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

November 3, 2015

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
215 South Hamilton, Br.15, Rm. 7107
Madison, WI 53703

Kristin K. Shimabuku
Asst. District Attorney
215 South Hamilton, Rm. 3000
Madison, WI 53703

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

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

Brandon Kuhl
Kuhl Law, LLC
P. O. Box 5267
Madison, WI 53705-0267

Mark A. Hall
Dwight House
4117 Dwight Drive
Madison, WI 53704

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

2014AP437-CRNM State of Wisconsin v. Mark A. Hall (L.C. #2008CF2084)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Mark Hall appeals a judgment sentencing him to prison following the revocation of his probation on a fifth charge of operating a motor vehicle under the influence of an intoxicant (OWI-5th). Attorney Brandon Kuhl has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***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 whether Hall

[1] All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

was entitled to any additional sentence credit. Hall was sent a copy of the report, and has filed a response explaining why he believes additional sentence credit is warranted. 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 an underlying conviction before this court. *See* ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Nor can the appellant challenge the validity of any probation revocation decision in this proceeding. *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). The only potential issue for appeal is the circuit court's imposition of sentence following revocation.

Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Hall was afforded the opportunity to comment on the revocation materials and to address the court prior to sentencing. The circuit court 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. Regarding the severity of the offense, the court noted that it was a fifth offense and that Hall's BAC was very high at 0.27. With respect to Hall's character and rehabilitative needs, the court said it understood addiction, but that did not excuse getting into a vehicle while intoxicated. The court concluded that a

prison term was necessary to protect the public, because the only way treatment might have a chance to work would be in a confined setting.

The court then sentenced Hall to two years of initial incarceration and two years of extended supervision. It also rolled over the previously imposed costs, imposed standard conditions of supervision, found that Hall was eligible for the Substance Abuse Program but not for the Challenge Incarceration Program, and awarded 447 days of sentence credit based upon the agreement of the parties.

The sentence imposed was within the applicable penalty range, and constituted two-thirds of the maximum exposure Hall faced. *See* WIS. STAT. §§ 346.65(2)(am)5. (classifying OWI-5th as a Class H felony); 939.50(3)(h) (providing maximum imprisonment term of six years for Class H felonies); and 973.01 (explaining bifurcated sentence structure). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence imposed here was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances"—particularly after Hall violated his probation by committing another OWI offense. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Hall contends that he is entitled to an additional thirty-six days of sentence credit for time he spent on a probation hold on a bailjumping case for which he was serving probation at the same time he was serving his probation for this case. *See generally* WIS. STAT. § 973.155(1)(a) (an "offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which [the] sentence was imposed"). Hall

relies primarily upon the rule that sentence credit which is due on one sentence should be applied to all other concurrent sentences contemporaneously imposed for the same course of conduct. *See* ***State v. Ward***, 153 Wis. 2d 743, 746, 452 N.W.2d 158 (Ct. App. 1989). Hall believes that the concurrent-sentence rule applies here because he was placed on probation for the bailjumping case at the same time he was placed on probation for this OWI-5th case. However, a term of probation is not a sentence. Since Hall was revoked and served his entire jail sentence on the bailjumping case before he was subsequently revoked and sentenced to prison on this OWI case, his sentences were neither concurrent nor contemporaneously imposed.

Alternatively, Hall cites ***State v. Beets***, 124 Wis. 2d 372, 385, 369 N.W.2d 382 (1985), for the proposition that it is possible for a person to be in custody related to two different courses of conduct at the same time—such as while simultaneously awaiting trial on one charge and probation revocation on another. While we agree with that statement of the law, we do not agree that is what happened here. The department did not place Hall on probation holds for both the bailjumping case and this OWI case at the same time. The thirty-six days at issue were spent on Hall's probation hold in the bail jumping case, and were properly credited only to his sentence on that case.

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

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

IT IS FURTHER ORDERED that Attorney Brandon Kuhl is relieved of any further representation of Mark Hall in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane Fremgen
Clerk of Court of Appeals