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

2014AP1210-CRNM	State of Wisconsin v. Aaron J. Aikens (L.C. #2011CF244)
2014AP1211-CRNM	State of Wisconsin v. Aaron J. Aikens (L.C. #2012CF1144)
2014AP1212-CRNM	State of Wisconsin v. Aaron J. Aikens (L.C. #2012CF1783)
2014AP1215-CRNM	State of Wisconsin v. Aaron J. Aikens (L.C. #2011CF1121)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Aaron Aikens appeals two judgments convicting him, based upon no contest pleas entered on separate dates, of repeated sexual assault of the same child and misappropriating identification information to obtain money, and two companion judgments sentencing him to prison following the revocation of his probation on convictions for robbery and bail jumping. He also appeals an order denying his motion for sentence modification on all four cases. Attorney Patricia FitzGerald has filed no-merit reports seeking to withdraw as appellate counsel in each

case. *See* WIS. STAT. RULE 809.32 (2013-14);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Aikens was sent copies of the reports, but has not filed a response. Upon reviewing the entirety of the records, as well as the no-merit reports, we conclude that there are no arguably meritorious appellate issues.

We first note that an appeal from a sentence following revocation does not bring an underlying conviction before this court. *See* ***State v. Drake***, 184 Wis. 2d 396, 398-99, 515 N.W.2d 923 (Ct. App. 1994). Nor can an appellant challenge the validity of any probation revocation decision in this proceeding. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent from the underlying criminal action); *see also* ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (judicial review of probation revocation is by way of certiorari to the court of conviction). Therefore, the only potential issues for appeal in the robbery and bail jumping cases would be the circuit court's imposition of sentence following revocation and its denial of sentence modification.

Next, as to the appeals involving sexual assault and identity theft, we see no arguable basis for plea withdrawal in either case. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice, such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or

[1] All references to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

failure by the prosecutor to fulfill the plea agreement. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Aikens entered his no contest pleas pursuant to negotiated plea agreements that were presented in open court. In exchange for Aikens' pleas, the State agreed to dismiss a repeater allegation on the sexual assault charge and to dismiss and read in two other counts relating to the identity theft.

The circuit court conducted standard plea colloquies, inquiring into Aikens' ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Aikens' understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure that Aikens understood that the court would not be bound by any sentencing recommendations. In addition, Aikens provided the court with signed plea questionnaires with attached jury instructions. Aikens indicated to the court that he understood the information explained on those forms, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaints—namely, that Aikens engaged in a consensual sexual relationship with a fourteen-year-old girl and that he was one of a group of men that used a debit card that someone had stolen from a car—provided a sufficient factual basis for the pleas. We see nothing in the records to suggest that counsel's performance was in any way deficient,

and Aikens has not alleged any other facts that would give rise to a manifest injustice. Therefore, Aikens' pleas were valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Aikens was afforded the opportunity at the sentencing hearing to review and comment on the revocation materials, to present character testimony from his mother, his grandmother, his step-grandfather, two brothers, and two friends, and to address the court prior to sentencing, both personally and by counsel.

The circuit court considered the standard sentencing factors and explained their application to these cases. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court noted that the amount of sentence exposure Aikens was facing was one measure of how serious the offenses were, and emphasized that Aikens ought to have known better than to have sex with a fourteen-year-old, and to participate in the beating and robbery of a pizza delivery person. With respect to Aikens' character and rehabilitative needs, the court was concerned that Aikens had continued to commit crimes while on probation, despite having the support of a loving family, but felt that he still had an opportunity to make positive changes in his lifestyle, given his youth. The court concluded that a modest prison term was necessary to protect the public and to avoid depreciating the seriousness of the offenses.

The court sentenced Aikens to three years of initial confinement and four years of extended supervision on the robbery case, with 150 days of sentence credit; a consecutive three years of initial confinement and four years of extended supervision on the sexual assault case; a consecutive one year of initial confinement and one year of extended supervision on the bail jumping case; and a consecutive one year of initial confinement and one year of extended supervision on the identity theft case. It also ordered that Aikens pay the undisputed amount of restitution; imposed standard costs and conditions of supervision; directed that Aikens provide the mandatory DNA sample and surcharge required for specified sexual crimes; and found that Aikens was not eligible for the Challenge Incarceration or Substance Abuse programs.

The sentences imposed were within the applicable penalty ranges, and constituted just over a quarter of the maximum exposure Aikens faced. *See* WIS. STAT. §§ 943.32(1) (2007-08) (classifying robbery as a Class E felony); 973.01(2)(b)5. and (d)4. (2007-08) (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 948.025(1)(e) (2009-10) (classifying three or more first- or second-degree sexual assaults of the same child as a Class C felony); 973.01(2)(b)3. and (d)2. (2009-10) (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony); 943.201(2)(a) (2009-10) (classifying misappropriation of identification to obtain money as a Class H felony); 946.49(1)(b) (2009-10) (classifying bail jumping as a Class H felony); and 973.01(2)(b)8. and (d)5. (2009-10) (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. That is particularly true here, where Aikens had harmed multiple victims in various ways, and had committed additional offenses while on probation.

Aikens filed a postconviction motion seeking sentence modification on the grounds of three new factors: (1) that the court had not had the benefit of a presentence report describing Aikens' childhood when it sentenced Aikens; (2) that the revocation summary had suggested that Aikens needed confinement for AODA treatment, but a subsequent DOC assessment determined that Aikens did not have any AODA needs to be treated in confinement; and (3) that Aikens has learned that the victim of his sexual assault had a child, with whom he would like to develop a relationship. Aikens asked that his sentences be modified to be concurrent, and that the no-contact provision relating to the victim of his sexual assault be modified to allow her to bring the child to visit him in prison. The circuit court denied the motion without a hearing, ruling that the alleged grounds did not constitute new sentencing factors as a matter of law.

A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (reaffirming holding of ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a particular set of facts clearly and

convincingly establishes a new sentencing factor is a question of law that we review de novo. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 546-47, 335 N.W.2d 399 (1983); ***Harbor***, 333 Wis. 2d 53, ¶¶36-37. However, whether any such new factor warrants a modification of sentence is a discretionary determination to which we will defer. *See* ***Hegwood***, 113 Wis. 2d at 546.

The parties advised the court prior to sentencing that they would not be requesting a PSI because similar information would be provided in the revocation materials that could be supplemented by counsel at the sentencing hearing. The type of information Aikens now wishes he had provided about his childhood and substance abuse issues does not relate to a "new" factor, but simply constitutes more detailed information about topics that were already addressed at sentencing. *See* ***Harbor***, 333 Wis. 2d 53, ¶¶57-58 (additional information relating to a topic that was already addressed at sentencing, such as mental health issues, does not constitute a new sentencing factor). As to Aikens' paternity discovery, he cites no authority that would permit him visitation with a child fathered by sexual assault. Moreover, we observe that the circuit court seemed to suggest that it was a mitigating factor that Aikens had not impregnated the victim. We therefore see no basis to set aside the circuit court's refusal to modify Aikens' sentences.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction, sentences after revocation, or order denying sentence modification. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction in Appeal Nos. 2014AP1211-CRNM and 2014AP1212-CRNM, the sentences imposed following revocation in Appeal Nos. 2014AP1210-CRNM and 2014AP1215-CRNM, and the order denying sentence modification in all four cases are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patricia FitzGerald is relieved of any further representation of Aaron Aikens in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane Fremgen
Clerk of Court of Appeals