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DISTRICT IV

February 19, 2018

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

2016AP1334-CRNM State of Wisconsin v. Brian L. Nickel (L.C. # 2014CF24)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian Nickel appeals a judgment sentencing him to prison following the revocation of his probation on a conviction for child abuse—recklessly causing harm. Attorney Ellen Krahn has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32

(2015-16);¹ *Anders v. California*, 386 U.S. 738, 744 (1967); *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the legality of the sentence and the circuit court's exercise of its sentencing discretion. Nickel was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

We first note that an appeal from a sentence following revocation does not bring an underlying conviction before this court. *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Nor can an appellant challenge the validity of any probation revocation decision in this proceeding. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent from the 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 way of certiorari to the court of conviction). The only potential issue for an appeal is the circuit court's imposition of sentence following revocation.

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.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Nickel was afforded the opportunity to review and comment on the revocation materials and to address the court prior to sentencing, both personally and by

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

counsel. The State recommended eighteen months of initial incarceration and eighteen months of extended supervision, while the defense asked the court for 300 days.

The circuit court considered the standard sentencing factors and explained their application to this case. *See generally State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court observed that Nickel had slammed his son’s head against the wall multiple times while drunk, so that the child no longer felt safe with his father. With respect to the defendant’s character and rehabilitative needs, the court noted that Nickel had a “continuous” criminal history since 2003 involving multiple OWI offenses, and that he had demonstrated an inability to stop drinking. The court concluded that a significant prison term was necessary to protect the public.

The court then sentenced Nickel to eighteen months of initial incarceration and one year of extended supervision, to be served consecutive to an OWI sentence that Nickel was then serving. The court also found Nickel ineligible for the Challenge Incarceration or the Substance Abuse Programs, directed Nickel to provide a DNA sample, and awarded 167 days of sentence credit. The judgment of conviction also imposed a mandatory DNA surcharge in violation of *State v. Williams*, 2017 WI App 46, ¶26, 377 Wis. 2d 247, 900 N.W.2d 310, *pet. for review granted*. However, in response to our inquiry as to whether Nickel wished to pursue this issue, counsel has informed us that the circuit court subsequently vacated the surcharge, and the issue has been resolved.

The components of the bifurcated sentence imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 948.03(3)(b) (classifying child abuse—recklessly causing harm as a

Class I felony); and 973.01(2)(b)9. and (d)6. (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony).

There is a presumption that a sentence “well within the limits of the maximum sentence” is not unduly harsh. *State v. Grindemann*, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983)). The sentence imposed here was not “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.” *Id.*, ¶31 (quoting *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). This is particularly true given Nickel’s criminal history and multiple prior failures on probation.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment. 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 sentencing the defendant after revocation of probation is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ellen Krahn is relieved of any further representation of Brian Nickel in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals