STATE OF WISCONSIN

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

DISTRICT X

Case Nos. XXAPXXXX & XXAPXXXX

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN SMITH,

Defendant-Appellant.

On Appeal from Judgments of Conviction after Revocation of Probation Entered in the Bay County Circuit Court, 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

ISSUE PRESENTED

Is there any arguable merit to challenge the concurrent, three-year sentences of imprisonment, consisting of two years' confinement and one year supervision, imposed following revocation of probation on convictions for possession of marijuana with intent to deliver as a repeat drug offender?

STATEMENT OF THE CASE

This is an appeal from two cases that were consolidated in the circuit court pursuant to a plea agreement and, subsequently, for purposes of sentencing after revocation of probation. (R1:43, 45; R2:35, 37).[1] This court consolidated the appeals brought following the sentencing after revocation.

In each of these cases, John Smith pled no contest to one count of possession of marijuana with intent to deliver, as a repeat drug offender. (R1:30; R2:23). Circuit Judge Grover Cleveland withheld sentence on both counts and placed Mr. Smith on probation for three years with various conditions. (*Id*.). Subsequently, Mr. Smith's probation was revoked, and he was returned to court for sentencing. On March 9, 2012, Judge Cleveland imposed concurrent three-year sentences of imprisonment, consisting of two years' confinement and one year extended supervision. (R1:39; R2:32).

Mr. Smith filed notices of intent to seek postconviction relief following the sentencing after revocation. (R1:40;

---

[1] In this brief, "R1" refers to the appeal record in Case No. XXAPXXXX CRNM, and "R2" refers to the appeal record in Case No. XXAPXXXX CRNM.

R2:33). Undersigned counsel was appointed to represent Mr. Smith in postconviction proceedings and, subsequently, filed no-merit notices of appeal pursuant to Wis. Stat. Rule 809.32 from the judgments of conviction entered following the sentencing after revocation. (R1:41; R2:34).

STATEMENT OF FACTS

In the first case, the state charged Mr. Smith with a single count of possession of marijuana with intent to deliver as a repeat drug offender. (R1:2, 11). The charge stemmed from Mr. Smith's arrest on January 2, 2007, when an officer found nine individual packages of marijuana and $712 cash in Mr. Smith's pants following a consent search. (R1:2:3-6).

In the second case, the state charged Mr. Smith with six crimes: possession with intent to deliver marijuana as a repeat drug offender, three counts of felony bail jumping, one count of misdemeanor bail jumping and one count of obstructing an officer. (R2:3, 13). The charges were based upon conduct occurring in September of 2007, while Mr. Smith was released on bail in the first case. In this matter, following a traffic stop and a dog sniff of the car Mr. Smith was driving, police found in his pants 14 individually wrapped bags of marijuana and $377 cash. (R2:3:5-8).

In both cases, in support of the drug repeater enhancer the state alleged a 2004 conviction in Illinois for delivery of cocaine in an amount of 15 or more grams. (R1:11; R2:3:1).

In November of 2008, the state and Mr. Smith, who was represented by counsel, entered into a plea agreement pursuant to which Mr. Smith pled no contest to two counts of possession with intent to deliver marijuana as a repeat drug offense. The agreement also involved a third case in which

Mr. Smith pled no contest to two misdemeanors, battery and intimidation of a victim. (R1:43:2-3; R2:35:2-3). The charges in the misdemeanor case stemmed from domestic disturbance involving Mr. Smith's girlfriend. (R1:32:14; R2:25:14).

The court followed the parties' joint sentencing recommendation. (R1:43:2-3, 10-11; R2:35:2-3, 10-11). With respect to the two drug counts, the court withheld sentence and placed Mr. Smith on probation for three years. (R1:43:10; R2:35:10). On the two misdemeanors in the third case, the court imposed nine months in jail. (*Id*. at 11). Mr. Smith did not file notices of intent from the judgments of conviction entered after that sentencing held on November 26, 2008.

In December 2008, police responded to the report of a domestic disturbance involving Mr. Smith and his girlfriend. (R1:32:11; R2:25:11). Police found Mr. Smith driving his girlfriend's car without a valid license and arrested him. (*Id*.). Shortly thereafter, Mr. Smith entered into an alternative to revocation agreement that included electronic monitoring. (*Id*.). Various violations ensued and, eventually, Mr. Smith was terminated from both an AODA group and a domestic violence counseling group due to poor attendance and inappropriate behavior. (*Id*. at 11-12).

On August 18, 2010, the probation agent ordered Mr. Smith to report to her office. Mr. Smith absconded, and his whereabouts were unknown until his arrest in October 2010. (*Id*. at 12). While an absconder, in September 2010, Mr. Smith's girlfriend in Illinois reported to the probation agent that she and Mr. Smith had gotten into an argument over financial support of their child. (*Id*.). She reported that Mr. Smith threatened to throw her off a second story deck. (*Id*.). Mr. Smith fled when police were called to the residence.

(*Id*.). Mr. Smith was on absconder status for more than 16 months of the 36-month probation term. (*Id*. at 14).

While in the Bay County Jail awaiting revocation of probation, Atlanta police executed a warrant for Mr. Smith's DNA for purposes of a cold case homicide investigation involving the death nearly 20 years earlier of a 16-year-old girl. (*Id*.). Following revocation, Mr. Smith was returned to court for sentencing in these two cases. (R1:45; R2:37). By the time of the sentencing after revocation, a detainer had been filed against Mr. Smith regarding charges in Georgia related to the homicide. (R1:44:3; 45:6, 8-9; R2:36:3; 37:6, 8-9).

In the revocation materials submitted to the court, the Department of Corrections recommended concurrent, one-year jail sentences. (R1:32:16; R2:25:16). The prosecutor recommended four years' imprisonment, consisting of three years' confinement followed by one year of extended supervision. (R1:45:3; R2:37:3). The prosecutor argued that the department's recommendation was "woefully inadequate" given Mr. Smith's performance on supervision and prior criminal history. (*Id*. at 4-5). The prosecutor told the court that Mr. Smith had three convictions in Georgia for delivering cocaine and one conviction for possession of a firearm and had been sentenced on one matter to 10 years in prison. (*Id*. at 3). Mr. Smith's counsel, who had also represented him in these cases through the plea and first sentencing, responded that the prosecutor's recitation of the criminal record was "essentially accurate …." (*Id*. at 5).

In his sentencing recommendation, defense counsel made a "pragmatic" argument that, given the serious charges Mr. Smith was facing in Georgia, the court should impose concurrent, six-month jail sentences that would amount to

essentially a time-served sentence. (*Id*. at 5-8). Counsel argued that the pending Georgia detainer would prevent Mr. Smith from receiving any treatment or programming in the Wisconsin prison system, and, therefore, it would make sense to speed up his transfer to Georgia. (*Id*. at 10). The prosecutor opposed that request. (*Id*. at 9-10).

After Mr. Smith's allocution, the court gave its sentencing decision and imposed concurrent terms of two years' confinement and one year extended supervision. (*Id*. at 14). The court's sentencing decision consisted of the following:

> THE COURT: Okay. Thank you. Well, I have reviewed the history of this probation effort here, and it's not a good history. I mean there's failure to complete programs. There's dirty UAs, not most of them but enough. There were only nine UAs taken during the whole time on probation; seven of them clean, two of them dirty.
>
> The purpose of probation is to make sure that people comply with the requirements that are laid out for them, and your requirements included completing AODA and domestic violence treatment, domestic violence treatment for some very good reasons that I wouldn't go into detail about, so this is not what I would call a good history on probation.
>
> Although I think defense counsel means it in a good way, but I don't know of any sentencing factors that I can consider that allow me to say, well, you know, another state wants him; therefore, that should determine the sentence.
>
> No. I really have to stay with the sentencing factors that are the important ones which have seriousness of the offense, need for protection of the community, which is very high in this case, and

> rehabilitative needs and character of the defendant which would include the criminal history that is laid out here. That's a very highly significant factor in this case too.
>
> I cannot simply, after failure on community supervision simply have a community based sentence which is what a jail sentence would be, and that means 99 times out of 100 on a sentencing after revocation that a person does face a prison sentence.
>
> The appropriate sentence here I think is a three-year sentence to the Wisconsin State Prison system; two years initial confinement, one year extended supervision. That's in each case and to run concurrent. I believe that that sentence does balance the sentencing factors that I've just laid out here on the record.

(*Id*. at 12-14).

Consistent with the parties' request, the court granted sentence credit of 164 days. (*Id*. at 14-15).

SCOPE OF REVIEW

The potential issues for this brief are shaped by ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994), and ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996), in which this court rejected as untimely challenges to the validity of a conviction that were raised for the first time on direct appeal taken from a sentence imposed following revocation of probation. In light of those decisions, Mr. Smith's direct appeal right is limited, at this point, to issues arising from the sentencing after revocation of probation. Accordingly, this brief addresses only those potential issues that arise from the sentencing after revocation.

ARGUMENT

Is There any Arguable Merit to Challenge the three-year Sentence of Imprisonment, Consisting of Two Years' Confinement and One Year Supervision, on Convictions for Possession of Marijuana with Intent to Deliver as a Repeat Offender, Which Was Imposed Following Revocation of Probation?

Any argument challenging the sentences imposed following revocation of probation as illegal or an erroneous exercise of discretion would be frivolous and without arguable merit.

There is a strong public policy against interfering with the sentencing decision of a court and an equally strong presumption that the sentencing court acted reasonably. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. The defendant bears the burden of showing that there was some unreasonable or unjustifiable basis for the sentence imposed. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). An appellate court has a duty to affirm a sentence if facts of record show it is sustainable as a proper exercise of discretion. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

Mr. Smith was convicted of possession of marijuana with intent to deliver in violation of Wis. Stat. § 961.41(1m)(h)1., a Class I felony. The maximum penalty for such an offense is a $10,000 fine and imprisonment for three years and six months. Wis. Stat. § 939.50(3)(i). The court may impose initial confinement of up to one year and six months and extended supervision of two years. Wis. Stat. § 973.01(2)(b)9 & (d)6. However, when pleading no contest to the drug charges, Mr. Smith admitted the prior drug conviction alleged by the state, making him subject to the

enhancer under Wis. Stat. § 961.48 for repeat drug offenders. The enhancer added four years to the maximum term of imprisonment. Wis. Stat. § 961.48(1)(b).

On each of the two counts, Mr. Smith was facing a maximum of seven years' and six months' imprisonment, of which five years and six months could be ordered as confinement and two years as extended supervision. The three years' imprisonment imposed here, consisting of two years' confinement and one year supervision, is well within the maximum permitted by statute. Moreover, even though the two crimes were committed eight months apart, the court imposed concurrent sentences. There is nothing illegal about the sentences imposed.

To properly exercise its discretion regarding the length of sentence selected within the statutory maximum, the court must explain the reasons for the sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶¶38-39 (citing ***McCleary v. State***, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971)). A sentencing decision should be based primarily on the following factors: the gravity of the offense, the character of the defendant, and the need for protection of the public. ***State v. Klubertanz***, 2006 WI App 71, ¶18, 291 Wis. 2d 751, 713 N.W.2d 116. However, the sentencing court may determine the amount of weight to give a particular factor in the case before it. ***Stenzel***, 276 Wis. 2d 224, ¶9.

At the sentencing after revocation, the court expressly considered the seriousness of the offenses, the character of the defendant and the need to protect the public. The court said protection of the public and the character of the defendant were of highest importance, given Mr. Smith's poor performance on probation and his prior criminal record. Indeed, the record before the court showed that Mr. Smith

had absconded from probation for some 16 months, was terminated from both AODA and domestic violence treatment programs, and had allegedly been involved in another domestic disturbance while on probation and while an absconder. In addition, Mr. Smith had prior convictions in Georgia, including for delivery of cocaine, and had previously served time in prison. The record shows that the court gave adequate reasons for the sentence imposed and those reasons were supported by the facts before it. Any claim that the court erred in its exercise of discretion would be without arguable merit.

Any claim that the sentences imposed were unduly harsh or excessive, within the meaning of the legal standard, would also be without arguable merit. To prevail on such a claim, the defendant must show that 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.'" ***Stenzel***, 276 Wis. 2d 224, ¶21 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). This court has said that a sentence which is well within the limits of the maximum sentence, as are Mr. Smith's, does not violate the judgment of reasonable people. ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Indeed, had the sentences been imposed consecutively, Mr. Smith was facing maximum confinement of 11 years, and he received two years.

A defendant also has a due process right to be sentenced on the basis of accurate information. ***United States v. Tucker***, 404 U.S. 443, 448 (1972). To establish a due process violation at sentencing, the defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied upon

the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. At both an adjourned hearing and at the sentencing after revocation, defense counsel told the court that there were no factual corrections to be made to the revocation summary. (R1:44:2-3; 45:2; R2:36:2-3; 37:2). Mr. Smith could not meet his burden under ***Tiepelman*** to prove that the court relied upon inaccurate information when sentencing him.

Any argument challenging the sentences imposed after revocation of probation would be frivolous and without arguable merit.

CONCLUSION

For the reasons set forth above, undersigned counsel respectfully requests, pursuant to Wis. Stat. Rule 809.32, that this court enter an order relieving her of further representation of Mr. Smith in this matter.

Dated this 9th day of January, 2013.

Respectfully submitted,

_____

[ATTORNEY NAME]
[State Bar No.]

[Attorney 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 9th day of January, 2013.

Signed:

_____

[ATTORNEY NAME]
[State Bar No.]

[Attorney 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 9th day of January, 2013.

Signed:

_____

[ATTORNEY NAME]
[State Bar No.]

[Attorney contact information]

Attorney for Defendant-Appellant