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

2017AP1051-CRNM State of Wisconsin v. Andrew P. Moon (L.C. # 2015CF237)

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).

Attorney Linda J. Schaefer has filed a no-merit report seeking to withdraw as appellate counsel for appellant Andrew P. Moon. *See* WIS. STAT. RULE 809.32 (2015-16)¹; *see also Anders v. California*, 386 U.S. 738, 744 (1967). Moon was sent a copy of the report, and has filed a response. Counsel has filed a supplemental no-merit report. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

In September 2015, Moon was convicted of carrying a concealed weapon, failure to comply with an officer's attempt to take him into custody, and possession of drug paraphernalia. In November 2015, Moon was placed on probation, with a withheld sentence. In April 2016, the Department of Corrections revoked Moon's probation. At sentencing after revocation, the court sentenced Moon to a total of three years of initial confinement and two years of extended supervision.

The appeal in this case from the sentence following revocation 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

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

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.

The no-merit report, response and supplemental no-merit report address whether there would be arguable merit to a challenge to the revocation proceedings. Because any challenge to the revocation proceedings would be outside the scope of this appeal, we do not address whether a challenge to any aspect of the revocation proceedings would have arguable merit. Additionally, to the extent the no-merit response raises issues related to the underlying conviction, those issues are outside the scope of this appeal as well. As explained, the scope of this appeal is limited to review of the sentence imposed by the circuit court following revocation of Moon's probation. Accordingly, this opinion discusses only whether there would be arguable merit to a challenge to the sentence imposed by the circuit court 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 complained of."² *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the gravity of the offenses, Moon'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 court sentenced Moon to three years of initial confinement and two years of extended supervision. The sentence was within the maximum Moon faced and, given the facts of this case, was not excessive or unduly harsh so as to shock the conscience. *See*

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.

State v. Grindemann, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no error in the sentence imposed by the circuit court following revocation.

The no-merit report addresses whether there would be arguable merit to a challenge to the sentence following revocation based on a claim that a witness provided false testimony against Moon at the revocation hearing. Counsel states that Moon could argue that he was sentenced based on inaccurate information because the witness's testimony at the revocation hearing was false. See *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (“A defendant has a constitutionally protected due process right to be sentenced upon accurate information.”). Counsel concludes that this issue lacks arguable merit because a defense investigator was able to obtain supporting statements only from third parties claiming the witness admitted lying, but was unable to obtain a recantation from the witness. Counsel concludes that, without a recantation from the witness, there is no admissible evidence to support the argument that the witness lied at the revocation hearing.

The no-merit report's discussion of this issue conflates the revocation proceedings with the sentencing after revocation. As outlined above, any challenge to the sufficiency of the evidence to support revocation is not before us. This appeal is limited to a review of the sentence imposed after revocation.

At sentencing after revocation, the court explicitly stated that it was sentencing Moon for his three underlying convictions in this case, and that the court was not sentencing Moon based on whatever had caused his revocation. The court also explained that it was not taking into account the pending criminal case against Moon, which arose from the witness's claims against Moon that led to revocation. Nothing in the court's remaining sentencing remarks would support

a non-frivolous claim that the court actually relied on the facts from the revocation proceedings in imposing sentence. *See id.*, ¶26 (“A defendant who requests resentencing due to the circuit court’s use of inaccurate information at the sentencing hearing must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.” (quoted source omitted)). Because the circuit court explicitly stated that it did not rely on the facts from the revocation proceedings in imposing sentence after revocation, a claim that Moon is entitled to resentencing because the witness provided false testimony at the revocation hearing would be wholly frivolous.

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

IT IS FURTHER ORDERED that Attorney Linda J. Schaefer is relieved of any further representation of Andrew P. Moon 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