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**DISTRICT III**

March 31, 2015

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

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2014AP674-CRNM State v. Terrance R. McMurtry (L. C. #2011CF614)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Terrance McMurtry has filed a no-merit report concluding there is no basis for appealing a judgment of conviction after revocation of probation. McMurtry has 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 be raised on appeal, and we summarily affirm.

On May 24, 2011, McMurtry was arrested following a traffic stop for operating while intoxicated (OWI) and operating after revocation. McMurtry's blood alcohol concentration at

the time was .321%. The complaint alleged McMurtry had previously been convicted of OWI on November 10, 1998; November 12, 2002; and August 25, 2009.

McMurtry pled no contest to OWI, fourth offense within five years. The circuit court withheld sentence, placed McMurtry on probation for two years, and ordered him to serve seven months in jail as a condition. We summarily affirmed the conviction.

McMurtry's probation was revoked.[1] The revocation summary indicates McMurtry was arrested following an altercation at his residence. McMurtry violated the conditions of his probation by consuming alcohol (a breath test administered at the jail registered .254%); engaging in violent and aggressive behavior toward an elderly man resulting in three broken ribs, and a threat to kill him with a butcher knife; and pushing and slapping his girlfriend.[2] The revocation summary further indicated that in addition to his prior OWI convictions, McMurtry had previously been convicted of battery in 1990 and manufacture or delivery of cocaine in 1994 and 2002.

The circuit court's sentence after revocation of probation consisted of two years' initial confinement and three years' extended supervision.

[1] The circuit court placed McMurtry on probation in November 2011. He served a jail term as a condition of his probation until March 5, 2012. The revocation summary indicates McMurtry was placed in custody for probation holds due to consumption of alcohol in June, July and October 2012.

[2] McMurtry admitted consuming alcohol but denied the other allegations.

Because this appeal arises from a judgment after revocation of probation, McMurtry is barred from raising issues in this appeal that relate to the underlying conviction. *See* ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). Further, revocation is independent from the underlying criminal action. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978). This court's review is therefore limited to whether the court properly exercised its sentencing discretion.

The record discloses no arguable basis for challenging the sentencing court's discretion. The court considered the proper sentencing factors, including McMurtry's character, the seriousness of the offenses and the need to protect the public. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The circuit court emphasized McMurtry's dismal history of alcohol consumption and other criminality. Indeed, the court noted that while on probation, McMurtry arrived at the Green Bay Municipal Court intoxicated on June 13, 2012. On July 27, 2012, he also tested positive for alcohol, and from August 6, 2012 to October 31, 2012, he tested positive for alcohol three different times. The court further noted that on the day of his arrest, which led to the revocation, McMurtry admitted to drinking beer and numerous double shots of gin. The court also considered the "horribly dangerous" situation involving McMurtry's OWI fourth offense, driving with a BAC of .321%.

McMurtry argues "people out there have done more worst things than drinking and disorderly conduct [and] never got this much time." McMurtry was facing six years, consisting of three years' initial confinement and three years' extended supervision. WIS. STAT.

§§ 346.65(2)(am)4m.; 973.01(2)(b)8.; 973.01(2)(d)5.[3] The court's sentence of two years' initial confinement and three years' extended supervision was allowable by law and not unduly harsh or so excessive as to shock the public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185**.**

Our independent review of the record discloses no other issues of arguable merit. Therefore,

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

IT IS FURTHER ORDERED that attorney Steven Phillips is relieved of further representing McMurtry in this matter.

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

[3] References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.