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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT III**

May 7, 2013

To:

Hon. William C. Stewart Jr.  
Circuit Court Judge  
Dunn County Judicial Center  
615 Stokke Parkway, Suite 1500  
Menomonie, WI 54751

Clara Minor  
Clerk of Circuit Court  
Dunn County Judicial Center  
615 Stokke Parkway, Suite 1500  
Menomonie, WI 54751

Martha K. Askins  
Asst. State Public Defender  
P.O. Box 7862  
Madison, WI 53707-7862

James M. Peterson  
District Attorney  
615 Stokke Parkway  
Menomonie, WI 54751

Gregory M. Weber  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Timothy W. Markling 73189  
Fox Lake Corr. Inst.  
P.O. Box 200  
Fox Lake, WI 53933-0200

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

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2012AP2704-CRNM      State of Wisconsin v. Timothy W. Markling (L.C. # 2009CF237)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Timothy Markling has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),<sup>1</sup> concluding there is no basis for challenging the sentence imposed after revocation of Markling's probation. Markling has filed a response claiming he is entitled to additional sentence credit. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

In June 2010, Markling pleaded no contest to operating while intoxicated, as a fifth or sixth offense. Consistent with the parties' joint recommendation, the court withheld sentence and imposed three years of probation with one year in jail as a condition. Markling's probation was later revoked. The maximum possible sentence the court could impose on sentencing after revocation is six years. The court ultimately imposed a four-year sentence consisting of two years' initial confinement followed by two years' extended supervision, with 556 days' sentence credit.

Neither the underlying conviction nor the revocation is the subject of this appeal. *See State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). This court's review is therefore limited to whether the circuit court properly exercised its sentencing discretion.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. After considering the seriousness of the offense, Markling's character, and the need to protect the public, the court imposed a sentence authorized by law. *See State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Markling's sentence is so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

There is likewise no arguable merit to a claim that Markling is entitled to additional sentence credit. Markling contends he is entitled to sentence credit for good time earned while serving the jail sentence imposed as a probation condition. WISCONSIN STAT. § 973.155(4) provides, in relevant part, that sentence credit "shall include earned good time for those inmates

... serving sentences of one year or less and confined in a county jail, house of correction or county reforestation camp.” Further, WIS. STAT. § 302.43 provides that “every inmate of a county jail is eligible to earn good time in the amount of one-fourth of his or her term for good behavior,” and the inmate “shall be given credit for time served prior to sentencing under [§] 973.155, including good time under [§] 973.155(4).”

It would appear that these statutes support Markling’s sentence credit claim. However, WIS. STAT. § 973.155(4) applies only to inmates “serving sentences.” Neither probation nor the imposition of incarceration as a condition of probation is a “sentence” for purposes of the good time statute. See *Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974); see also *State v. Fearing*, 2000 WI App 229, ¶¶8-13, 239 Wis. 2d 105, 619 N.W.2d 115. Markling was not serving a “sentence” while incarcerated as a condition of probation. Therefore, the court properly determined he was not entitled to additional sentence credit for good time.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Martha K. Askins is relieved of further representing Markling in this matter. See WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*