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DISTRICT III

November 22, 2022

To:

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Circuit Court Judge
Electronic Notice

Marilyn Baraniak
Clerk of Circuit Court
Langlade County Courthouse
Electronic Notice

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Jacob McGhee 615585
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You are hereby notified that the Court has entered the following opinion and order:

2022AP763-CRNM State of Wisconsin v. Jacob McGhee (L. C. No. 2013CF132)

Before Stark, P.J., Hruz and Gill, 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 Jacob McGhee has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),¹ concluding that no grounds exist to challenge the sentence imposed after revocation of McGhee's probation. McGhee was informed of his right to file a response to the no-merit report, but he has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), this court identified a potential issue of

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

arguable merit regarding sentence credit. We therefore ordered counsel to file a supplemental no-merit report addressing that issue. Having reviewed the supplemental no-merit report and its attached documents, we now conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment imposing sentence following the revocation of McGhee's probation. *See* WIS. STAT. RULE 809.21.

In July 2013, McGhee was charged in the instant case with second-degree sexual assault of a child. In April 2014, McGhee entered a no-contest plea to an amended charge of third-degree sexual assault of a child. The circuit court approved a deferred entry of judgment (DEOJ) agreement, which provided that the court would defer entering a judgment of conviction on the third-degree sexual assault of a child charge for a period of five years, provided that McGhee complied with the conditions as set forth in the agreement. If McGhee complied with the terms of the agreement, that charge would be dismissed at the end of the five-year period.

In May 2016, McGhee stipulated that he had violated the terms of the DEOJ agreement. The parties then entered into an amended DEOJ agreement, with a term of four years from the date the agreement was signed. McGhee subsequently violated the amended DEOJ agreement, and he returned to the circuit court in July 2019 for sentencing on the third-degree sexual assault of a child charge. The court withheld sentence and placed McGhee on probation for a period of four years. The court ordered that McGhee would be entitled to eighty-one days of sentence credit in the event that his probation was revoked.

On November 24, 2020, McGhee's probation was revoked in this case and in Eau Claire County case Nos. 2018CF1815 and 2019CF333. McGhee's sentencing after revocation hearing in this case took place on July 15, 2021. The State recommended a sentence consisting of two

years' initial confinement followed by four years' extended supervision, consecutive to any other sentence. The defense asked the circuit court to follow the Department of Corrections' (DOC) recommendation of one year in jail. After considering McGhee's character, the gravity of the offense, the need to protect the public, the prospect of rehabilitation, and the need for general and specific deterrence, the court sentenced McGhee to eighteen months' initial confinement followed by four years' extended supervision, consecutive to any other sentence. The parties agreed that McGhee was entitled to 334 days of sentence credit, and the court awarded McGhee credit in that amount.

The no-merit report addresses: (1) whether the circuit court erroneously exercised its discretion when sentencing McGhee following the revocation of his probation; and (2) whether McGhee's trial attorney was constitutionally ineffective during the sentencing after revocation proceedings.² Upon our independent review of the record, the no-merit report, and the supplemental no-merit report, we agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit.

In particular, we note that in the no-merit report, appellate counsel stated that McGhee had "expressed dissatisfaction with his trial counsel's performance" because McGhee believed that he was entitled to additional sentence credit. Based upon the record and the no-merit report,

² An appeal from a judgment imposing sentence after the revocation of probation 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 the subject of this appeal. See *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (explaining that probation revocation is independent from the underlying criminal action); see also *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (holding that judicial review of probation revocation is by petition for certiorari in the circuit court). Our review is limited to the validity of the sentence imposed after the revocation of McGhee's probation.

it was not clear to this court whether a claim for additional sentence credit would lack arguable merit. We therefore ordered appellate counsel to file a supplemental no-merit report further addressing this issue. After reviewing the supplemental no-merit report and its attached exhibits, we agree with appellate counsel that there would be no arguable merit to a claim that McGhee is entitled to additional sentence credit.

At McGhee’s original sentencing hearing in July 2019, the circuit court ordered that McGhee would be entitled to eighty-one days of sentence credit in the event that his probation was later revoked. McGhee’s probation was subsequently revoked in November 2020, and the revocation order and warrant recommended sentence credit of eighty-one days, plus additional credit “[f]rom 06/03/20 until [McGhee’s] return to court.”³ When McGhee returned to court for his sentencing after revocation hearing in this case on July 15, 2021, the parties agreed that McGhee was entitled to a total of 334 days of sentence credit, and the court awarded him credit in that amount.

It is unclear how the parties determined that McGhee was entitled to 334 days of sentence credit. Appellate counsel notes that she contacted the DOC’s records office twice to confirm that McGhee had received the appropriate amount of credit. Counsel submitted the DOC’s response as an attachment to the supplemental no-merit report. In the response, DOC employee Terri Marco noted that McGhee was awarded 334 days of sentence credit in this case, which consisted

³ McGhee was apparently arrested in Eau Claire County on June 3 or 4, 2020, and remained in custody following that date.

of the eighty-one days awarded at his original sentencing hearing plus 253 additional days. Marco stated that she was “not sure where these [253] days came from.”⁴

As discussed above, on the same date that McGhee’s probation was revoked in the instant case, his probation was also revoked in two Eau Claire County cases. Marco’s response to appellate counsel noted that McGhee received 218 days of sentence credit in Eau Claire County case No. 2019CF333 for the time period from June 3, 2020, until January 6, 2021—the day before McGhee’s sentencing after revocation hearing in case No. 2019CF333. Marco concluded that McGhee is not entitled to credit for that same 218-day period in the instant case because McGhee’s sentence in this case is consecutive to his sentence in case No. 2019CF333. *See State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) (“Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.”).

Thus, to the extent McGhee believes that he is entitled to sentence credit in this case for the 218-day period from June 3, 2020, until January 6, 2021, we agree with appellate counsel that McGhee is not entitled to that credit because he has already received credit for that time period in case No. 2019CF333. McGhee is also not entitled to credit for the time period from January 7, 2021—the date of his sentencing after revocation hearing in case No. 2019CF333—until July 14, 2021—the day before his sentencing after revocation hearing in this case—because he was serving his sentence after revocation in case No. 2019CF333 during that time period, and his custody during that time period was therefore properly credited toward that sentence. Again,

⁴ The State has not challenged McGhee’s entitlement to 334 days of sentence credit.

McGhee cannot receive dual credit in this case for time credited toward his consecutive sentence in case No. 2019CF333. *See id.*

McGhee has not filed a response to the no-merit report, and, accordingly, he has not explained why he believes he is entitled to additional sentence credit in this case for any other period of time that he may have spent in custody. The DOC has determined that McGhee is not entitled to any additional sentence credit, beyond the 334 days already awarded. Having independently reviewed the record, the no-merit report, and the supplemental no-merit report and attached exhibits, we cannot discern any basis for a claim that McGhee is entitled to additional sentence credit. As such, we conclude this issue lacks arguable merit.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Roberta A. Heckes is relieved of her obligation to further represent Jacob McGhee 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