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DISTRICT IV

March 3, 2022

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

2021AP46-CRNM State of Wisconsin v. Cody Kenneth Moser (L.C. # 2017CF419)

Before Kloppenburg, Graham, and Nashold, 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 Michael Herbert, appointed counsel for Cody Moser, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Moser was sent a copy of the report and has filed a response. Upon consideration of the report, the response, and an independent review of the

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm the judgment of conviction against Moser.

As part of a plea agreement, Moser pled no contest to one count of possession of cocaine with intent to deliver, as party to a crime. The circuit court withheld sentence and ordered two years of probation with nine months of jail time as a condition of probation. Moser's probation was later revoked, and he was returned to the court for sentencing after revocation. The court sentenced Moser to a thirteen-year prison term consisting of eight years of initial confinement and five years of extended supervision, consecutive to any other sentence. This no-merit appeal followed.

An appeal from a revocation sentence 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 revocation is not before us. See *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent of underlying criminal action); see also *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (review of probation revocation is by petition for certiorari in circuit court).

Thus, the only potential issues at this point are those relating to sentencing after revocation. The circuit court's duty at a sentencing after revocation is the same as its duty at the original sentencing. *State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289.

The no-merit report addresses whether the circuit court erred in exercising its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The court considered the required sentencing factors along with other relevant factors, and the court did not

rely on any inappropriate factors. See *State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The thirteen-year sentence that the court imposed was less than the fifteen-year maximum. See WIS. STAT. §§ 961.41(1m)(cm)2. and 939.50(3)(e) (2015-16). Under the circumstances, Moser could not plausibly argue that the sentence was unduly harsh or so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We note that the circuit court’s sentencing remarks were highly critical of Moser. The court appeared particularly concerned with Moser’s character, his failure to take responsibility, his attitude at sentencing, and his extensive criminal history, which included several new charges since he received probation in this case. However, these were all relevant factors, and the record supports the court’s reasoning and the sentence imposed.

In his response to the no-merit report, Moser makes three arguments. Based on our independent review of the record, we conclude that none of these arguments raises an issue of arguable merit. We discuss each argument below.

Moser’s first argument relates to sentence credit. Moser argues that the circuit court imposed sentence so as to deprive him of his sentence credit—494 days—in violation of *State v. Armstrong*, 2014 WI App 59, 354 Wis. 2d 111, 847 N.W.2d 860, and related case law.

“[A circuit] court may consider the amount of sentence credit to which the defendant is entitled *so long as* the court does not do so with the purpose of enlarging the sentence to deprive the defendant of [the] right to receive sentence credit.” See *Armstrong*, 354 Wis. 2d 111, ¶30; see also *id.*, ¶¶22-32 (discussing additional case law). Here, Moser points to a statement the court made when it explained why it would not follow the department of corrections

recommendation that Moser be sentenced to only one year in jail. The court stated: “You have more than one year of jail credit time. So if I follow their recommendation, it would be absolutely worthless.”

The circuit court’s statement does not provide an arguable basis to claim that the court enlarged Moser’s sentence to deprive him of sentence credit. When read in context, the statement instead reflects the court’s determination that a short sentence was a grossly inadequate sentence considering the relevant sentencing factors. The court made the statement immediately after summarizing Moser’s recent criminal history and observing that the department’s recommendation appeared at odds with the department’s own findings as to protection of the public. Immediately after making the statement, the court then explained that it would also not follow the State’s recommendation of four years because a four-year sentence was similarly “worthless” and “did not do justice to” Moser’s ongoing criminal conduct. The court further stated that “[t]o do anything similar to what’s being recommended here would unduly depreciate the seriousness” of Moser’s criminal conduct. The record makes clear that the court was considering relevant factors, not enlarging Moser’s sentence to deprive him of sentence credit. *But cf. Struzik v. State*, 90 Wis. 2d 357, 367-88, 279 N.W.2d 922 (1979) (concluding that the sentencing court misused its discretion by adding fourteen days to a five-year sentence after calculating that the defendant had fourteen days of sentence credit).

Moser next argues that the circuit court misused its discretion because it considered the maximum sentence available as a “baseline” rather than following the principle that courts should impose the least amount of confinement time consistent with the primary sentencing factors. *See Gallion*, 270 Wis. 2d 535, ¶44. Moser points to the court’s statement that the court was “close to maxx[ing] you out ... because you’ve not given me one reason not to.” We are

satisfied that the court was not using the maximum sentence as a baseline when making this statement. Rather, the court was explaining its determination that Moser’s conduct and other relevant factors warranted a significant prison term. It would be frivolous to argue otherwise.

Moser’s third and final argument is that trial counsel was ineffective by not adequately preparing him for the sentencing hearing. Moser alleges that, if counsel had more adequately prepared him, he would have received a lower sentence. He alleges that his behaviors at sentencing angered the judge and that counsel “was unaware of my impaired social skills and how they would adversely affect me at sentencing.” We conclude that Moser’s allegations regarding counsel are too conclusory to support a non-frivolous claim for ineffective assistance of counsel. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (explaining that a defendant is not entitled to a postconviction hearing if a postconviction motion “presents only conclusory allegations”).

Our review of the record discloses no other issues with arguable merit, and we see nothing further in Moser’s response that raises any issues with arguable merit.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael Herbert is relieved of any further representation of Cody Moser 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