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December 16, 2015

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

2015AP48-CRNM State of Wisconsin v. Dale E. Hertzfeld (L.C. # 1997CF36)

Before Lundsten, Sherman and Blanchard, JJ.

Attorney Suzanne Hagopian has filed a no-merit report seeking to withdraw as appellate counsel for appellant Dale Hertzfeld. *See* WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to the sentence imposed by the circuit court following revocation or to the court's order denying sentence modification. Hertzfeld was sent a copy of the report, and

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

has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

In 1999, Hertzfeld was convicted of three counts of first-degree sexual assault of a child. Hertzfeld was sentenced to prison on two of the counts, and the court withheld sentence and imposed a consecutive period of probation on the third count. In 2012, the Department of Corrections revoked Hertzfeld's probation. The court sentenced Hertzfeld to an indeterminate term of fifteen years in prison. Hertzfeld moved for sentence modification based on a new factor, and the court denied the motion on grounds that, in the court's exercise of discretion, the court determined that the alleged new factor would not justify sentence modification.

The appeal in this case from the sentence following revocation does not bring the underlying conviction before us. *See State v. Drake*, 184 Wis. 2d 396, 398-99, 515 N.W.2d 923 (Ct. App. 1994). Additionally, the validity of the probation revocation itself is not before us in this appeal. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation independent from 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 petition for certiorari in circuit court). The only potential appellate issues at this point in the proceedings relate to sentencing following revocation.

The no-merit report addresses whether there would be arguable merit to a challenge to Hertzfeld's sentence. 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 complained of.”² *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, sentencing after revocation was contested, and the circuit court held a full-day sentencing hearing with testimony from three witnesses and, additionally, Hertzfeld. The State recommended twenty-five years of prison. The defense argued for two years of prison. The court imposed an indeterminate prison term of fifteen years.

The court explained that it considered the standard sentencing factors, including the seriousness of the offense, Hertzfeld’s character, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court incorporated its comments from the original sentencing hearing in 1999, noting in particular that the court continued to give the greatest weight to the seriousness of the offense. The sentence was within the applicable penalty range and, given the facts of this case, was not so excessive or unduly harsh as to shock the conscience. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Hertzfeld 723 days of sentence credit, on counsel’s stipulation. We agree with counsel that a challenge to the sentence imposed after revocation by the circuit court would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court’s order denying sentence modification. Hertzfeld moved to modify his sentence based on the new factor of a recent psychological evaluation indicating that Hertzfeld is low risk to reoffend sexually. Hertzfeld argued that the evidence that he was low risk to reoffend contradicted the evidence at the sentencing hearing that Hertzfeld was high risk to reoffend based

² A circuit court’s duty at sentencing after revocation is the same as its duty at an original sentencing. *See State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289.

on his lack of participation in group sex offender treatment. Hertzfeld pointed out that the State had argued that Hertzfeld was high risk to reoffend, and that, in imposing sentence, the circuit court cited the treatment provider's opinion that Hertzfeld was high risk to reoffend.

The circuit court denied the motion, explaining that the alleged new factor would not justify a modification of the sentence it imposed. *See State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. The court explained that, at the sentencing after revocation, the court gave the greatest weight to the seriousness of the offense, and that factor was not meaningfully impacted by the recent evaluation of Hertzfeld's risk to reoffend. The court also explained that it had considered Hertzfeld's character, as reflected by his continued justification for the sexual assaults, which also remained unchanged in light of the alleged new factor. The court explained that it had also considered the need to protect the public and that, even in light of the recent evaluation indicating Hertzfeld is low risk to reoffend and that the risk may be managed in the community, the evidence at sentencing nonetheless indicated that Hertzfeld is totally resistant to supervision in the community. The court also explained that the recent psychological evaluation indicated that the risk assessment instruments utilized for the assessment have limitations, including that the risk instruments "should be considered to underestimate risk"; that Hertzfeld is combative, unmotivated, dishonest, and manipulative; and that Hertzfeld continued to deny the offense, asserting in the evaluation that he falsely admitted the offense while in treatment. The court determined that, for those reasons, the alleged new factor did not justify sentence modification. We agree with counsel's assessment that a challenge to the circuit court's exercise of discretion would lack arguable merit.

Hertzfeld has filed a no-merit response disputing the evidence presented at the sentencing hearing and arguing that the testifying witnesses lied. However, while Hertzfeld contends that he

has supporting evidence, he does not explain what that evidence is or whether it differs from the evidence he presented at the sentencing hearing. In any event, the disputed sentencing issues were either addressed by Hertzfeld himself during his testimony and allocution at the sentencing hearing or by defense counsel during his sentencing recommendation, and the circuit court made credibility determinations in determining the sentence to impose. We discern no basis for a non-frivolous argument that the circuit court erred by resolving the disputed issues at sentencing.

Hertzfeld also argues that the circuit court erred by denying his motion for sentence modification. Hertzfeld contends that he presented a new factor justifying sentence modification and also that the psychological evaluation misrepresented some of his statements. However, Hertzfeld does not explain the basis for an argument that the court erroneously exercised its discretion by determining that the alleged new factor would not justify sentence modification, and we discern no non-frivolous basis for that argument.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction or the order denying sentence modification. 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 of conviction and the order denying sentence modification are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Suzanne Hagopian is relieved of any further representation of Dale Hertzfeld in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals