COURT OF APPEALS
DECISION
DATED AND RELEASED

February 8, 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. 95-2971-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGER A. MCGINNIS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marquette County: DONN H. DAHLKE, Judge. *Affirmed*.

VERGERONT, J.[1] Counsel for Roger McGinnis has filed a no merit report pursuant to RULE 809.32, STATS. McGinnis has filed a response with numerous attachments relating to previous offenses and his efforts to obtain executive clemency. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

McGinnis was convicted by a jury of operating after revocation of his license, fifth offense. The no merit report addresses the sufficiency of the evidence, the trial court's exclusion of evidence offered for the purpose of showing that the revocation was not duly made and that McGinnis was not aware of his revoked status, the trial court's failure to grant a continuance to allow McGinnis an opportunity to attempt to reopen some previous cases and the propriety of the sentence. Our independent review of the record confirms counsel's conclusion that there is no arguable basis for appeal on these issues.

McGinnis concedes that he was driving after revocation of his license. The only issue is whether he knew or had cause to believe that his license might be revoked or suspended. *See* ***State v. Collova***, 79 Wis.2d 473, 487, 255 N.W.2d 581, 588 (1977). This court must view the evidence in a light most favorable to the verdict and affirm the verdict if the jury, acting reasonably, could have been convinced beyond a reasonable doubt by the evidence it had a right to believe and accept as true. *See* ***State v. Olson***, 75 Wis.2d 575, 594-95, 250 N.W.2d 12, 22 (1977).

The State presented sufficient evidence to support the conviction. McGinnis testified that he recalled being in a Sauk County court on October 26, 1992, and the judge telling him that his operating privileges in Wisconsin were revoked for six months. He agreed that he had not taken steps to reinstate those privileges at any time thereafter. He also acknowledged that he had gotten tickets in Dane County and was aware that the State of Wisconsin believed that his operating privileges were revoked. He testified that he reinstated his Illinois driving privileges on October 21, 1993, while he was living in Wisconsin, but gave an Illinois address at which he had not lived for over a year. Finally, although McGinnis denied it, the arresting officer testified that McGinnis admitted to him at the time of arrest that his operating privileges were revoked. In his response, McGinnis challenges the credibility of the officer's testimony and accuses the officer of perjury. The jury is the sole judge of the witness' credibility and it had the right to accept the officer's testimony. *See* ***State v. Toy***, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985).

At trial, McGinnis established that an April 22, 1992 five-year suspension of his driving privileges was based on a failure to pay a forfeiture arising out of a default judgment for selling a motor vehicle without a title. McGinnis explained that he defaulted because the notice was sent to the wrong

address. The prosecution objected to this line of questioning and the trial court excluded further testimony on that subject. McGinnis's excuses or explanations for the April 22, 1992 suspension are irrelevant because he was also subject to a December 8, 1993 order of revocation. That revocation was based on failure to obey a traffic sign or signal in addition to operating after revocation and suspension. Because the December 8, 1993 revocation was not based "solely" on the failure to pay a forfeiture, § 343.44(2)(c)2, STATS., does not apply. *See* ***State v. Biljan***, 177 Wis.2d 14, 20, 501 N.W.2d 820, 823 (Ct. App. 1993). Because McGinnis was guilty of driving after the December 8, 1993 revocation, evidence relating to the April 22, 1992 suspension was irrelevant.

McGinnis was not prejudiced by the trial court's failure to grant a continuance while he sought to reopen the 1992 judgment for failing to deliver title at the time of sale. The motion to reopen was ultimately denied. McGinnis was therefore not prejudiced by the trial court's failure to wait for resolution of the motion. In his response to the no merit report, McGinnis states that he was unaware that he could appeal the decision denying the motion to reopen and notes that he applied for executive clemency. The trial court was not required to delay trial until all avenues of relief have been exhausted. This appeal does not provide a forum for collateral attack on other convictions or the performance of counsel in other cases.

The trial court properly exercised its sentencing discretion. The court ordered a fine of $600 plus costs, six months in the county jail with Huber privileges and revocation of McGinnis's operating privileges for six months. The fine was a fraction of the maximum fine allowed and the jail sentence was one-third the maximum penalty. The trial court reasonably rejected McGinnis's argument that he failed to receive written notices, pointing out that it is his responsibility to notify the department of his change of address. The court also noted McGinnis's belated acknowledgment of the seriousness of the situation. The sentencing court considered no improper factors and the sentence is not so excessive, unusual or disproportionate as to shock public sentiment. ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Our review of the no merit report and the response, as well as our independent review of the record, establishes no arguable issues for appeal. Therefore, we relieve Attorney Ruth S. Downs of further representing McGinnis in this matter and affirm the judgment of conviction.

By the Court.—Judgment affirmed.