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January 8, 2013

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

2012AP1603-CRNM State of Wisconsin v. Cory M. Peterson (L.C. #2008CF355)

Before Curley, P.J., Kessler and Brennan, JJ.

Cory M. Peterson appeals from a corrected judgment of conviction entered after revocation of probation. He entered a no-contest plea in 2009 to one count of second-degree sexual assault of a child who had not attained the age of sixteen years. *See* WIS. STAT. § 948.02(2) (2009-10).¹ The circuit court withheld sentence and imposed a sixty-month term of probation with ninety days in jail as a condition of probation. Peterson did not appeal from the

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

original judgment of conviction. The Department of Administration, Division of Hearings and Appeals, revoked Peterson's probation in 2011, and he returned to circuit court on December 12, 2011, for a sentencing hearing. The circuit court imposed a twelve-year term of imprisonment, evenly bifurcated between initial confinement and extended supervision and concurrent with a previously imposed sentence.

Peterson pursued a postconviction motion to correct the judgment of conviction, which erroneously reflected that the circuit court imposed a consecutive sentence in this matter. The circuit court granted the motion. Peterson now appeals from the corrected judgment.

Appellate counsel, Martha K. Askins, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Peterson filed a response that we construed by order of October 16, 2012, as a statement that he wished to appeal but could not identify any potential issues other than those already discussed by his appellate counsel. This court has considered the no-merit report, and we have independently reviewed the record. We conclude that there are no arguably meritorious issues for appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

We note preliminarily that Peterson may not, in an appeal from a judgment entered after revocation of probation, raise challenges either to the validity of his underlying conviction or to the decision made at the original sentencing hearing to impose probation. *See State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). Further, any challenge to the probation revocation decision must be raised by petition for *certiorari* review directed to the circuit court. *See State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 183, 572 N.W.2d 505 (Ct. App. 1997). Thus, we turn to the 2011 sentencing proceeding.

Peterson could not raise an arguably meritorious challenge to his sentence. Sentencing decisions lie within the circuit court's discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence.” *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The same legal principles apply at sentencing after revocation of probation as govern the original sentencing. See *State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289. Therefore, the circuit court must consider the primary sentencing factors of “the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. See *id.* Further, the sentencing court must “specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Gallion*, 270 Wis. 2d 535, ¶40.

The circuit court considered appropriate sentencing factors here, first observing that sexual assault of a minor “is a very serious offense.” The circuit court considered the protection of the public, emphasizing the need to shield minors from adult offenders. The circuit court discussed Peterson's character, finding that he “knows right from wrong” notwithstanding his mental health disabilities, namely, bipolar disorder, ADHD, and cognitive delay.

The circuit court considered a variety of mitigating factors, including Peterson's own history of physical and sexual victimization at the hands of his father, and the circuit court

praised Peterson for obtaining a high school equivalency degree as an adult. The circuit court was concerned, however, that the presentence investigation report reflected numerous rule violations during his term of probation and further reflected that he had not participated in a satisfactory way in his sex offender treatment program.

The circuit court identified protection of the public, rehabilitation, and deterrence as the primary sentencing goals. The circuit court determined that Peterson required sex offender treatment and anger management courses to meet his rehabilitative needs. The circuit court determined that Peterson must be confined for a sufficient time “to protect the public in the near future,” and that his treatment needs must be addressed in a confined setting. The circuit court agreed, however, that Peterson could serve his sentence concurrently with a previously imposed sentence for capturing a representation depicting nudity.

The circuit court identified the factors that it considered in fashioning the sentence. The factors are proper and relevant. We agree with Peterson’s appellate counsel that an arguably meritorious challenge to the sentence could not be sustained.

Last, we note that the circuit court ordered Peterson to pay a DNA surcharge if he provides a DNA sample in this matter. Pursuant to WIS. STAT. § 973.046(1r), a DNA surcharge is mandatory following a conviction for second-degree sexual assault of a child. We therefore

agree with Peterson's appellate counsel that pursuit of postconviction relief grounded on a challenge to the DNA surcharge would be frivolous within the meaning of *Anders*.²

Based on an independent review of the record, we conclude that no additional issues warrant discussion. Any further proceedings would be without arguable merit within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Martha K. Askins is relieved of any further representation of Cory M. Peterson on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

² We limit our review to whether the record discloses arguably meritorious grounds for Peterson to pursue appellate relief, and we therefore do not consider whether the circuit court here properly ordered Peterson to pay a DNA surcharge only if he gives a DNA sample. *Cf.* WIS. STAT. § 973.046(1r) (requiring circuit court to impose a DNA surcharge when it imposes a sentence or places a person on probation for a violation of WIS. STAT. § 948.02(2)).