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DISTRICT III

August 15, 2023

To:

Hon. Thomas J. Walsh
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Peter Anderson
Electronic Notice

Winn S. Collins
Electronic Notice

Marquise Adonis Apolo Bailey 556860
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2022AP503-CRNM State of Wisconsin v. Marquise Adonis Apolo Bailey
(L. C. No. 2019CF748)

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).

Marquise Bailey appeals from a judgment sentencing him to prison following the revocation of his probation on a felony conviction for expelling a bodily fluid at a corrections officer, as a repeat offender. Attorney Peter Anderson has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22);¹ *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses the validity of the sentence and trial counsel's performance. Bailey was advised of his right to respond to the report, but he has not

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

filed a response. Having independently reviewed the entire record as mandated by *Anders*, we conclude that there are no arguably meritorious issues for appeal. *See Anders*, 386 U.S. at 744.

We first note that an appeal from a sentence following revocation 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 an appellant challenge the validity of any 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).

Our review of a sentence determination begins “with the presumption that the trial 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 counsel’s analysis and conclusion that any challenge to the sentence or counsel’s performance at sentencing would lack arguable merit.

Bailey was afforded the opportunity to comment on the revocation materials and to address the circuit court—both personally and by counsel—prior to sentencing. Bailey’s trial counsel brought several of Bailey’s positive character traits to the court’s attention and argued for a one-year jail sentence. The record does not reveal any errors made by Bailey’s trial counsel during the sentencing hearing.

The circuit court observed how troubling it was that Bailey kept repeating similar conduct. The court concluded that there was a need for both punishment and protection of the public. The court then sentenced Bailey to fourteen months’ initial confinement followed by

fourteen months' extended supervision. The sentence did not exceed the maximum available penalty, and the court rationally explained why it imposed the sentence based upon standard sentencing factors. *See* WIS. STAT. §§ 946.43(2m)(a), 939.50(3)(i); *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

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 judgment after revocation of probation is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Peter Anderson is relieved of any further representation of Marquise Bailey in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals