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March 6, 2013

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

2012AP2086-CRNM State of Wisconsin v. Carlos G. Comas (L.C. #2008CF104)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Carlos G. Comas appeals from a judgment of conviction entered upon resentencing required by ***State v. Comas***, No. 2010AP2687-CR, unpublished slip op. ¶15 (WI App Sept. 29, 2011). His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Comas has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

independent review of the resentencing record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Comas was convicted of repeated sexual assault of the same child. He filed a postconviction motion for resentencing and on appeal from his conviction argued that the sentencing court mistakenly believed that a mandatory minimum sentencing provision applied when it did not. ***Comas***, unpublished slip op. ¶¶1-7. On appeal, the court concluded that a mandatory minimum sentence did not apply and it reversed the judgment of conviction and order denying the motion for resentencing and remanded with directions that Comas be resentenced without reliance on the twenty-five year mandatory minimum. ***Id.*** at ¶15. Comas was sentenced to twelve years' initial confinement and six years' extended supervision.

The no-merit appeal first addresses the sufficiency of the evidence at Comas's jury trial and whether any errors occurred during the trial that would support a motion for a new trial. Comas's response to the no-merit report relates to the sufficiency of the evidence; he questions whether there was evidence of an intentional touching of the victim because nothing showed up on a doctor's report. The potential issues regarding the sufficiency of the evidence and trial errors, if any, need not be considered because they relate to a previous final judgment of conviction, and the present appeal brings before us only the sentence imposed at the resentencing proceeding. *See* ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449; ***State v. Drake***, 184 Wis. 2d 396, 400, 515 N.W.2d 923 (Ct. App. 1994); WIS. STAT. RULE 809.10(4) ("[a]n appeal from a final judgment or final order brings before the court all prior *nonfinal* judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding *not previously appealed* and ruled upon." (emphasis added)).

Comas had an appeal from the judgment of conviction in which he could have challenged the sufficiency of the evidence or other trial error but did not. He cannot revive issues he abandoned.[2] *See* ***State v. Walker***, 2006 WI 82, ¶7, 292 Wis. 2d 326, 716 N.W.2d 498 (when a defendant seeks modification of the sentence imposed at resentencing, a new postconviction motion for sentence modification is required); ***Scaccio***, 240 Wis. 2d 95, ¶8 (the logic behind the rule that a postrevocation appellant cannot challenge the original conviction is that the appellant already had an opportunity to raise any issues relating to the conviction in a first direct appeal); ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996) (cannot raise issues not pursued from original conviction and sentence because of dissatisfaction with the sentence imposed after probation revocation).

The no-merit report properly analyzes that a challenge to the sentence as an erroneous exercise of discretion or unduly harsh or excessive is without merit. The sentence was based on the facts of record and the sentencing court identified the objectives of the sentence to be to impose punishment, deter Comas from similar future conduct, and primarily, protect the community for a substantial period. Those are proper objectives. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The eighteen-year sentence is well within the sixty year maximum and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not

[2] This no-merit appeal from resentencing is not the proper mechanism for obtaining relief from the absence of appellate review on the claims not pursued in the first appeal. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992) (establishing a writ of habeas corpus as the way to raise claims of ineffective appellate counsel).

so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment and discharges appellate counsel of the obligation to represent Comas further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Steven D. Grunder is relieved from further representing Carlos G. Comas in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals