OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (608) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

January 20, 2015

To:

Hon. Julie Genovese
Circuit Court Judge
Br. 13, Rm. 8103
215 South Hamilton
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Suzanne L. Hagopian
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Corey C. Stephan
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

David J. Warthman
P.O. Box 941607
Atlanta, GA 31141-0607

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

2013AP1036-CRNM State of Wisconsin v. David J. Warthman (L.C. #2010CF561)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

David Warthman appeals two judgments sentencing him to prison following the revocation of his probation on two misdemeanor counts of fourth-degree sexual assault and two felony counts of false imprisonment. Assistant State Public Defender Tristan Breedlove has filed a no-merit report seeking to withdraw as appellate counsel, and has since been succeeded by Attorney Suzanne Hagopian. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***,

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

386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the circuit court's exercise of its sentencing discretion and the lack of any new sentencing factors. Warthman was sent a copy of the report, and has filed a response complaining about the unfairness of several of the conditions of his probation and how he feels the sexual assault treatment facilitator and his probation officer have misinterpreted and/or mischaracterized his actions—which, he contends, in turn led the circuit court to sentence him based on inaccurate information. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

We first note that an appeal from a sentence following revocation does not bring the probation revocation decision itself before this court. *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). Therefore, any questions regarding the validity or reasonableness of the probation conditions and whether Warthman's conduct violated those conditions are not before us. The only potential issues for appeal are whether the circuit court reasonably exercised its sentencing discretion given the information that was before it—including any findings made during the revocation proceeding; whether any of the other information the court relied on was inaccurate; and whether the sentences imposed conformed to statutory requirements.

The record shows that Warthman was afforded the opportunity to comment on the revocation materials and to address the circuit court prior to sentencing both personally and by counsel. The court then 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.

The court first observed that false imprisonment and fourth-degree sexual assault are both serious crimes. With respect to Warthman's character and rehabilitative needs, the court gave Warthman credit for having held down jobs and having educational ambitions. However, the court had "very serious concerns" about how Warthman viewed women, stating its view that Warthman had "a lot of anger towards women" stemming back to his relationships with his mother and ex-wife, and that Warthman acted out that anger in dangerous ways, including the assault in this case.

The court said it had hoped that Warthman could address his issues through treatment while on probation, but Warthman's treatment providers reported that Warthman had instead been resistant to treatment, making disruptive, argumentative, and victim-blaming comments in group, and exhibiting a "defensive and uncooperative attitude" and "wide variety of distortions" that showed a "total lack of responsibility for his sexual assaultive behavior." The court further noted that Warthman had also demonstrated resistance to other rules of probation by using a computer without a chaperone after explicitly being denied permission, arguing about gym membership, and engaging in a sexual relationship with an Asian woman he had met at a grocery store, much like the Asian victim in this case, without approval from his agent. The court concluded that Warthman posed a risk to other women if he did not get treatment, and that the intensive treatment available in the confined setting of the Wisconsin State Prison System was necessary to protect the public.

Warthman challenges his treatment providers' assessments of his progress, and argues that the circuit court sentenced him on "inaccurate" information by relying on those assessments and by giving its own opinion about his anger toward women. However, it was an indisputable fact that Warthman had been terminated from his sexual treatment program. The circuit court was certainly entitled to consider the reasons given by the treatment providers for the termination, and the court was plainly permitted to draw inferences about Warthman's character based on the information before it.

The court sentenced Warthman to concurrent terms of two years of initial confinement and two years of extended supervision on each of the false imprisonment counts, and nine months on each of the sexual assault counts to be concurrent to each other but consecutive to the false imprisonment sentences. The court also converted previously imposed costs into a civil judgment, found that Warthman was not eligible for the Challenge Incarceration or Earned Release Programs, and awarded 201 days of sentence credit as stipulated by the parties.

The sentences imposed were all within the applicable penalty ranges. *See* WIS. STAT. §§ 940.30 (classifying false imprisonment as a Class H felony); 939.50(3)(h) (providing maximum imprisonment term of 6 years for Class H felonies); 940.225(3m) (classifying fourth-degree sexual assault as a Class A misdemeanor); 939.51(3)(a) (providing maximum imprisonment term of nine months for Class A misdemeanors); and 973.01 (explaining bifurcated sentence structure) (all 2009-10 Stats.). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense[s] 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, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments. *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.

Accordingly,

IT IS ORDERED that the judgments sentencing Warthman after revocation are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Assistant State Public Defender Suzanne Hagopian is relieved of any further representation of David Warthman in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane Fremgen
Clerk of Court of Appeals