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May 3, 2018

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

2017AP1984-CRNM	State of Wisconsin v. Terry W. Klemke (L.C. # 2015CF521)
2017AP1985-CRNM	State of Wisconsin v. Terry W. Klemke (L.C. # 2015CF1068)
2017AP1986-CRNM	State of Wisconsin v. Terry W. Klemke (L.C. # 2016CF278)

Before Brennan, P.J., Brash and Dugan, 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).

Terry W. Klemke appeals judgments of conviction entered after the circuit court sentenced him for four crimes following revocation of probation. Appellate counsel, Diane C. Lowe, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Wis.

STAT. RULE 809.32 (2015-16).¹ Klemke did not respond. This court has considered the no-merit report, and we have independently reviewed the records. We conclude that there are no arguably meritorious issues for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

In 2016, Klemke entered no contest pleas to a variety of charges in three Eau Claire County cases. We describe only the charges that are relevant here. In case No. 2015CF521, which underlies appeal No. 2017AP1984-CRNM, he pled no contest to one count of reproducing a representation of nudity, a Class I felony, and one count of battery as an act of domestic abuse, a Class A misdemeanor. *See* WIS. STAT. §§ 942.09(2)(am)2., 940.19(1), 968.075(1)(a). In case No. 2015CF1068, which underlies appeal No. 2017AP1985-CRNM, he pled no contest to intimidating a victim as an act of domestic abuse, a Class A misdemeanor. *See* WIS. STAT. §§ 940.44(1), 973.055(1). In case No. 2016CF278, which underlies appeal No. 2017AP1986-CRNM, he pled no contest to threatening a law enforcement officer, a Class H felony. *See* WIS. STAT. § 940.203(2). The circuit court withheld sentence for all of the foregoing counts and imposed probation. Klemke did not appeal the original judgments of conviction.

The Department of Administration, Division of Hearings and Appeals, revoked Klemke's probation, and Klemke returned to circuit court on April 24, 2017, for a sentencing hearing. For each conviction in case Nos. 2015CF521 and 2015CF1068, the circuit court imposed nine months in jail and ordered Klemke to serve the sentences concurrently with each other but

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

consecutive to the sentence imposed in case No. 2016CF278. In the latter case, the circuit court imposed an evenly bifurcated, six-year term of imprisonment. Klemke appeals.

We note preliminarily that Klemke may not, in an appeal from judgments entered after revocation of probation, raise challenges either to the validity of his underlying convictions or to the decision made at the original sentencing hearing to impose probation. See *State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). Further, any challenge to the probation revocation decision must be raised by petition for *certiorari* review directed to the circuit court. *State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 183, 572 N.W.2d 505 (Ct. App. 1997). We therefore turn to the 2017 sentencing proceeding.

Sentencing decisions lie within the circuit court’s discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence.” *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The same legal principles apply at sentencing after revocation of probation as govern the original sentencing. See *State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289. Thus, the sentencing court must “specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Gallion*, 270 Wis. 2d 535, ¶40. In seeking to fulfill these objectives, the circuit court must consider the primary sentencing factors of “the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712

N.W.2d 76. The court, in its discretion, may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See id.*

Here, the circuit court identified punishment and community protection as the primary sentencing goals and discussed the sentencing factors relevant to those goals. The circuit court considered the offenses “extremely severe” and part of a pattern of behavior in which Klemke endangered, threatened, and humiliated another person. The circuit court discussed Klemke’s character, finding that he tended to blame others, including the police, for problems of his own making and further finding that he was “defiant” as demonstrated by his mounting criminal convictions. *See State v. Fisher*, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The circuit court considered the need to protect the public, stating that Klemke’s actions endangered not only the woman with whom he had had an intimate relationship but also the community at large because he permitted his personal problems to “spill over” onto others in the form of threats against the police. The circuit court thus considered proper factors in regard to appropriate sentencing objectives.

Appellate counsel advises that, in Klemke’s view, the sentences are excessive. ““What constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual.”” *State v. Cummings*, 2014 WI 88, ¶75, 357 Wis. 2d 1, 850 N.W.2d 915 (citation and one set of quotation marks omitted). Here, Klemke faced a maximum of six years of imprisonment for the Class H felony, three-and-a-half years of imprisonment for the Class I felony, and nine months in jail for each misdemeanor. *See* WIS. STAT. §§ 939.50(3)(h)-(i), 939.51(3)(a). He also faced a fine of \$10,000 for each crime. *See* §§ 939.50(3)(h)-(i),

939.51(3)(a). The sentences here did not exceed the maximums allowed by law and the aggregate punishment was significantly less than the circuit court could have imposed. We cannot conclude that the sentences were unduly harsh or unconscionable. See *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507. We agree with appellate counsel that further proceedings to challenge the sentences would lack arguable merit.

The no-merit report does not include a discussion of sentence credit. The records show that the circuit court awarded Klemke 106 days of credit against his sentences in case No. 2015CF521, representing periods he spent in custody from November 10, 2016, to November 11, 2016, and from January 10, 2017, to April 24, 2017. In response to an inquiry from the Department of Corrections, counsel for the State and for Klemke agreed that this award constituted an improper duplication of credit Klemke received in case No. 2016CF278 for the same periods of presentence custody. The circuit court therefore vacated the 106 days of credit awarded for these periods in case No. 2015CF521. A challenge to this order would lack arguable merit. The sentences in case No. 2015CF521 are consecutive to the sentence in 2016CF278, and time spent in presentence custody “is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.” *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988).

Based on an independent review of the records, we conclude that no additional issues warrant discussion. Any further proceedings would be without arguable merit within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction are summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Diane C. Lowe is relieved of any further representation of Terry W. Klemke on appeal. *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