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April 6, 2016

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

2014AP1946-CRNM State of Wisconsin v. Paul William Herdenberg
(L.C. # 2005CF179)

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

Paul William Herdenberg appeals from a judgment imposing sentence after the revocation of his probation. Herdenberg's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Herdenberg has filed a response to the no-merit report. Upon consideration of these submissions and an independent review of the record, we noted a minor error on the March 10, 2014

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

judgment underlying this appeal. An earlier judgment entered on February 12, 2013, reflects that Herdenberg was convicted of second-degree sexual assault of a child on February 11, 2013,[2] not March 7, 2014. This appears to be a clerical error and we order that upon remittitur, the judgment imposing sentence after revocation shall be modified to reflect February 11, 2013, as the date of conviction. We conclude that the judgment, as modified, may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2005, pursuant to a plea agreement, Herdenberg pled no contest to fourth-degree sexual assault, a misdemeanor, and second-degree sexual assault of a child, a felony. On the felony, the parties entered into a deferred entry of judgment agreement which provided that after two years, upon Herdenberg's compliance with the agreement's terms, the felony would be dismissed with prejudice. As recommended by the parties, the circuit court entered judgment on the misdemeanor, withheld sentence in favor of probation, and deferred entry of judgment on the felony. Herdenberg pursued a direct appeal pursuant to the no-merit procedure in WIS. STAT. RULE 809.32. After conducting an independent review of the record, we concluded there was no arguable merit to the appeal and affirmed the misdemeanor judgment of conviction. ***State v. Herdenberg***, No. 2006AP954-CRNM, unpublished slip op. and order (WI App Oct. 3, 2006). During the pendency of his no-merit appeal, Herdenberg absconded to Minnesota. Herdenberg's probation was revoked and the circuit court entered an order terminating the felony deferred judgment agreement. Herdenberg filed a motion to vacate the order terminating the deferred

[2] Though the electronic circuit court docket entries reflect that Herdenberg's deferred entry of judgment agreement was revoked on December 14, 2012, the record, including the February 12, 2013 judgment, supports February 11, 2013, as the date of conviction.

judgment agreement or, in the alternative, to withdraw his plea, asserting that a conviction on the felony would constitute double jeopardy. Ultimately, the parties reached a resolution wherein Herdenberg received a sixth-month jail sentence on the revoked misdemeanor and entered into a second deferred judgment agreement on the felony. Before the deferred judgment agreement expired, Herdenberg was convicted of burglary. The parties agreed to recommend that the circuit court enter judgment on the felony but withhold sentence in favor of a seven-year term of probation. At a February 11, 2013 sentencing hearing on the felony, per the joint agreement, the circuit court withheld sentence and ordered seven years of probation. Herdenberg's probation was soon revoked and on March 7, 2014, the circuit court imposed a sixteen-year bifurcated sentence, with nine years of initial confinement followed by seven years of extended supervision.

Despite this complicated procedural history, as the no-merit report correctly explains, this WIS. STAT. RULE 809.32 appeal brings before the court only the sentence imposed after revocation. *See* ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. Herdenberg's underlying conviction is not before us. ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996); ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Similarly, he cannot challenge the probation revocation decision in this appeal. ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978). The only possible issue for appeal is whether the sentence imposed after revocation was an erroneous exercise of discretion.

We agree with appellate counsel's analysis and conclusion that there is no arguably meritorious challenge to the sentence imposed. In fashioning its sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. As to the gravity of the offense, the court determined that while this was "in the scheme of sexual assaults

… on the less serious side," the victim was only thirteen years old, making this a "serious felony." In terms of Herdenberg's character, the court acknowledged that he was not indifferent to his offense, stating "You actually care[,]" but considered his failure to comply with the terms of two deferred judgment agreements and probation. The court determined that prison was necessary to protect the public, as a general deterrent, and to punish Herdenberg given his failure to comply with the basic terms of supervision, complete sex offender treatment, or refrain from committing new crimes. The court found that "the low end" of the probation agent's and State's recommendation was appropriate given that Herdenberg had accepted responsibility and made some "positive" accomplishments. The sentence was based on consideration of appropriate factors and sentencing objectives. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-41, 270 Wis. 2d 535, 678 N.W.2d 197. Further, we cannot conclude that the sixteen-year sentence when measured against the maximum of forty years is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his response, Herdenberg argues that his conviction for second-degree sexual assault of a child was a double jeopardy/multiplicity violation owing to the fact that he was previously convicted of fourth-degree sexual assault. We agree with appellate counsel's analysis and conclusion that this issue is not within the scope of this appeal from a sentence following the revocation of probation. *See* ***Drake***, 184 Wis. 2d at 399; ***Tobey***, 200 Wis. 2d at 784.[3] For this

[3] As part of the no-merit report, appellate counsel addresses the merits of this issue and provides several legal reasons why Herdenberg's double jeopardy claim is without arguable merit. Though appellate counsel's analysis appears sound, we decline to address the merits because they are beyond the scope of this appeal from a sentence imposed after revocation. We will not circumvent the proper procedures for raising Herdenberg's challenge to the original judgment entered on February 12, 2013, from which no direct appeal was taken. We observe that on February 11, 2013, Herdenberg signed the CR-233 form entitled "Notice of Right to Seek Postconviction Relief" and indicated he did not intend to seek postconviction relief.

same reason, we reject Herdenberg's claim that the attorney representing him for purposes of sentencing after revocation was ineffective for failing to raise the double jeopardy issue. Herdenberg also suggests that appellate counsel had a duty "to get all of the transcripts of the record to make a more informed decision." We disagree. Herdenberg fails to identify which transcripts should have been prepared and made part of the appellate record. Regardless, given the limited scope of this appeal, the only transcripts necessary for its prosecution are the February 11, 2013 and March 7, 2014 sentencing transcripts, and, arguably, the October 26, 2005 transcript, all of which are included in the record.

Our review of the record discloses no other potential issues for appeal. Therefore,

IT IS ORDERED that upon remittitur, the judgment of conviction shall be modified as described herein.

IT IS FURTHER ORDERED that the judgment, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Frederick A. Bechtold is relieved from further representing Paul William Herdenberg in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals