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DISTRICT III

January 8, 2019

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

2017AP1597-CRNM State of Wisconsin v. Kai J. Rasmussen (L. C. No. 2015CF48)

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

Counsel for Kai Rasmussen has filed a no-merit report concluding there is no basis to challenge Rasmussen's sentence after revocation of probation. Rasmussen was advised of his right to respond and has not responded. We independently review the record, as mandated by *Anders v. California*, 386 U.S. 738 (1967). We modify the judgment to provide three additional days of sentence credit. We otherwise conclude there is no merit to any issue that could be

raised on appeal, and we therefore summarily affirm the judgment as modified. *See* WIS. STAT. RULE 809.21 (2015-16).¹

Rasmussen was charged with four counts of possession of child pornography. He pleaded to a single count of child enticement, and the remaining counts were dismissed and read in. The circuit court adopted a joint sentencing recommendation of a withheld sentence and five years' probation. Rasmussen's probation was revoked after he threatened violence against a woman unless she performed oral sex, and then forced her to perform oral sex. Rasmussen appeared before the circuit court for sentencing after revocation, as well as for a preliminary hearing on the new charge that triggered the revocation. The court adopted a joint recommendation of four years' initial confinement and four years' extended supervision on the sentence after revocation, and it dismissed and read in charges related to the new case.

The no-merit report addresses potential issues² regarding whether the circuit court properly exercised its discretion in sentencing after revocation;³ and whether Rasmussen received the effective assistance of counsel. This court is satisfied that the no-merit report properly analyzes these issues, and we will not further address them.

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

² Revocation is independent from the underlying criminal action. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978). Because this appeal arises from sentencing after revocation of probation, Rasmussen is barred from challenging issues related to the underlying conviction. *See State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996).

³ Counsel uses the phrase "abuse of discretion." We have instead used the phrase "erroneous exercise of discretion" since 1992. *See Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

However, the no-merit report fails to discuss a potential issue regarding sentence credit. The record reveals correspondence from the Wisconsin Department of Corrections (DOC) to the circuit court noting Rasmussen had received 320 days of sentence credit. However, the DOC subsequently calculated Rasmussen was entitled to 323 days of sentence credit. The correspondence stated: “The Revocation Order and Warrant (attached) recommended the following custody credits: 11-26-2015 to 12-01-2015 and from 02-26-2016 until sentencing. (According to our calculations 323 days.)”

The circuit court responded that on the date of sentencing, the court had inquired of the parties the amount of sentence credit. Based upon the stipulation of the attorneys, the court had ordered the stipulated number. However, the parties stipulated at the sentencing after revocation hearing that Rasmussen was entitled to credit for the period from November 26, 2015, to December 1, 2015; and from February 26, 2016, to January 9, 2017. Calculations of those stipulated periods confirm that Rasmussen was entitled to 323 days of sentence credit, as a matter of law. Three additional days of sentence credit are thus appropriate. Accordingly, we modify the judgment to provide three additional days of sentence credit.

Our independent review of the record discloses no other issues for appeal.

Therefore,

IT IS ORDERED that the judgment be modified to provide an additional three days of sentence credit and, as modified, the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of further representing Kai Rasmussen 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