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June 6, 2017

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

2016AP1789-CRNM State of Wisconsin v. Justin L. Kummer (L. C. # 2004CF88)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Justin Kummer filed a no-merit report concluding there is no arguable basis to an appeal challenging Kummer's sentence after his probation was revoked. Kummer filed a response raising several concerns. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

In 2005, Kummer pled guilty to one count of second-degree sexual assault of his thirteen-year-old girlfriend, J.R. Kummer was nineteen years old at the time, and said he believed his girlfriend was sixteen or seventeen years old. The circuit court withheld sentence and placed

Kummer on probation for four years, consecutive to a sentence for an unrelated crime. In 2015, Kummer's probation was revoked based on five violations. Kummer admitted that he failed to pay court-ordered obligations and monthly supervision fees, he possessed a cell phone with internet access without his agent's approval, and he had access to a Facebook page under an alias. Kummer denied allegations that he had unsupervised contact with four-year-old M.G.G., and that he had sexual contact with her. However, the Administrative Law Judge (ALJ) found the child credible, and found Kummer guilty of all five violations. Kummer was returned to court for sentencing. The circuit court imposed a sentence of five years' initial confinement and five years' extended supervision on the 2005 charge.

An appeal from a judgment imposing a sentence after revocation is limited to review of the sentence imposed. *State v. Drake*, 184 Wis. 2d 396, 399-400, 515 N.W.2d 923 (Ct. App. 1994). The initial conviction and the revocation proceedings are not subject to this appeal.

The record discloses no arguable basis for challenging the sentencing court's discretion. The court could have imposed a sentence of forty years' imprisonment and a \$100,000 fine. The court appropriately considered the seriousness of the offense, Kummer's character, and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court noted Kummer's impulse-control problem, affecting his risk of reoffending, and that Kummer committed another assault while on probation for this offense. The court considered no improper factors and the ten-year sentence is not arguably so excessive, unusual or disproportionate to the offense as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his response to the no-merit report, Kummer says he has new information consisting of two police reports that he contends would constitute new factors for sentence modification. One of the police reports was initiated by M.G.G.'s father, alleging Kummer slapped M.G.G. The second police report was initiated by M.G.G.'s mother, who reported M.G.G. may have witnessed sexual activities while at M.G.G.'s father's residence. Kummer says he knew of the incidents but only recently discovered the police reports. Kummer contends these reports suggest M.G.G.'s parents may have coached M.G.G. to make a false allegation. We conclude there is no arguable basis for concluding the police reports constitute new factors. Whether the police reports constitute new factors is a question of law. *See State v. Harbor*, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828. Neither of the police reports was highly relevant to the sentence. *See id.*, ¶40. Rather, they relate to the credibility of M.G.G., whose accusation of sexual contact was one of five reasons for the revocation of Kummer's probation. The sentencing court could rely on the ALJ's finding that M.G.G. credibly reported the sexual assault that led to revocation of Kummer's probation. This appeal is not the appropriate forum for challenging the revocation order or for presenting new evidence regarding the revocation.

Kummer notes the State did not charge him with the sexual assault of M.G.G. The sentencing court is allowed to consider a defendant's behavior including uncharged offenses and those that are not proved beyond a reasonable doubt. *State v. Frey*, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436.

Kummer notes that in the present case, no force was used in his sexual assault of J.R., and J.R.'s mother's comments at the initial sentencing hearing suggest she thought J.R. was promiscuous. Sexual intercourse with a thirteen-year-old is a strict liability offense. *See State v. Jadowski*, 2004 WI 68, ¶23, 272 Wis. 2d 418, 680 N.W.2d 810. Absence of force, confusion

regarding the child's age, and the child's consent are not defenses. These circumstances were reasons for the court's imposition of probation. Kummer's violations of the terms of his probation justify the prison sentence imposed after revocation.

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

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that attorney Andrew Hinkel is relieved of his obligation to further represent Kummer in this matter. *See* WIS. STAT. RULE 809.32(3) (2015-16).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3) (2015-16).

Diane M. Fremgen
Clerk of Court of Appeals