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DISTRICT III

March 19, 2019

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

2018AP1-CRNM State of Wisconsin v. Stanley M. Whiters
2018AP2-CRNM (L. C. Nos. 2011CF805, 2011CF806)

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 Stanley Whiters has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] concluding there is no basis for challenging the sentences imposed

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

after revocation of Whiters's probation.[2] Whiters has filed a response challenging the circuit court's refusal to find him eligible for the earned release program ("ERP") and its denial of his postconviction motion for sentence modification. Upon our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

In May 2014, Whiters was convicted upon his no-contest pleas of one count of delivering less than one gram of cocaine and one count of delivering not more than 200 grams of tetrahydrocannabinol (THC)—the charges arising from two Brown County Circuit Court cases. The circuit court withheld sentence in both cases and placed Whiters on probation for three years with a total of nine months in jail as a condition of probation. Whiters's probation was later revoked and, out of a maximum possible sentence of thirteen and one-half years, the court imposed consecutive terms resulting in an aggregate eleven-and-one-half-year sentence, consisting of five-and-one-half-years' initial confinement and six years' extended supervision. Whiters's postconviction motion for sentence modification was denied, and these no-merit appeals follow.

As the no-merit report acknowledges, an appeal from a judgment imposing sentence after probation 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 revocations themselves is not the subject of these appeals. *See* ***State ex rel. Flowers v. DHSS***,

[2] The no-merit report was filed by attorney Katie R. York, who has been replaced by attorney Mark R. Thompson as Whiters's appellate counsel.

81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is 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 revocation is by petition for certiorari in circuit court). This court's review is therefore limited to issues arising from the sentencing after Whiters's probation revocations.

The no-merit report addresses whether the circuit court properly exercised its discretion when imposing the sentences after revocation. Upon reviewing the records, we agree with counsel's description, analysis, and conclusion that there is no arguable merit to this possible issue.

Both the no-merit report and Whiters's response address whether the circuit court properly denied Whiters's postconviction motion for sentence modification. Relevant to that motion, Whiters's probation was revoked based on allegations that Whiters touched a minor "on the vagina, over her underwear" and "on her buttocks over the clothes," and based on Whiters's admissions that he possessed and consumed alcohol and marijuana, that he left two children—ages seven and nine—alone without adult supervision, and that he failed to reside overnight at an approved residence. In his postconviction motion, Whiters notified the court that the State had decided not to charge Whiters for sexual assault of a minor, as alleged in the revocation order. Whiters thus argued that the State's decision not to prosecute the alleged sexual assaults constituted a new factor justifying sentence modification.

A circuit court may modify a defendant's sentence upon a showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor

exists; and (2) the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶36-37. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Id.***, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law this court decides independently. ***Id.***, ¶33. Whether a new factor justifies sentence modification is subject to the circuit court's exercise of discretion. ***Id.*** If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

Here, the circuit court denied the motion concluding that while the information was new, it did not justify modification of the sentence. The court properly noted that a sentencing court may consider evidence of unproven offenses as part of its determination of the defendant's character and need for incarceration and rehabilitation. *See* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). As the court further recognized, the fact that charges were not subsequently brought for the alleged sexual assault may go to the propriety of the revocation of Whiters's probation, but it does not implicate the appropriateness of the sentences imposed upon his revocation. *See* ***State v. Verstoppen***, 185 Wis. 2d 728, 739, 519 N.W.2d 653 (Ct. App. 1994).

This court has held that a subsequent acquittal on criminal charges that formed the basis of a probation revocation constitutes a new factor for sentence modification purposes. ***Id.*** at 741. As the circuit court recognized, however, there is a fundamental difference between acquittal by a jury and the prosecutorial decision not to issue charges. A decision not to issue charges may result from any number of factors and does not establish that Whiters did not commit the alleged sexual assault in the same way an acquittal would. Moreover, nothing in the record suggests the

court's sentencing determination was based on the assumption that sexual assault charges would be issued. Rather, the court was satisfied that the entirety of Whiters's criminal history and record on supervision—of which the sexual assault allegations were just a part—demonstrated that the sentences imposed were both appropriate and necessary. Therefore, any challenge to the court's exercise of discretion in denying Whiters's motion for sentence modification would lack arguable merit.

In his response, Whiters also challenges the circuit court's refusal to deem him eligible for ERP. An ERP eligibility decision is part of the court's exercise of sentencing discretion. WIS. STAT. § 973.01(3g). This court has held, however, that while the sentencing court must state whether a defendant is eligible or ineligible for ERP, the court is not required to make completely separate findings on the reasons for the eligibility decision, as long as the overall sentencing rationale justifies that decision. *See* ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. In imposing the sentences, the circuit court recounted Whiters's lengthy criminal history. The court was not required to repeat that history to establish grounds for deeming Whiters ineligible for ERP. Moreover, the court stated that it took Whiters's ineligibility for ERP into account when imposing sentence, and it imposed a sentence "lesser than [the court] might have sentenced" Whiters had he been deemed eligible for the program. Any challenge to the court's discretionary decision would lack arguable merit.

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

Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Mark R. Thompson is relieved of further representing Stanley Whiters in these matters. *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