COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 1997

NOTICE

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.

Nos. 96-1805-CR-NM and 97-1247-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID MIKEL,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. In these consolidated appeals, David A. Mikel appeals from a judgment convicting him of conspiracy to deliver

tetrahydrocannabinols (THC) contrary to §§ 161.41(1)(h)3.[1] and 939.31,[2] STATS., and from an order denying his sentence modification motion. Mikel received a ten-year sentence after he entered a guilty plea.

Mikel's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Mikel received a copy of the report and was advised of his right to file a response. He 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 of conviction.

The no merit report addresses only whether the trial court properly exercised its sentencing discretion. Noting that the trial court denied a sentence modification motion, we ordered appellate counsel to seek the entry of an order denying that motion so that this court would have jurisdiction to review the trial court's refusal to modify the sentence. We then consolidated the appeal from the judgment of conviction (appeal number 96-1805-CR-NM) with the appeal from the denial of sentence modification (appeal number 97-1247-CR-NM).

We note that the no merit report does not discuss whether the acceptance of Mikel's guilty plea presents an issue of arguable merit. In lieu of rejecting the no merit report as insufficient, we will undertake our independent review of the record as mandated by ***Anders***. However, counsel is warned that future deficient no merit reports may be rejected.

---

[1] Section 161.41, STATS., was amended and renumbered to § 961.41, STATS., by 1995 Wis. Act 448, § 244, eff. July 9, 1996.

[2] Section 939.31, STATS., was amended to reflect the change in § 161.41 by 1995 Wis. Act 448, § 447, eff. July 9, 1996.

Our review of the record discloses that Mikel's guilty plea was knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). The court confirmed the terms of the negotiated plea agreement, advised Mikel of the maximum possible punishment for this crime, confirmed his age and the extent of his education and that he understood the proceedings and his attorneys. The court reviewed the elements of the crime, enumerated the various constitutional rights Mikel would waive by his guilty plea and confirmed that Mikel understood those rights. The court ascertained that Mikel's counsel had had a sufficient opportunity to discuss the case and the plea decision with his client and that Mikel was satisfied with the representation he had received. The court found an adequate factual basis for the plea based upon the evidence adduced at the preliminary hearing. The court then accepted Mikel's plea as having been knowingly, voluntarily and intelligently entered.

Based on the plea colloquy, we conclude that a challenge to Mikel's guilty plea as unknowing or involuntary would lack arguable merit. Furthermore, Mikel's plea waived any nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

We turn to the issue raised in the no merit report: whether the trial 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 the gravity of the offense, the need to protect the public, Mikel's history of criminal conduct and drug offenses, and that probation had been ineffective on a previous occasion. The ten-year sentence imposed by the trial court did not exceed the statutory maximum. The trial court properly exercised its sentencing discretion.

Given the trial court's sentencing rationale, we also see no arguable merit to an appellate challenge to the trial court's order denying sentence modification. The trial court ruled that the ability of the defendant to receive alcohol treatment while incarcerated was not a new factor because the court was aware at sentencing that such treatment would be delayed.

A new factor is a fact relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing, ***State v. Kaster,*** 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989), or which frustrates the sentencing court's intent. ***State v. Michels,*** 150 Wis.2d 94, 100, 441 N.W.2d 278, 281 (Ct. App. 1989). The matters raised by Mikel in his sentence modification motion do not satisfy these criteria.

We affirm the judgment of conviction and the order denying the sentence modification motion and relieve Attorney Jeri A. Urbanski of further representation of David Mikel in this matter.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.