs. The circuit court withheld sentence and placed Dorton on probation for three years. Dorton subsequently enrolled in the county's drug treatment court program. However, he failed to fulfill his treatment court and probation obligations and was revoked. The circuit court then sentenced him to three years of imprisonment, consisting of one-and-a-half years of initial confinement and one-and-a-half years of extended supervision.

The no-merit report first addresses whether the circuit court properly exercised its discretion in imposing its sentence after revocation. The circuit court's duty at sentencing after probation revocation is the same as its duty at the original sentencing. *State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289. Where, as in the present case, the same judge presides at both proceedings, we will consider the original sentencing reasons to be implicitly adopted at the sentencing after revocation. *State v. Reynolds*, 2002 WI App 15, ¶8, 249 Wis. 2d 798, 643 N.W.2d 165.

Here, the record reveals that the circuit court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing a sentence of three years of imprisonment, the court considered the seriousness of the offense, Dorton's character, and the need to protect the public. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Dorton's criminal history, the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *See Ocanas*

*v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Dorton's sentence would lack arguable merit.

The no-merit also addresses whether the circuit court properly found Dorton ineligible for the Challenge Incarceration Program and whether it properly determined Dorton's sentence credit. We are satisfied that the no-merit report properly analyzes these issues as without merit, and we will not discuss them further.

As noted, Dorton filed a response to counsel's no-merit report. In it, he complains that his trial counsel was ineffective for failing to object when the same judge who supervised his participation in drug treatment court imposed his sentence after revocation. A claim of ineffective assistance of counsel requires a showing of both deficient performance and prejudice. *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998).<sup>2</sup>

The no-merit report acknowledges that, according to the supreme court's best practices for drug treatment courts available at the time of Dorton's representation, it was suggested that the treatment judge not preside at sentencing.<sup>3</sup> However, a suggested best practice is just that: a recommendation, not a binding requirement or a basis for counsel to object. As such, Dorton cannot show deficient performance.

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<sup>2</sup> This court normally declines to address claims of ineffective assistance of counsel in the context of a no-merit review if the issue was not raised postconviction in the circuit court. However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Dorton's claim has sufficient merit to require appointed counsel to file a postconviction motion and request a hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

<sup>3</sup> See WISCONSIN TREATMENT COURTS: BEST PRACTICES FOR RECORD-KEEPING, CONFIDENTIALITY AND EX PARTE INFORMATION at 10 (Dec. 2011); available at <http://www.wicourts.gov/courts/programs/docs/treatmentbestpractices.pdf>.

Dorton also cannot show prejudice. Everything in the circuit court's statements at sentencing can be found in the record and particularly in the presentence investigation report and revocation summary. Moreover, the court said nothing to suggest that it harbored any bias or prejudice against Dorton.<sup>4</sup> Accordingly, we are satisfied that Dorton's response does not present an issue of arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.<sup>5</sup> Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Christina Starner of further representation in this matter.

Upon 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 Christina Starner is relieved of further representation of Dorton in this matter.

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

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<sup>4</sup> For the same reasons, we are not persuaded that there would be any merit to a claim that the circuit court violated Dorton's due process rights by not recusing itself sua sponte.

<sup>5</sup> Any challenge to the underlying conviction is outside the scope of this appeal. See *State ex rel. Marth v. Smith*, 224 Wis. 2d 578, 582 n.5, 592 N.W.2d 307 (Ct. App. 1999).