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May 11, 2016

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

2015AP1833-CRNM State of Wisconsin v. Duane B. Peterson (L.C. # 2012CF62)

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

Attorney Christina Starner has filed a no-merit report seeking to withdraw as appellate counsel for Duane Peterson. *See* WIS. STAT. RULE 809.32 (2013-14);[1] ***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 the order denying, in part, Peterson's motion for postconviction relief. Peterson 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. Attorney Starner has filed a supplemental no-merit report. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. We affirm.

In September 2012, Peterson was convicted of false imprisonment and criminal damage to property. The circuit court ordered Peterson to serve three years of probation, sentence withheld, with six months of conditional jail time. In June 2014, the Department of Corrections (DOC) revoked Peterson's probation. The court sentenced Peterson to three years of initial confinement and three years of extended supervision, with 280 days of sentence credit.

In February 2015, Peterson filed a postconviction motion to modify restitution to reduce the total restitution award by $10; to clarify that State Farm Insurance Company should be the recipient of $4,939.80 of the restitution award, and the victim should be the recipient of the remaining $1,000 in restitution to cover deductibles that the victim actually paid; and to reflect the circuit court's oral pronouncement that Peterson's liability for restitution was joint and several with his co-actor. In March 2015, Peterson filed a supplemental postconviction motion arguing that the victim's mother, rather than the victim, had paid the insurance deductibles and should be the recipient of the $1,000 of restitution for out-of-pocket expenses, and that justice did not require that Peterson pay restitution to State Farm. Following a motion hearing, the circuit court entered an order reducing the restitution award by $10; clarifying that $500 of the restitution award was payable to the victim, $500 to the victim's mother, and the remaining amount to State Farm; and finding that justice required the restitution payment to the insurance company. In April 2015, the court entered an amended judgment of conviction reflecting the

modifications in its restitution order and indicating that Peterson's liability for the restitution was joint and several with his co-actor.

In May 2015, while still represented by appointed counsel, Peterson filed a pro se motion for sentence modification based on the asserted new factor that the State had dismissed the charges underlying Peterson's revocation. The circuit court denied the pro se motion, explaining that the court considered the factual allegations that supported the revocation but that the court was aware that the charges could be dismissed.

The appeal in this case from the sentence following revocation and orders denying postconviction relief does not bring the underlying conviction before us. *See* ***State v. Drake***, 184 Wis. 2d 396, 399, 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 and the circuit court's decisions as to the postconviction motions.

First, we agree with counsel's assessment that a challenge to the sentence imposed by the circuit court would lack arguable merit. 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 complained of."[2] ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, at sentencing after revocation, the circuit court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offenses, Peterson'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 sentence was within the statutory maximums and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is 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" (quoted source omitted)). We discern no erroneous exercise of the court's sentencing discretion.

We also agree with counsel's assessment that a challenge to the circuit court's order denying, in part, Peterson's postconviction motions would lack arguable merit. The circuit court adequately explained its exercise of discretion in determining that justice required Peterson pay restitution to State Farm. *See* WIS. STAT. § 973.20(5)(d). We discern no arguable merit to further proceedings as to this issue.

Next, we address the issues raised in Peterson's no-merit response. Peterson argues first that he is entitled to withdraw his plea. However, as explained above, this appeal is from

[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.

sentencing after revocation, and thus the underlying convictions are not before us. *See* ***Drake***, 184 Wis. 2d at 399.

Peterson also argues that the sentencing judge was biased. We discern no arguable merit to this issue. Neither the record nor Peterson's no-merit response reveal any facts that would support a non-frivolous claim of judicial bias.

Peterson also questions whether his bond money can be applied to the restitution he was ordered to pay. Peterson contends that he posted a $2,000 bond, and that the bond was forfeited for missing a court appearance in June 2012 because his trial attorney misinformed him as to the hearing date. Peterson asserts that he appeared in court the next day, but that his attorney failed to appear and so he left to try to call her. However, our review of the record indicates that Peterson's counsel was present at the scheduled June 11, 2012 hearing. The transcript of the hearing indicates that Peterson failed to appear at the scheduled time, but then appeared, with counsel, later in the afternoon. The circuit court increased Peterson's bond from $2,000 to $5,000, noting that Peterson had been present in court when the court set the date and time for the June 11 hearing. The court instructed Peterson to have a seat in the courtroom so that officers could take Peterson into custody pending his payment of the balance of the $5,000 bond, and Peterson left the courtroom. The court took a recess and then went back on the record to state that Peterson had indicated that he was going to make a phone call regarding posting bail, but never returned. Peterson's $2,000 bond was then forfeited on June 22, 2012, because Peterson had left the courtroom on June 11, 2012, to make a phone call and had never returned. Because Peterson's bond was forfeited, it cannot be applied to restitution. *See* ***State v. Cetnarowski***, 166 Wis. 2d 700, 711, 480 N.W.2d 790 (Ct. App. 1992) ("A defendant's forfeiture of a cash bond is unrelated to his or her liability on the underlying charge.... The Wisconsin

Legislature has not demonstrated an intent that bail bond deposits be passed on to crime victims under any circumstances." (quoted source omitted)). We discern no arguable merit to further proceedings on this issue.

Next, Peterson argues that the victim fraudulently claimed a $500 medical insurance deductible. Peterson asserts that the victim has no health insurance. However, Peterson asserted in his postconviction motion that the victim was insured and paid a $500 medical deductible, and attached the supporting victim impact statement. The victim testified to the deductible at the postconviction motion hearing. Nothing in the record or Peterson's no-merit response would support a non-frivolous challenge to the circuit court's award of $500 in restitution to the victim.

Finally, Peterson contends that his trial counsel failed to present the following information to the sentencing court: the victim is a drug addict and had been confronted by Peterson and others in recovery; the victim and Peterson's co-actor had recently been romantically involved, and after their relationship ended the victim was stalking Peterson's co-actor, who came to Peterson's home for safety; the victim had recently threatened Peterson and Peterson felt his life was threatened when the victim came to Peterson's home on the day of the incident; and the victim had worked with law enforcement as a confidential informant. It appears, then, that Peterson is asserting that his trial counsel was ineffective by failing to present mitigating information to the sentencing court. *See* ***State v. Harbor***, 2011 WI 28, ¶¶67-76, 333 Wis. 2d 53, 797 N.W.2d 828 (counsel is ineffective if counsel's performance was deficient and the deficiency was prejudicial; under certain circumstances, counsel may be ineffective at sentencing by failing to present mitigating factors). However, our review of the original sentencing hearing indicates that the information that Peterson asserts that his counsel should have presented was, in large part, stated on the record. *See* ***State v. Brown***, 2006 WI 131, ¶21,

298 Wis. 2d 37, 725 N.W.2d 262 (when, as here, the same judge presided over the original sentencing and the sentencing after revocation, we treat the second hearing as a continuum of the first). At the original sentencing hearing, defense counsel argued that there was a "toxic relationship" between Peterson, his co-actor, and the victim. Defense counsel informed the court that Peterson had been threatened by the victim and that the victim came to Peterson's home on the day of the incident. Peterson spoke at sentencing and informed the court that he was in recovery, that both the victim and Peterson's co-actor struggled with addiction and had brought their issues to Peterson's home, and that he had been scared and was still scared based on threats that had been made against him. As to specific details that Peterson asserts should have been presented at sentencing but were not, we conclude that a claim of ineffective assistance of counsel for failing to present those details would be wholly frivolous. Because the potentially mitigating factors that Peterson identifies in his no-merit response were, in fact, presented to the sentencing court, we discern no arguable merit to further proceedings as to this issue.

We also agree with counsel's assessment in her supplemental no-merit report that it would be frivolous to argue that Peterson was entitled to sentence modification based on the State dismissing the charges that resulted in Peterson's revocation. The fact that the allegations considered by the sentencing court did not result in a conviction does not amount to a "new factor" because a court may consider uncharged and unproven offenses at sentencing. *See* ***Harbor***, 333 Wis. 2d 53, ¶40 (a "new factor" is a fact highly relevant to the imposition of sentence, but not known to the sentencing court because it was not in existence or because it was unknowingly overlooked by all of the parties); ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 ("A sentencing court may consider uncharged and unproven offenses ....").

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction.[3] 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 orders denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christina Starner is relieved of any further representation of Duane Peterson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] Additionally, to the extent this opinion does not specifically address statements in the no-merit response, we have considered those statements and conclude they do not provide a basis for further non-frivolous proceedings.