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DISTRICT II

February 10, 2016

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

2015AP236-CRNM State of Wisconsin v. Mark A. Friesema (L.C. #2007CF277)

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

Mark Friesema appeals from a judgment sentencing him after revocation of his probation for homicide by intoxicated use of a vehicle contrary to WIS. STAT. § 940.09(1)(a) (2007-08).¹ Friesema's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Friesema received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and

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

an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses whether the circuit court misused its discretion in imposing a thirteen-year sentence. We agree with appellate counsel that this issue does not have arguable merit for appeal.²

The original sentencing court withheld sentence and imposed probation. There would be no arguable merit to a challenge to Friesema's sentence after revocation of his probation. The circuit court's duty at sentencing after probation revocation is the same as its duty at the original sentencing. *State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289. The sentencing considerations include "the gravity and nature of the offense, including the effect on the victim," the defendant's character and rehabilitative needs, and the need to protect the public. *State v. Owens*, 2006 WI App 75, ¶8, 291 Wis. 2d 229, 713 N.W.2d 187. The weight to be given the various sentencing factors is within the circuit court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). The discretion of the sentencing judge must be exercised on a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted).

² Any challenge to the underlying conviction for homicide by intoxicated use of a vehicle is outside the scope of this appeal from sentencing after revocation. *State ex rel. Marth v. Smith*, 224 Wis. 2d 578, 582 n.5, 592 N.W.2d 307 (Ct. App. 1999). "[R]eview of probation revocation is by way of certiorari review to the court of conviction." *Id.* at 583.

The circuit court properly exercised its discretion at sentencing. The circuit court viewed Friesema's offense as very serious. The court noted Friesema's failure on probation, his alcohol and other drug abuse issues, the need to protect the public from Friesema's conduct, and Friesema's need for rehabilitation. The sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The circuit court properly determined that Friesema was not eligible for either the Earned Release Program or the Challenge Incarceration Program. Sec. 973.01(3g) and (3m). There would be no arguable merit to a challenge to the sentence.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment and relieve Attorney Sara Kelton Brelie of further representation of Mark Friesema in this matter.

Upon the foregoing reasons,

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 Sara Kelton Brelie is relieved of further representation of Mark Friesema in this matter.

Diane M. Fremgen
Clerk of Court of Appeals