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DISTRICT II

May 6, 2015

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

2014AP2872-CRNM State of Wisconsin v. Bruno C. Moelter (L.C. #2000CF200)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Bruno C. Moelter appeals from a judgment sentencing him after revocation of his probation. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967); Moelter has filed a response. Upon consideration of the report, the response, and our independent review of the record as required by ***Anders*** and RULE 809.32, we conclude that there is no arguable merit to any issue that could be

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

raised on appeal and that this appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgment, accept the no-merit report, and relieve Attorney Steven D. Phillips of further representing Moelter in this matter.

In 2000, Moelter pled guilty to three consolidated operating while intoxicated (OWI) cases, bringing his OWI offenses to eight. He served a ten-year bifurcated prison sentence in one case, followed by consecutive five-year probation terms in the other two. He was released from prison on January 31, 2006, discharged from his extended supervision on January 26, 2011, and immediately began serving his consecutive terms of probation.

On February 9, 2013, the truck Moelter was driving struck a utility pole. The responding police officer observed that Moelter had "very bloodshot, glassy eyes," spoke very slowly, was difficult to understand, "was not walking or standing straight and was swaying and moving extremely slow," and was "having a hard time staying awake." A witness following Moelter's vehicle told the officer that Moelter was driving erratically before striking the pole. Moelter denied that he had been drinking or taking any medications. After performing poorly on field sobriety tests, he was arrested and transported to a hospital for a blood draw. There, Moelter's wife informed the arresting officer that both she and Moelter use Fentanyl patches for pain and that eight of the ten patches from a prescription she had filled three days earlier were missing.

Moelter gave a statement to his probation officer, who transcribed what Moelter told her and he signed it. According to the statement, Moelter said he was upset over the death of his best friend a week earlier, drank some Jack Daniels, ate a half of one his wife's Fentanyl patches, drove to the store for cigarettes, and collided with the pole on the way home. The probation officer alleged three violations of his supervision: driving while intoxicated, consuming alcohol,

and driving under the influence of an illegal narcotic. The State charged him with OWI and two counts of operating with a detectable amount of a restricted controlled substance.

No blood test evidence was submitted at Moelter's revocation hearing, but the probation officer conceded that a lab analyst had informed her that neither alcohol nor Fentanyl had been detected. The Division of Hearings and Appeals nonetheless revoked his probation due to Moelter's written admission to having consumed both. The State dismissed the three criminal charges. The circuit court denied Moelter's petition for writ of certiorari challenging the probation revocation.

At sentencing, the prosecutor argued that Moelter admitted consuming alcohol and Fentanyl, that alcohol in the blood sample possibly dissipated because the sample was drawn at least two hours after the accident, that Fentanyl could have been present at a concentration below the Crime Lab equipment's ability to detect it, and that Moelter's long OWI history included three offenses within a five-month period and, in the offense that sent him to prison, he drove drunk with his young son in the car, collided with a tree, and fled the scene.

Moelter claimed the probation agent misrepresented his statements. He said she asked what he would have drunk if he had drunk something and how he would have taken Fentanyl if he had done so, that he did not have his glasses and could not read what she wrote, and simply signed the statement because she told him to. He argued the lab results proved he had ingested no alcohol or Fentanyl, and blamed his impaired condition at the time of arrest on having had virtually no sleep for two to four days due to stress from three recent funerals. The court imposed a sentence of two and one-half years' initial confinement and two and one-half years' extended supervision. This no-merit appeal followed.

The report correctly states that "[w]hen probation is revoked, there can be no challenge to the underlying conviction; appellate review is limited to the sentencing after revocation." ***State v. Bush***, 2004 WI App 193, ¶13, 276 Wis. 2d 806, 688 N.W.2d 752. The report thus properly examines whether the trial court erroneously exercised its discretion in sentencing Moelter after his probation was revoked. We agree that it did not.

Sentencing is left to the discretion of the circuit court and appellate review is limited to determining if the court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A proper exercise of discretion requires a sentencing court to provide on the record a rational and explainable basis for the sentence imposed and to identify its sentencing objectives, the facts relevant to those objectives, and why the sentence advances those objectives. ***Id.***, ¶¶38-39, 40-42. We review sentencing after revocation under this same standard. ***State v. Reynolds***, 2002 WI App 15, ¶8, 249 Wis. 2d 798, 643 N.W.2d 165 (2001). When a proper exercise of discretion has been demonstrated, this court has a strong policy against interference with that discretion and we presume the sentencing court acted reasonably. ***Gallion***, 270 Wis. 2d 535, ¶18.

The court considered the gravity of Moelter's offense, his rehabilitative needs, the need to safeguard the public, the prosecutor's, defense counsel's, and the probation officer's comments, his efforts at sobriety, his claim of noningestion, and the lab's inability to detect Fentanyl below a certain concentration. Moelter faced three and three-quarter years' confinement but got two and one-half. The sentence was not "so excessive and unusual and so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). As it was within the limits of an

acceptable sentence, we cannot say it is unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

Moelter's response asserts that the revocation was based on hearsay and a "falsified statement concocted by [his] parole agent," who "took total advantage of the fact that [he] did not have [his] glasses to see what she wrote," and that the sentencing court ignored the exonerating blood test results, resulting in a miscarriage of justice.

Moelter may not challenge the validity of the probation revocation decision here. *See* ***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). Rather than reviewing the revocation or the facts underlying it, we are reviewing only the sentence imposed after revocation. We have concluded that it represents a proper exercise of discretion. Our review of the record discloses no other potential issues for appeal. Therefore,

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 Steven D. Phillips is relieved of further representing Moelter in this matter.

Diane M. Fremgen
Clerk of Court of Appeals