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January 22, 2013

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

2012AP1518-CRNM State of Wisconsin v. Mark N. Moderson (L.C. #2005CF13)

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

Mark N. Moderson appeals from a judgment imposing sentence after probation revocation. Appellate counsel, Martha K. Askins, Esq., has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Moderson was advised of his right to file a response and has responded. Upon our independent review of the Record as mandated by ***Anders***, of counsel's report, and of Moderson's response, we conclude that there is no issue of arguable merit to be raised on appeal. Therefore, we summarily affirm the judgment.

In January 2005, Moderson was charged with theft by a contractor. He had been contracted to replace the roof and siding on his client's home. He completed the work but, because he failed to pay the subcontractor for materials, the subcontractor filed a construction lien against the client's property.

Pursuant to a plea bargain, Moderson pled guilty. Under the terms of the bargain, sentence would be withheld and Moderson would be placed on probation for three years. He agreed to pay restitution to the victim named in the complaint, as well as another victim of a similar theft. The restitution amount totaled over $12,000; Moderson paid $2500 on the day of sentencing.

Moderson absconded from probation in March 2009, leaving the United States for the Philippines, evidently to live with a woman he had met online. A warrant was issued, and Moderson was apprehended in June 2011 as he was going through customs at the Minneapolis airport. His probation was revoked and he was returned to the circuit court for sentencing. The circuit court imposed fourteen months' initial confinement and eighteen months' extended supervision, reiterating the restitution obligation.

This matter is before us following sentencing after probation revocation, so Moderson's underlying conviction is not before us. *See* ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923, 924 (Ct. App. 1994). In addition, Moderson cannot challenge the revocation decision. *See* ***State ex rel. Flowers v. Dept. of Health & Soc. Servs.***, 81 Wis. 2d 376, 384, 260 N.W.2d 727, 732 (1978). Thus, our review is limited to the circuit court's sentencing discretion.

Counsel nevertheless raises a preliminary question of whether there is any arguable merit to a challenge to the revocation proceedings, given that Moderson's three-year probation term

would have expired, at least according to the calendar, some time in 2009. We agree with counsel's analysis, however, that there is no issue of arguable merit to this issue. If it is determined that a probationer "has violated the terms of his or her supervision, the department [of corrections] or division [of hearings and appeals] may toll all or any part of the period of time between the date of the violation and the date an order of revocation" is entered. WIS. STAT. § 304.072(1). Moderson's term of probation would have been properly tolled for the time period in which he was out of the country, as such departure was contrary to the terms of his supervision as both unauthorized travel and an unauthorized change of residence. His probation therefore could have been revoked upon his return in 2011.

Turning now to the sentence, sentencing after probation revocation is reviewed "on a global basis treating the latter sentencing as a continuum of the" original sentencing hearing. *See* ***State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 101, 619 N.W.2d 289, 291. Thus, at sentencing after probation revocation, we expect the circuit court will consider many of the same objectives and factors that it is expected to consider at the original sentencing hearing. *See* ***ibid.***; *see also* ***State v. Brown***, 2006 WI 131, ¶¶20–21, 298 Wis. 2d 37, 49–50, 725 N.W.2d 262, 268. When, as here, the same judge presides over both the original sentencing and sentencing after revocation, the judge need not revisit the original sentencing explanation; we consider that reasoning implicitly adopted. ***Wegner***, 2000 WI App 231, ¶9, 239 Wis. 2d at 102, 619 N.W.2d at 292.

The circuit court agreed with the parties that the primary objective was to make sure the victims were repaid; this is a community protection objective. Indeed, the original sentencing-after-revocation hearing was delayed because Moderson was attempting to obtain funds to pay a large portion of his restitution obligation. However, the circuit court also appears to have had a

punishment objective in mind, observing that Moderson had absconded from his responsibilities and had probation in another county extended because of failure to pay court-ordered obligations.

The circuit court did comment that it could think of worse crimes, noting that Moderson had at least performed the work for his clients instead of simply running off with their money, but stated that victims take this kind of crime seriously. In essence, those victims had to pay twice—first to Moderson for the work, then later to the subcontractors who filed liens. The circuit court observed that Moderson was expressing remorse, but told him that the best way to demonstrate that remorse would have been to pay the ordered restitution, not leave the country.

Ultimately, the circuit court imposed fourteen months' initial confinement, ordering that twenty-five percent of Moderson's prison wages go to his restitution obligation in this case, and eighteen months' extended supervision, with payment of the restitution obligation as a condition thereof. This sentence reflects appropriate objectives, and the circuit court considered no improper factors in imposing sentence. The thirty-two month sentence is within the prescribed forty-two month maximum, and is not so excessive as to shock public sentiment. There is no arguable merit to a challenge to the circuit court's sentencing discretion.

Moderson raises two issues in his response. The first is that he should not have been convicted as a repeater. The repeater allegation was charged in the criminal complaint, though no copy of a prior judgment of conviction was attached to the complaint.[1] However, the repeater

[1] According to the electronic docket entries, the predicate felony case cited in the complaint belongs to a Mark Moderson with a different middle name and different date of birth.

allegation was not contained in the subsequent information, was crossed off on the plea questionnaire form, and was not discussed as part of the plea colloquy. Nevertheless, the repeater enhancer is listed on the judgment of conviction, likely because the circuit court in accepting the plea directed that Moderson be convicted "in the matter and form as set forth in the complaint."

We conclude there is no issue of arguable merit that can be raised on appeal. As stated above, we cannot review the original judgment of conviction. *See* ***Drake***, 184 Wis. 2d at 399, 515 N.W.2d at 924. Moreover, any error in including the repeater modifier on the judgment of conviction appears harmless: the repeater element serves as a penalty enhancer, and Moderson's penalty was not enhanced in this case.[2]

Moderson also complains that, according to the plea questionnaire, he was not supposed to serve jail time if he paid $2500 up front. Indeed, the plea questionnaire recites the bargain as "withheld sentence, 3 [years'] probation, $12,258.98 restitution, if $2,500 restitution paid up front, then no jail[.]" The "no jail" condition was not expressly addressed at the plea hearing.

Our reading of the terms as listed on the plea questionnaire is that if Moderson paid $2500 in restitution up front, then the State would not ask the circuit to order him to serve any *initial* jail time as a condition of probation, although it appears that the potential for some jail time was in fact contemplated. Part of the bargain, as stated on the record during the plea

[2] We are reluctant to deem inclusion of the repeater enhancer to be a mere scrivener's error that we could order corrected, *see* ***State v. Prihoda***, 2000 WI 123, ¶¶26–27, 239 Wis. 2d 244, 258, 618 N.W.2d 857, 864–865, because the circuit court expressly directed the judgment of conviction be based on the charges in the criminal complaint. Moderson is free to ask the circuit court to correct the judgment, though we express no opinion on whether the circuit court can or should make the correction.

colloquy, was that if Moderson did not pay, or at least make significant progress in paying, the total restitution within the first two years and three months of his probation, then Moderson would serve the *last* nine months of probation in jail.

In any event, to the extent that Moderson is challenging his current sentence on these grounds, he is not serving a jail sentence. Rather, he is serving a prison sentence because he failed to complete his probation as called for by the terms of his bargain with the State, that probation was revoked, and sentence was imposed. He was warned of that potential penalty when the circuit court placed him on probation. There is no issue of arguable merit here.

Our independent review of the Record reveals no other issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Martha K. Askins, Esq., is relieved of further representation of Moderson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals