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

2014AP958-CRNM State of Wisconsin v. Cody O. Bruner (L.C. # 2005CF121)

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

Cody Bruner appeals companion judgments sentencing him to four years in prison with five years of extended supervision on a felony arson conviction and concurrent terms in jail on five related misdemeanor convictions following the revocation of his probation and a deferred prosecution agreement. Attorney Daniel R. Goggin II has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);¹ *Anders v. California*,

¹ All references to the Wisconsin Statutes are to the 2013-14 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). Counsel informs us that Bruner has complaints about his pleas, the assistance of counsel, and the sentences, and addresses each of those issues. Bruner was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, 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. *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Nor can an 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 this appeal is the circuit court's imposition of sentence following revocation, and the only potential challenge to counsel's performance would be as it relates to the post-revocation sentencing.

Our review of a sentence determination begins "with the presumption that the trial 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 Bruner was afforded the opportunity to review and comment on the revocation materials and the PSI report and to address the court prior to sentencing, both personally and by counsel. The State recommended that the court adopt "a similar sentence to" the PSI's recommendation of four to five years of initial incarceration with

five to six years of extended supervision, while the defense asked the court to impose and stay a sentence of four years of initial incarceration with four years of extended supervision.

The trial 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 the impact on the arson victims was substantial because they were uninsured. With respect to the defendant's character and rehabilitative needs, the court acknowledged that Bruner was young at the time of the offense, did not have a particularly significant criminal history, and was dealing with some mental health and substance abuse issues. However, the court felt the positive aspects of Bruner's character were outweighed by the negative ones, including his inability to maintain employment due to probation violations and his failure to make any good faith effort toward restitution. The court noted that Bruner's performance during seven years of probation showed that there was little hope for future rehabilitative efforts and concluded that a significant prison term was necessary to protect the public.

The court then sentenced Bruner to four years of initial incarceration and five years of extended supervision on the felony arson count, with concurrent sentences ranging from sixty days to six months on each of the misdemeanor counts. It also ordered that the previously ordered restitution be carried over and collectable through prison wages or garnishment, imposed standard costs and conditions of supervision but did not impose a DNA surcharge and did not impose any fine so that any available funds could go to restitution, found Bruner eligible for the Challenge Incarceration and Substance Abuse programs, and awarded 162 days of sentence credit.

The controlling sentence imposed on the felony arson count was within the applicable penalty range, and constituted less than a quarter of the maximum exposure Brunker faced. *See* WIS. STAT. §§ 943.02(1)(a) (classifying arson as a Class C felony); 939.50(3)(c) (providing maximum imprisonment term of 40 years for Class C felonies). 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.” *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). That is particularly true when Brunker was first placed on probation.

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.

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

IT IS FURTHER ORDERED that Attorney Daniel R. Goggin II is relieved of any further representation of Cody Brunker in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane Fremgen
Clerk of Court of Appeals