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DISTRICT IV

December 19, 2024

To:

Hon. Michael P. Screnock
Circuit Court Judge
Electronic Notice

Carrie Wastlick
Clerk of Circuit Court
Sauk County Courthouse
Electronic Notice

Tristan Breedlove
Electronic Notice

Lucas Swank
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Derek Ross Harvey
1220 Silver Drive, Apt. 6
Baraboo, WI 53913

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

2023AP1027-CRNM State of Wisconsin v. Derek Ross Harvey (L.C. # 2016CF157)

Before Kloppenburg, P.J., Blanchard, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Attorneys Lucas Swank and Tristan Breedlove have filed a no-merit report seeking to withdraw as appellate counsel for appellant Derek Harvey. *See* WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to any issue arising from the sentence imposed by the circuit court following the revocation of Harvey's probation. Harvey was sent a copy of the report but has not

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

filed a response. On our independent review of the no-merit report and the record, we agree with the assessment of counsel that there are no arguably meritorious appellate issues. We summarily affirm. *See Wis. Stat. Rule 809.21.*

Harvey was charged with strangulation and suffocation, misdemeanor battery, and disorderly conduct, all as domestic abuse, and three counts of felony bail jumping. Pursuant to a plea agreement, Harvey pled guilty to one count of bail jumping in this case and one count of possession with intent to deliver heroin in a separate case, and the remaining charges against him were dismissed and read in for sentencing purposes. The circuit court sentenced Harvey to imprisonment on the heroin conviction in the separate case and withheld sentence and imposed one year of probation on the bail jumping conviction in this case, consecutive to the prison sentence. Harvey's probation was revoked, and he was returned to court for sentencing. The court sentenced Harvey to three years of initial confinement and three years of extended supervision.

This appeal from the sentence imposed following revocation of probation does not bring the underlying conviction before us. *See State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Additionally, the validity of the probation revocation itself is not before us in this appeal. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation independent from 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 petition for certiorari in circuit court). The only potential appellate issues at this point in the proceedings relate to sentencing following revocation.

This court's 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 complained of."² *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record indicates that the circuit court afforded Harvey the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Harvey's rehabilitative needs, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (quoted source omitted)). The court granted Harvey 311 days of sentence credit, on counsel's stipulation. We agree with counsel's assessment that further proceedings related to the sentence imposed after revocation would be wholly frivolous.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment. 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 judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

² A circuit court's duty at sentencing after revocation is the same as its duty at an original sentencing. *See State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289.

IT IS FURTHER ORDERED that Attorneys Lucas Swank and Tristan Breedlove are relieved of any further representation of Derek Harvey in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals