COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 27, 1996

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.

NOTICE

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

No. 95-1514-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRELL TYLER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. After Darrell Tyler pled guilty, the circuit court entered judgment convicting him of one count of first-degree intentional homicide, party to the crime, contrary to §§ 940.01 and 939.05, STATS. On appeal, Tyler's counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Based upon our review of the no merit report, Tyler's response and affidavit and an independent review of the

record, we conclude that there is no arguable merit to any issue that could be raised in this appeal. Therefore, we affirm the circuit court's judgment.

Counsel's no merit report identifies three potential issues for this court's review: (1) whether Tyler's guilty plea was knowingly, intelligently and voluntarily entered; (2) whether the trial court erred in ordering that Tyler and a co-actor in the crime, Roy Rogers, be tried in a joint trial with separate juries; and (3) whether the trial court erroneously exercised its discretion at sentencing. Tyler's response identifies two additional issues for review: (1) whether he was denied the effective assistance of counsel at trial and on appeal; and (2) whether certain statements made by Tyler to police were obtained in violation of his rights under ***Miranda***.[1]

BACKGROUND

Based on statements made by Tyler to police, Detective Leroy Shaw offered the following narrative at Tyler's preliminary hearing[2] of the events leading up to the death of Clance Venson. Tyler and two minors, Rogers[3] and Dawan T., met during the evening hours of September 20, 1993, and decided to rob someone. Dawan T. contacted Venson, who agreed to drive the three friends in exchange for crack cocaine. Tyler was armed with a .25 caliber handgun; Rogers had a Tech 22 gun. After Venson drove the three friends to the east side of Milwaukee, Rogers directed Venson to pull the vehicle into an alley. Rogers pulled out his Tech 22 and told Venson: "Break yourself."[4] Upon seeing Rogers's gun, Venson said, "I don't have no money, please don't kill me." Rogers tied Venson's hands behind his back with a toy snake; Dawan T. placed duct tape over Venson's mouth. After placing Venson in the trunk of his car, the three friends resumed their drive. Eventually, Rogers armed himself

[1] ***Miranda v. Arizona,*** 384 U.S. 436 (1966).

[2] Although the transcript indicates that the Honorable Ted E. Wedemeyer, Jr., presided at the preliminary hearing, the docket sheet correctly identifies Court Commissioner Audrey Brooks as the presiding judicial officer.

[3] Rogers was waived into adult court on the charge.

[4] This phrase was explained by the witness to be a demand that the victim give up his valuables.

with Tyler's .25 caliber handgun, got out of the car and opened the trunk. Venson, who had loosened his hands and removed the duct tape, spoke to Rogers, begging him "not to kill him and to just take the car." Rogers shot once into the trunk and then closed the lid. After driving around again for a short period of time, the trio pulled into an alley. Rogers got out of the car and again opened the trunk lid. Tyler saw Venson raise his head and arms. Rogers pointed his .25 caliber handgun at Venson's head and fired. Rogers closed the trunk and returned to the car, telling the others, "I shot him in the head."

The trio then obtained bleach at a friend's house, cleaned the .25 caliber handgun and sold it. Later, they drove Venson's car to North 23rd Street. After cleaning the vehicle with the remaining bleach, Tyler and his friends set the car on fire "to hide any evidence." As the flames started to grow, the trio split up for the night.

At approximately 12:30 a.m., Detective Shaw arrived at 2520 North 23rd Street where he observed a fire-and-smoke-damaged car. Detective Shaw observed Venson's blood-stained body in the trunk. The body was removed and Venson was pronounced dead by Medical Investigator John Jones at the scene. Dr. K. Alan Stormo, an assistant medical examiner for Milwaukee County, performed an autopsy, determining that the cause of death was "exsanguination from a gunshot wound to the right side of [Venson's] head."

Tyler was charged with first-degree intentional homicide, party to the crime and armed robbery, party to the crime. Tyler pled guilty to the murder charge, and the State dismissed the armed robbery charge. The trial court sentenced Tyler to life imprisonment with a parole eligibility date of January 1, 2020.

DISCUSSION

1. Tyler's Guilty Plea

We have reviewed the plea colloquy between Tyler and the trial court and conclude that the requirements of § 971.08, STATS., and ***State v. Bangert,*** 131 Wis.2d 246, 267-72, 389 N.W.2d 12, 23-25 (1986), were met. The court questioned Tyler at length about the proposed plea and the various constitutional rights that Tyler would waive by the plea. Tyler indicated that he understood his rights and that his guilty plea would waive those rights. The court discussed the maximum penalty for the crime. The record contains a guilty plea questionnaire which Tyler acknowledged signing. *See* ***State v. Moederndorfer,*** 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987). An appellate challenge to the validity of the guilty plea would lack arguable merit.

2. Joint Trial

The second potential issue identified in the no merit report is whether the trial court erred in ordering Tyler and his co-actor Rogers tried in a joint trial. The pursuit of this issue on appeal would lack all merit because a plea of guilty constitutes a waiver of nonjurisdictional defects and defenses such as this alleged defect. *See* ***State v. Aniton***, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (1994).

3. Trial Court's Sentencing

We first determine whether the trial court properly exercised its discretion in imposing a sentence based upon three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris,*** 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). We then consider whether that discretion was abused by imposing an excessive or unduly harsh sentence. We will find that a trial court erroneously exercised its sentencing discretion by imposing an unduly harsh or excessive sentence "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." ***Ocanas v. State,*** 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

After considering the three primary sentencing factors, the trial court commented on several positive factors relevant to the imposition of sentence. The trial court noted that Venson's murder was Tyler's first criminal offense and that Tyler enjoyed the support of his family. The trial court further noted that Tyler expressed remorse for the killing and stated his wish to take responsibility for the killing as the oldest member of the threesome. At the same time, the court assigned significant weight to the seriousness of the crime, characterizing it as "savage" and "vicious." We conclude that the trial court considered the appropriate sentencing factors and properly exercised its discretion. We further conclude that the sentence imposed was not "unduly harsh or excessive." *See* ***State v. Daniels,*** 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-18 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

4. Ineffective Assistance of Counsel

Tyler next contends that both his trial and appellate counsel were ineffective in providing him legal assistance. We first consider Tyler's claim that his trial counsel rendered ineffective assistance.

In ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979), we declared:

> This court is of the opinion that where a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged. We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case.

Here, the record is devoid of any transcripts showing that Tyler raised any claim of ineffective assistance of counsel. Consequently, the trial court never had the opportunity to address the issue, nor did Tyler's trial counsel have an opportunity to explain the reasons underlying his handling of the case. As we did in ***Machner,*** we decline to consider whether the assistance rendered by Tyler's trial counsel was ineffective without an appropriate record. *See* ***id.*** at 804, 285 N.W.2d at 909 (where there is no testimony from defendant's trial counsel "we decline to find that the manner in which counsel defended the appellant was of such a nature as to cause us to find him incompetent").

We next consider Tyler's argument that his appellate counsel rendered ineffective assistance. The proper method of asserting an ineffective assistance of appellate counsel is an original petition for a writ of *habeas corpus* to the appellate court. *See* ***State v. Knight,*** 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992) ("[W]e conclude that to bring a claim of ineffective assistance of appellate counsel, a defendant should petition the appellate court that heard the appeal for a writ of habeas corpus."). Tyler has not asked this court to construe his brief as a petition for a writ of *habeas corpus* and we refrain from so doing. Thus, Tyler's claim for ineffective assistance of appellate counsel fails for a lack of proper presentation.

5. Violation of Tyler's *Miranda* Rights

Finally, we address the issue of whether the trial court properly denied Tyler's challenge to the admissibility of his statements to police. *See* § 971.31(10), STATS. This court determines whether a statement to police was voluntarily given by independently applying the constitutional principles to the facts of the case. ***State v. Owens,*** 148 Wis.2d 922, 926-27, 436 N.W.2d 861, 871 (1989) (citing ***State v. Woods,*** 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984)). However, we accept the historical facts as found by the trial court unless such findings are clearly erroneous. Section 805.17(2), STATS. The circumstances which surround a defendant's interrogation and subsequent statement "concern evidentiary or historical facts." ***Owens,*** 148 Wis.2d at 927, 436 N.W.2d at 871.

In order to find that Tyler's statement was involuntary, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Clappes,*** 136 Wis.2d 222, 239, 401 N.W.2d 759, 767 (1987). Taking into account the totality of the circumstances, we must balance the personal characteristics of the defendant against any pressures imposed by the police. ***Id.*** at 236, 401 N.W.2d at 766.[5]

Based on the uncontroverted evidence presented at Tyler's ***Goodchild***[6] hearing, the trial court found that police advised Tyler of his ***Miranda*** rights prior to interviewing him and that Tyler stated that he understood his rights. The trial court found that the interview resulting in Tyler's confession started at 3:30 p.m. and concluded at 5:20 p.m., that Tyler was not handcuffed and that police did not wear their weapons during the

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[5] In ***State v. Clappes,*** 136 Wis.2d at 236-37, 401 N.W.2d at 766, the supreme court listed the factors that should be considered in evaluating the coercive nature of the police practices:

> the length of the interrogation, any delay in arraignment, the general conditions under which the confessions took place, any excessive physical or psychological pressure brought to bear on the declarant, any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the individual was informed of his right to counsel and right against self-incrimination.

[6] ***State ex rel. Goodchild v. Burke,*** 27 Wis.2d 244, 133 N.W.2d 753 (1965).

interview. The trial court found that Tyler did not request an attorney. The trial court found that police made no promises or threats to Tyler. The trial court further found that Tyler had no history of mental illness, was not under the influence of any drugs or intoxicants during the interview and was able to read the statement prepared by police and initial its contents. In light of the trial court's findings, we conclude that the record supports the conclusion that Tyler's confession was voluntarily and intelligently made and did not result from improper police practices.

Upon our review of the record, we are satisfied that there are no additional issues of arguable merit that Tyler could raise on appeal. In light of the foregoing discussion, this court affirms the judgment and discharges Tyler's counsel of his obligation to represent Tyler further in this appeal.

By the Court.—Judgment affirmed.