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DISTRICT IV

February 27, 2018

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Austin A. Tripke
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You are hereby notified that the Court has entered the following opinion and order:

2016AP2535-CRNM State of Wisconsin v. Austin A. Tripke (L.C. # 2014CF275)

Before Sherman, J.¹

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).

Austin Tripke appeals a judgment sentencing him to jail following the revocation of his probation on convictions for negligent operation of a motor vehicle off of a highway, resisting an officer, and disorderly conduct. Attorney Patricia Sommer has filed a no-merit report seeking to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

withdraw as appellate counsel. See WIS. STAT. RULE 809.32; *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 validity of the sentences. Tripke 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, I conclude that there are no arguably meritorious appellate issues.

I 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 issues for this appeal would be the circuit court's imposition of sentence following revocation or counsel's performance as it relates to the post-revocation sentencing.

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

The trial 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 noted that the original charges had been felonies before the parties had reached a plea agreement, and that the outcome of Tripke's dangerous driving behavior could have been even worse than it was. With respect to Tripke's character and rehabilitative needs, the court observed that Tripke seemed to have an excuse for everything and took responsibility for nothing. The court concluded that it was necessary to incarcerate Tripke to hold him accountable and to not depreciate the seriousness of the offenses.

The court then sentenced Tripke to consecutive terms of nine months in jail with work release privileges on the negligent driving and obstructing an officer charges, and to a concurrent period of ninety day on the disorderly conduct charge. The court also awarded 140 days of sentence credit, which resulted in the sentence on the disorderly conduct charge being time served.

The sentences imposed did not exceed the maximum penalties authorized by statute. *See* WIS. STAT. §§ 941.01(1) (classifying negligent operation of a motor vehicle as a Class A misdemeanor); 946.41(1) (classifying obstructing an officer as a Class A misdemeanor); 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor); 947.01(1) (classifying disorderly conduct as a Class B misdemeanor); 939.51(3)(b) (providing maximum imprisonment of ninety days for a Class B misdemeanor).

Although the court imposed the maximum allowable sentences, the sentences were 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,” given that the court had first provided Tripke the opportunity of probation, and that two passengers in the vehicle Tripke crashed had suffered injuries, and that the court allowed work release privileges. *See generally State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Upon an independent review of the record, I have found no other arguable basis for reversing the judgment. *See State v. Allen*, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. I 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patricia Sommer is relieved of any further representation of Austin Tripke 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