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July 17, 2013

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

2013AP628-CRNM State of Wisconsin v. Russell G. Barton (L.C. # 2010CF140)

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

Russell G. Barton appeals from a judgment imposing sentence after the revocation of probation. 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). Barton has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent

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

review of the 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* RULE 809.21.

Barton was originally charged with nine crimes: three counts of burglary of a dwelling, three counts of misdemeanor theft, and three counts of felony bail jumping. He entered a guilty plea to two amended charges of possession of burglarious tools and one of the theft charges. The other charges were dismissed as read-ins at sentencing. On October 12, 2010, sentence was withheld and Barton was ordered to serve three years of probation.

In February 2012, Barton was charged with new crimes after he forced entry into a convenience store, stole cartons of cigarettes, and drove off without paying for gas. After his probation was revoked, Barton was sentenced to consecutive terms of eighteen months' initial confinement and two years' extended supervision on the possession of burglarious tools convictions and nine months' jail time on the theft conviction. Those were the maximum terms that could be imposed.

This appeal brings before the court only the sentence imposed after revocation.² The only possible issue for appeal is whether the sentence was an erroneous exercise of discretion or excessive.³ We agree with the no-merit analysis that the sentencing court properly exercised its discretion and that imposition of the maximum terms is not excessive in these circumstances.

² An appeal from sentencing after revocation is limited to issues raised by the events of the resentencing hearing and the judgment entered as a result of that sentencing hearing. *State v. Scaccio*, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. An appeal taken from sentencing after revocation does not bring the original judgment of conviction before this court. *Id.*

³ Although there was a dispute at sentencing about the number of days of sentence credit Barton was entitled to, the judgment of conviction reflects one more day of credit than Barton requested. No sentence credit issue exists.

The sentencing court examined Barton's failure on probation as demonstrating a high risk to reoffend and the severity of the offenses in light of dismissed and read-in charges. Appropriate sentencing factors were relied on.

Although Barton starts out his response with a complaint that his trial attorneys were ineffective at both sentencing hearings for not bringing certain things to the court's attention, the main thrust of his response is to provide an explanation for his behavior and crimes, including the ones that lead to the revocation of probation, and his alternative view of their severity. For example, Barton indicates that items taken from his former girlfriend's house, such as prescription drugs and a pail of coins, had little value, and he asserts he could not be charged with burglary of his mother's home because it was permissible for him to be there as the son of the homeowner. He also states he would not have committed a second burglary at his former girlfriend's house if he had not been driven there by a person pressuring him to obtain more prescription drugs. Barton explains why he had the multiple jail conduct reports, which were discussed at the original sentencing hearing, and suggests that the reports were generated by jailers to keep him in segregation and keep other cells open. He says his new crimes were because a friend failed to pay promised gas money and as a result, he was stranded away from

home.⁴ Barton contends imposition of the maximum terms was not justified based on his explanations and perception of the crimes.

At the original sentencing hearing, the court heard and commented on many of the mitigating circumstances Barton raises in his response to the no-merit report, including the reason for his addiction to pain pills, the lack of damage caused by his entry into the homes, and his difficult adjustment to jail as an explanation for the conduct reports. The court evaluated those circumstances and found Barton's criminal conduct to have been aggravated. The same judge presided at the sentencing after revocation. Although Barton's explanations may not have been at the forefront at that proceeding, they were known to the court. We cannot say the court failed to consider them in evaluating the seriousness of the offenses. Additionally, at the sentencing after revocation proceeding, the court heard Barton's explanation of the new crimes and a failed drug test on probation. The court indicated that it almost defies credibility and common sense to argue that excuses for failing on probation justified a non-prison sentence. In short, for the reasons stated by the sentencing court, there is no merit to a claim that the maximum sentences were excessive.

⁴ Barton even explains his conduct on probation and claims he misunderstood the sentencing judge's explanation about remaining drug free and would never have had a few puffs of marijuana if he had known it would result in returning to jail for six months. At the original sentencing the court stated that it imposed and stayed a six-month term of conditional jail time and that the term could be used for the first violation of probation. The court told Barton he had to maintain absolute sobriety, including no use or possession of controlled substances without a valid prescription. The court asked Barton if he understood and he confirmed he did. The judgment of conviction stated those conditions in plain terms. The record belies Barton's claim of a misunderstanding.

To the extent Barton’s response suggests he was sentenced on the basis of inaccurate information,⁵ such a claim lacks merit. A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a due process violation, the defendant must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *Id.*, ¶26. At the sentencing after revocation, the court did not mention the information that Barton suggests was inaccurate. So even if some characterizations were off the mark, there is no merit to arguing that the court relied on inaccurate information.

This court accepts the no-merit report, affirms the sentence after revocation, and discharges appellate counsel of the obligation to represent Barton further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Randall E. Paulson is relieved from further representing Russell G. Barton in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

⁵ Barton claims the prosecution should not have been allowed to reference burglary in the plural because he could not burglarize his mother’s home and that it was improper to call the incidents “break-ins” because he did not use forced entry and break anything but rather used a credit card to trip the lock. He also asserts it is inaccurate to portray him as having committed the crimes to support a serious drug addiction because he was only dependent on pain killers because of a 2003 shoulder injury and poor medical treatment.