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DISTRICT III

April 16, 2013

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

2012AP2620-CRNM State of Wisconsin v. Curtis Walker (L.C. # 2009CF1245)

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

Counsel for Curtis Walker has filed a no-merit report concluding there is no arguable basis for Walker to challenge a sentence imposed following revocation of his probation. Walker was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

Walker was placed on probation for delivery of heroin as a repeater. He violated the terms of his probation by having a physical altercation with his girlfriend, failing to attend

therapy sessions that were required as an alternative to revocation for a previous violation, and associating with a known drug dealer. Before sentencing, Walker sent the court a letter disputing the grounds for revocation and the facts supporting the previous alternative to revocation. At the sentencing hearing, Walker's attorney asked the court not to consider Walker's letter. The court then imposed a sentence of four years' initial confinement and four years' extended supervision, with credit for 493 days' jail time.

Walker did not commence postconviction proceedings from the initial judgment of conviction placing him on probation. Therefore, any issues relating to that judgment are not the subject of this appeal. See *State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). Likewise, the revocation of Walker's probation cannot be reviewed in this appeal because any error regarding the revocation must be reviewed by writ of certiorari, not an appeal from the sentence imposed after revocation. See *State ex rel. Marth v. Smith*, 224 Wis. 2d 578, 583-84, 592 N.W.2d 307 (Ct. App. 1999). Therefore, this appeal is limited to issues arising from the sentence after revocation.

The no-merit report addresses: (1) whether the court properly exercised its sentencing discretion; (2) whether Walker's trial counsel was ineffective, particularly for requesting that the court disregard Walker's letter; and (3) whether the court's comments at the initial sentencing hearing show the court had prejudged the sentence it would impose, constituting bias or the appearance of bias. We agree with counsel's conclusion that none of these issues has arguable merit.

The court could have imposed a sentence of seven and one-half years' initial confinement and five years' extended supervision and a \$25,000 fine. The eight-year sentence it imposed was

well within the limits of the maximum penalty and is therefore presumptively reasonable. *See State v. Grindeman*, 2002 WI App 105, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507. The court reviewed the transcript of the initial sentencing hearing and the revocation summary, and appropriately considered the seriousness of the offenses, Walker's character and rehabilitative needs and his failure on probation. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). While Walker's letter to the court took issue with many of the facts stated in the revocation summary, the administrative law judge resolved the disputed facts against Walker. To establish that his sentence was based on erroneous information, Walker would have the burden of proving the information was false. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. In light of the ALJ's findings, the record discloses no basis for believing Walker could establish that he was sentenced on false information.

The record also discloses no arguable basis for challenging the effectiveness of Walker's counsel at the sentencing hearing. To establish ineffective assistance of counsel, Walker would have to show deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's strategic decisions made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. In Walker's letter to the court, he admitted being untruthful to his agent. That admission, the ALJ's findings of fact, the prohibition of challenging revocation at the sentencing hearing and the risk associated with quibbling about the details support counsel's strategic decision to ask the court to disregard Walker's letter.

Finally, the record does not support any argument that the court prejudged the sentence it would impose. At the initial sentencing hearing, the court stated:

Having said that, I am going to give you another chance on probation. If you blow it, you are going to sit such a long time, you may not get out with your disease [of the kidneys, which

requires dialysis]. I mean it. I am trusting that you are completely a reformed person. And if you aren't, you are going to, you are going to be gone for a very, very long time.

And I am going to order a transcript now just in case I am not still here if you get revoked. Because I want the next Judge to read that. I am buying into you and your representations that this is it for you. That there will not be another offense. You will not break another law no matter what under any circumstances. And if you can't handle that, you're looking at 14 and a half years. And I am not going to feel bad if I give you every day of it. But I hope you handle it. I don't want to see you in prison.

These comments do not constitute a promise of a particular sentence if probation is revoked. *See State v. Goodson*, 2009 WI App 107, ¶13, 320 Wis. 2d 166, 771 N.W.2d 385. First, the court's remarks about imposing a very long prison sentence were contingent on Walker committing another crime. Walker's probation was revoked for rule violations, not commission of another crime. Second, the court carefully considered the factors that relate to sentencing, and did not rely exclusively on its previous statements. Finally, the sentence the court imposed was not nearly the fourteen and one-half years the court indicated it might impose when it placed Walker on probation. Therefore, Walker could not establish subjective or objective bias based on the court's earlier remarks.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Jefren Olson is relieved of his obligation to further represent Walker in this matter. WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals