

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 23, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3061-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHANIE B. HOLMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Beloit County:
EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J. and Roggensack, J.

PER CURIAM. Stephanie B. Holmes appeals from a judgment imposing a five-year sentence after her probation for welfare fraud was revoked.

Holmes's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Holmes received

a copy of the report and was advised of her right to file a response. She has not done so. Upon consideration of the report and an independent review of the record as mandated by *Anders*, we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we affirm the judgment.

Holmes was convicted of welfare fraud in 1991 and received a four-year term of probation with various conditions. Her probation was revoked in 1996 and she appeared with counsel for sentencing after revocation.¹ The circuit court imposed a five-year sentence and ordered Holmes to pay restitution.

The no merit report addresses whether the circuit court misused its sentencing discretion. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for protection of the public. *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given to these factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

Our review of the sentencing transcript reveals that the court considered the appropriate factors. The court considered that Holmes was a

¹ According to the transcript of the sentencing after revocation, Holmes's probation "apparently had been extended" prior to being revoked. The Department of Corrections representative at sentencing after revocation stated that she began supervising Holmes in approximately April 1995 and that she supervised her for approximately six weeks before Holmes absconded. Sentencing after revocation was delayed due to Holmes's flight from Wisconsin in approximately May 1995. However, there would be no arguable merit in asserting that Holmes's probation had expired. Probation revocation is reviewable in a separate certiorari proceeding. *State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971).

“miserable failure” while on probation and that she absconded from her supervision. The court considered that Holmes was responsible for her conduct and imposed a five-year sentence. The sentence did not exceed the statutory maximum. We conclude that the trial court properly exercised its sentencing discretion.

The no merit report also correctly states that Holmes may not challenge the underlying conviction in this appeal from a sentence after revocation of probation. *See State v. Drake*, 184 Wis.2d 396, 399, 515 N.W.2d 923, 924 (Ct. App. 1994). Appellate counsel is also correct that Holmes may not challenge the validity of the probation revocation decision. *Cf. State ex rel. Flowers v. DHSS*, 81 Wis.2d 376, 384, 260 N.W.2d 727, 732 (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, 311 (1971) (judicial review of probation revocation is by way of certiorari to the court of conviction).

Our independent review of the record discloses no arguable merit to any other issue that could be raised on appeal.

We affirm the judgment and relieve Attorney William E. Schmaal of further representation of Stephanie B. Holmes in this matter.

By the Court.—Judgment affirmed.

