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DISTRICT III

November 29, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Bayfield County Courthouse
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Kimberly Allison Lawton
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Dennis Schertz
Electronic Notice

Calan W. Edwards
23665 Kennedy Road
Mason, WI 54856

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

2020AP1817-CRNM State of Wisconsin v. Calan W. Edwards (L. C. No. 2017CF61)

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).

Calan Edwards appeals from an amended judgment sentencing him to prison[1] following the revocation of his probation on a felony bail jumping charge and a misdemeanor charge of resisting or obstructing an officer. Attorney Dennis Schertz has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses the validity of the sentences and trial counsel's

[1] Although the circuit court imposed a concurrent jail term on the misdemeanor count, that sentence would also be served in prison pursuant to WIS. STAT. § 973.03(2) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

performance at sentencing. Edwards was sent a copy of the report, and he has filed a series of responses, to which counsel has filed a supplemental report. Upon our independent review of the entire record, we conclude that counsel shall be allowed to withdraw and the amended judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

We first note that an appeal from a sentence following the revocation of probation does not bring an underlying conviction before this court. ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Nor can the appellant challenge the validity of his probation revocation decision in this proceeding. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (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) (judicial review of probation revocation is by way of certiorari to the court of conviction). As Schertz correctly recognizes, the only potential issues before us in this appeal relate to the circuit court's imposition of a sentence following revocation and counsel's representation at that sentencing. Therefore, we will not address Edwards' arguments regarding delays in the appointment of his first and second attorneys and the scheduling of a trial date, his complaints that he was pressured into accepting a plea deal, his challenges to his rules of supervision, or his assertion that his trial counsel failed to timely file a notice of intent to seek postconviction relief from his original judgment of conviction.

Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, we agree with appellate counsel's analysis and conclusion that any challenge to the sentences or trial counsel's representation at sentencing would lack arguable merit.

The record shows that Edwards had the opportunity to comment on the presentence investigation report (PSI) and to address the circuit court both personally and through his trial counsel prior to sentencing. In addition, trial counsel presented several character reference letters from Edwards' family, friends and employers, and Edwards' father addressed the court at the State's invitation for victims to speak. The parties then made a joint recommendation—in conjunction with the entry of a plea and deferred entry of judgment agreement in another case—for a period of eighteen months' initial incarceration, with 573 days' sentence credit, followed by eighteen months' extended supervision. After discussing relevant sentencing factors, including the severity of the offenses, Edwards' criminal history, and Edwards' efforts toward rehabilitation, the court accepted the parties' joint recommendation—despite expressing some personal misgivings that Edwards might be "snowing" everyone. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197 (discussing the proper exercise of sentencing discretion).

Edwards now asserts that: (1) he did not personally agree to the joint recommendation for a comprehensive plea deal in another case that included the time-served disposition in this case; (2) his sentences were "steep" considering that he had not committed violent offenses; (3) he was "not allowed" to present "testimony" from his father, brother and stepmother "during the court process" and (4) Schertz has inaccurately referred to Edwards' father as a "victim." None of these assertions provides an arguably meritorious basis for relief from Edwards' sentences after revocation.

First, as to the joint recommendation, we note that the plea agreement in the other case is not before us in this appeal. Even if trial counsel failed to consult with Edwards about the sentence recommendation for this case before addressing the circuit court, Edwards has failed to

show any possible prejudice from that omission. In particular, Edwards has not asserted that he asked his trial counsel to advocate for a different sentence on either of the counts in this case. Moreover, if Edwards disagreed with the proposed time-served disposition for the sentences, he had an opportunity to advise the court of that fact during his own allocution. It also appears from the court's comments that it would have imposed a longer sentence, in line with the PSI recommendation, if the parties had not presented a joint sentencing recommendation.

Second, a sentence may be considered unduly harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32. The bail jumping charge was a Class H felony punishable by up to three years' initial confinement and three years' extended supervision. *See* WIS. STAT. §§ 946.49(1)(b), 973.01(2)(b)8., 973.01(2)(d)5. The obstruction charge was a Class A misdemeanor punishable by up to nine months' imprisonment. *See* WIS. STAT. §§ 946.41(1), 939.51(3)(a). The concurrent sentences imposed here thus amounted to less than half of the time the court could have imposed had it chosen to make the sentences consecutive. In short, the sentences were well within the maximum penalty and not unduly harsh.

Third, the record shows that Edwards' father did speak on Edwards' behalf at the sentencing hearing, even though he was called upon by the State, and Edwards' sister was among the people who submitted letters on Edwards' behalf. The record does not show that Edwards asked to have other people speak at the sentencing hearing, and Edwards does not specify what

statements anyone else would have made. To the extent that Edwards may be asserting that his trial counsel told him that he would not call Edwards' father, brother, or stepmother to testify if the matter had gone to trial, that assertion has no bearing on the sentences imposed following revocation.

Fourth, the complaint and a sealed addendum to it identify Edwards' father as the victim of a misdemeanor battery charge that was read in and which served as the basis for the bail jumping count of conviction. Therefore, counsel accurately referred to Edwards' father as a victim in this matter. In any event, this issue also has no bearing on the sentences imposed following revocation.

On separate topics, unrelated to the sentences being challenged on appeal, Edwards also disputes Schertz's assertion in the no-merit report that Edwards refused to close his case file without further action and asserts that Schertz failed to send him his case file. The first assertion lacks merit. It is plainly evident that Edwards has not agreed to close his case file, given that he has filed multiple responses to the no-merit report seeking further postconviction proceedings. Therefore, counsel was obliged to file a no-merit report after concluding that there were no issues of arguable merit for appeal. As to the second assertion, Schertz responds that he did not send Edwards the case file because Edwards did not request it. It is true that WIS. STAT. RULE 809.32(1)(d) requires counsel to send a client a case file upon "request" Therefore, counsel was not obligated to send Edwards the file automatically and Edwards' procedural rights were not violated. However, we construe Edwards' complaint that counsel has not sent him the file as a request for the file. Therefore, if Schertz has not already done so, he should send Edwards' case file to him forthwith.

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the amended judgment after revocation is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Schertz shall send Edwards' case file to him, if he has not already done so.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Calan Edwards in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order shall not be published.

Sheila T. Reiff
Clerk of Court of Appeals