STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT X

Case No. XXXXAPXXXX CRNM

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN SMITH,

Defendant-Appellant.

On Notice of Appeal to Review a Sentencing after
Revocation of Probation and Order Denying a Sentence
Modification, Both Entered in the
Circuit Court for Bay County, the
Honorable Grover Cleveland, Presiding

NO MERIT BRIEF OF DEFENDANT-APPELLANT PURSUANT TO WIS. STAT. RULE 809.32

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in sentencing Mr. Smith following the revocation of his probation?

2. When Mr. Smith presented the court with what Judge Cleveland determined were "new factors", did the court misuse its discretion in refusing to modify Mr. Smith's sentence as requested?

STATEMENT OF THE CASE AND FACTS

On April 20, 2010, Mr. Smith entered no contest pleas to two counts of failure to pay child support and an additional two counts of failure to pay child support as a repeat offender before the Honorable Grover Cleveland. (34:9). On June 15, 2010, Judge Cleveland withheld sentence on all counts and placed Mr. Smith on probation for three years. (32:12). Conditions of probation included 12 months in the county jail on counts one and two to run consecutive to each other, with all but the first three months stayed, and to pay $100 per week toward his outstanding child support obligations. (32:39-41).

Mr. Smith's probation was later revoked (18), and Judge Cleveland imposed the following sentences:

-- count 1, 1 ½ years IC/2 years ES

-- count 2, 1 ½ years IC/2 years ES

-- count 3, 1 year IC/2 years ES

-- count 4, 1 year IC/2 years ES

The sentences were imposed consecutive to each other and all other sentences. (22). Mr. Smith was granted 90 days sentence credit. (22).

Following sentencing after revocation Mr. Smith filed a motion to modify his sentence based on new factors he identified for the trial court's consideration. (25). On June 29, 2012, Judge Cleveland issued a written decision and order denying the motion. (30).

A notice of appeal was filed with the trial court on July 17, 2012. (33).*

ARGUMENT

I. Did the Trial Court Misuse Its Discretion in Sentencing Mr. Smith Following the Revocation of His Probation?

Mr. Smith wishes to challenge the sentences imposed following the revocation of his probation. However, a review of the record reveals a proper exercise of sentencing discretion rendering any such claim without arguable merit.

Sentencing after revocation, like any sentencing, lies within the discretion of the trial court and a defendant bears a

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* The court's review in this matter is limited to the sentencing after revocation proceeding held on September 27, 2011, and the trial court's denial of Mr. Smith's request for a sentence modification. Mr. Smith's right to seek review of his plea or the terms of probation imposed in the original judgment of conviction expired when he did not pursue a direct appeal from the original judgment. *See* ***State v. Drake***, 184 Wis. 2d 396, 515 N.W.2d 923 (Ct. App. 1994).

heavy burden to demonstrate an erroneous exercise of discretion. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 799, 661 N.W.2d 483. Indeed, where there is evidence discretion was exercised, there is a strong public policy against interfering with a trial court's sentencing discretion. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Fisher***, 2005 WI App 175, ¶20, 285 Wis. 2d 433, 702 N.W.2d 56. "As long as the trial court considered the proper factors and the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience." ***State v. Wegner***, 2000 WI App 231, ¶12, 239 Wis. 2d 96, 619 N.W.2d 289.

The duty of a court sentencing after revocation is the same as any sentencing court. It must consider the gravity of the offense, the character of the accused, and the need to protect the public. ***Id***., ¶7. The weight to be given the various factors lies within the trial court's discretion. ***State v. Fisher***, 285 Wis. 2d at 447, ¶20.

Here the court had before it a revocation summary from the department detailing Mr. Smith's conduct while on supervision and a recommendation that he be sentenced to a combination of sentences totaling two to three years of initial confinement and four years extended supervision. (19:6). After hearing from both counsel and Mr. Smith, Judge Cleveland began his sentencing remarks by telling Mr. Smith:

> And the opportunity that I gave you was just a complete waste of time for you, for me, for the State, for your kids, for the community. You have totally disregarded what you were supposed to do while you were on probation.

(38:28). In support of this conclusion the court referred to information from the revocation summary that Mr. Smith had pending charges for disorderly conduct and sexual assault, (38:30), as well as allegations that he failed to pay any part of his child support obligation, used marijuana, lied to his agent when he denied using drugs, and provided false information to his agent about where he stayed one night. (38:34).

Judge Cleveland stated the offenses were serious felonies and that the opportunity given Mr. Smith to live in the community "was filled with criminal activity, alleged criminal activity, violations of the conditions that [the court] set, violations of the rules of probation." (38:35). The court was concerned that while this was a child support case, Mr. Smith had paid nothing in the time he was on probation. (38:31).

The court looked to Mr. Smith's character and expressed a negative view of it stating:

> You're somebody who's irresponsible, you aren't accountable, you're lazy, you have no desire to satisfy your legal obligations or moral obligations or your obligations to live in a community, call them what you want which is why you've paid zero cents in the last 16 months. That's just who you are.

(38:32). This view was apparently reinforced for the court based on Mr. Smith's admission that at the age of 29 he was "only" arrested eight times. (38:36).

Finally, Judge Cleveland concluded Mr. Smith's risk of reoffending was "extremely high" based upon his "serious set of felonies" and the fact he failed to rehabilitate himself when given the chance to live in the community. (38:37). The court concluded: "I think a prison sentence is not only appropriate but it's necessary. Anything short of that would

depreciate the seriousness of this offense and wouldn't accomplish in my opinion any of the sentencing objectives." (38:37). The court then imposed a cumulative sentence of five years initial confinement and eight years of extended supervision consecutive to any other sentence, with credit for 90 days. (38:38). Judge Cleveland concluded by declaring:

> You are not eligible for the Challenge Incarceration Program or you are not eligible for the Earned Release Program. If – I'm putting that in there because I don't think it's appropriate for you to be given an opportunity to complete either of those programs given your character, the history of this case, your refusal to do anything to better your children or to make your situation any better. I think that a five-year confinement portion is something that I want you to serve for both a deterrent purpose and a punishment punish. [sic] Rehabilitation obviously has not worked in the community, and hopefully you'll be able to get rehabilitation while you're in prison.

(38:41).

Judge Cleveland's comments demonstrate he considered the relevant factors and gave reasons for the sentences imposed. Any argument the court misused its discretion in sentencing Mr. Smith after revocation would be without arguable merit.

II. Did Judge Cleveland Err in Denying Mr. Smith's Request to Modify His Sentence Based on New Factors?

Following his sentencing after revocation, Mr. Smith filed a postconviction motion seeking a sentence modification based on several new factors. Judge Cleveland denied the motion and Mr. Smith may wish to argue this was error. For

the reasons stated below, counsel believes such an argument would be without merit.

In order to obtain a sentence modification based upon a new factor "the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. A defendant bears the burden to prove by clear and convincing evidence the existence of a new factor. ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). In ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), our supreme court defined a "new factor" as

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all the parties.

This continues to be the definition for a "new factor" for purposes of a sentence modification. ***Harbor***, 333 Wis. 2d 78, ¶52. Whether the fact or facts a defendant presents to the court is a "new factor" is a question of law. ***Id***. at 72, ¶36. Once the existence of a new factor is established, the trial court must then exercise its discretion to determine whether the new factor justifies modification of the sentence. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983).

At the sentencing after revocation Judge Cleveland commented on the six violations alleged in the revocation summary. These allegations were:

> 1.) On or about August 22, 2009, John Smith engaged in disorderly behavior, resulting in charges of Disorderly Conduct and Criminal Property Damage, in

violation of rule 1 of the Rules of Community Supervision, signed May 14, 2009.

2.) On or about February 9, 2011, John Smith engaged in sexually assaultive behavior, in violation of rule 1 of the Rules of Community Supervision, signed on August 24, 2010.

3.) Between about January 20, 2011 and about January 22, 2011, John Smith smoked marijuana, in violation of rules 1 and 20 of the Rules of Community Supervision, signed August 24, 2010.

4.) On or about February 3, 2011, John Smith provided false information to his Agent when he denied using drugs, in violation of rules 1 and 20 of the Rules of Community Supervision, signed August 24, 2010.

5.) On or about February 14, 2011, John Smith provided false information to his Agent in a signed statement, when he said he left his girlfriend's residence on the evening of February 9, 2011, when in fact he stayed the night, and didn't leave until around 8:00 on the morning of February 10, 2011, in violation of rules 1 and 15 of the Rules of Community Supervision, signed August 24, 2010.

6.) Between about August 24, 2010, and about February 10, 2011, John Smith failed to pay $100 per week toward his child support arrears, in violation of rules 1 and 21 of the Rules of Community Supervision, signed August 24, 2010.

(19:1).

In his postconviction motion Mr. Smith alleged there were four new factors which called into question the accuracy and weight to be accorded alleged violations 1, 2, 4, and 6. The new factors as impacting these violations were as follows:

Violation 1 – the disorderly conduct and criminal damage to property charges were dismissed on the prosecutor's motion as the fact there was no violation of the electronic monitoring Mr. Smith was on at the time rendered it highly unlikely he could have committed the offenses as alleged.

Violation 2 – although Mr. Smith was charged with second degree sexual assault (later amended to third degree sexual assault) and false imprisonment stemming from his interaction with a woman, following the sentencing after revocation in this case he proceeded to jury trial and was acquitted of the charges.

Violation 4 – the Administrative Law Judge declared allegation 4 not proven, although the decision on this point did not relate to the facts alleged.

Violation 6 - although Mr. Smith had not paid anything toward his child support obligations during his period on probation, there were mitigating circumstances and both his agent and Judge Cleveland had previously indicated he was making a good effort.

In his decision Judge Cleveland determined "the dismissal of the disorderly conduct charge, acquittal of the sexual assault charge, and the fact that ALJ held that the DOC did not prove Violation 4" qualified as new factors. (30:3-4). The court did not find the mitigating circumstances relating to Mr. Smith's failure to pay child support while on probation to be a new factor as Mr. Smith himself had brought them to the attention of the court at the sentencing after revocation, and the court had rejected them. (30:4).

After determining Mr. Smith had proven the existence of three new factors, Judge Cleveland then ruled, "[n]one of

the new factors, however, justify a modification of Smith's sentence because none of them change the facts that were considered by the Court when it imposed sentence on the revocation case." (19:4). Judge Cleveland stated that while he had discussed the pending charges in deciding the sentences to be imposed, he had also specifically noted sentence was being imposed on the revocation case only, and that there were other violations apart from the pending charges demonstrating Mr. Smith's failure to comply with the terms of his probation. (19:4-6). He further noted, citing ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980), that he was free to consider unproven offenses as evidence of a defendant's character. (19:6). As for the new factor regarding Violation 4, that Mr. Smith had lied to his agent when he denied using drugs, Judge Cleveland declared that at the sentencing he was not relying upon the ALJ's finding, which related to Mr. Smith lying about his location at a particular time, but upon Mr. Smith's statement that he used drugs while on probation and lied to his agent about it. (19:5).

Judge Cleveland explained that at the sentencing after revocation he

> communicated to Mr. Smith that his sentence would be based on his unwillingness to rehabilitate himself, his continuing risk to reoffend, and that anything short of a prison sentence would depreciate the seriousness of the offense and wouldn't accomplish any of the sentencing objectives.

(19:5). He concluded that none of the new factors presented justified a modification of sentence as they did not "change the analysis applied by the Court when it imposed sentence after revocation." (19:6).

As in ***State v. Verstoppen***, 185 Wis. 2d 728, 519 N.W.2d 653 (Ct. App. 1994), the court properly identified and assessed the significance of the new factors presented to it and then, in light of other sentencing factors, determined the new factors were insufficient to warrant a modification of sentence. Any challenge on this point would appear to be without arguable merit.

CONCLUSION

For the reasons set forth above, counsel believes there are no meritorious issues to be raised on behalf of Mr. Smith in the above case. Accordingly, she respectfully requests that she be released from any obligation to represent Mr. Smith further in this case.

Dated this 20th day of August, 2013.

Respectfully submitted,

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATION IN COMPLIANCE WITH 809.32(1)(b)

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 20th day of August, 2013.

Signed:

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this 20th day of August, 2013.

Signed:

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant