COURT OF APPEALS
DECISION
DATED AND RELEASED

November 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.

Nos.96-2416-CR-NM; 96-2417-CR-NM;
96-2418-CR-NM; 96-2419-CR-NM;
96-2420-CR-NM & 96-2421-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. MARTIN,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. These appeals arise from six cases which were disposed of by a single plea agreement. Pursuant to the agreement, John R. Martin pleaded no contest to and was convicted of two counts of second-degree sexual assault of a child, one count of sexual intercourse with a child over

sixteen and three counts of bail jumping in violation of §§ 948.02(2), 948.09 and 946.49(1)(b), STATS.[1]

In appeal no. 96-2416-CR-NM, Martin was charged with two misdemeanor burglary and two misdemeanor theft counts for separate entries into a hunting cabin. He was also charged with second-degree sexual assault of a child arising from an unrelated incident involving sexual intercourse between Martin and R.M.T. The theft and burglary counts were dismissed and read in for sentencing, and Martin pleaded no contest to the sexual assault.

In appeal no. 96-2417-CR-NM, Martin was charged with five misdemeanor counts of issuing worthless checks. The checks were written after Martin was released on bail for the case in appeal no. 96-2416-CR-NM, and the complaint included one count of bail jumping. When the information was issued, three additional bail-jumping charges were added. Pursuant to the plea agreement, the worthless check charges were dismissed and read in for consideration at sentencing. Martin pleaded no contest to one bail-jumping count, and the others were dismissed outright.

Appeal no. 96-2418-CR-NM arises from Martin's no contest plea to sexual intercourse with a child over the age of sixteen. K.A.B. had consensual sexual intercourse with Martin while Martin was free on bail. As a result, he was also charged with one count of bail jumping, which was dismissed and read in for sentencing.

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[1] The judgment of conviction entered in appeal no. 96-2419-CR-NM contains a parenthetical reference to § 939.623, STATS., (repeat serious sex crimes). This notation is not explained by the record. The complaint charged Martin with engaging in repeated acts of second-degree sexual assault of a child in violation of §§ 948.02(2) and 948.025, STATS. The plea agreement provided that Martin would plead to a violation of § 948.02(2) only. The court was not advised of an agreement that the enhancement provision would be included, and the court did not impose the minimum sentence mandated by § 939.623. After remand, the trial court should enter an amended judgment of conviction deleting the reference to § 939.623.

While Martin was free on bail, he had sexual contact or sexual intercourse with J.A.C., who was under sixteen. This is the case in appeal no. 96-2419-CR-NM. On the basis of Martin's admission that they had sexual intercourse at least five times, Martin was originally charged with repeated acts of second-degree sexual assault of a child in violation of §§ 948.02(2) and 948.025, STATS. As part of the plea agreement, the charge was amended, and Martin pleaded no contest to violating § 948.02(2) only.

Both appeal no. 96-2420-CR-NM and appeal no. 96-2421-CR-NM arise from cases in which the prosecution charged Martin with six misdemeanor counts of issuing worthless checks and six counts of bail jumping. In each case, Martin pleaded to one count of bail jumping, and the remaining bail-jumping charges were dismissed outright. The worthless check charges were all dismissed and read in for consideration at sentencing.

Martin was sentenced to consecutive four-year prison sentences for the sexual assault charges and nine months in jail for the sexual intercourse offense. He was granted sentence credit of 169 days against the initial sentence. Sentencing on the bail jumping charges was withheld, and Martin was ordered to serve five years probation for each charge. The periods of probation were concurrent with each other and consecutive to incarceration. Martin was ordered to make restitution for the sexual assaults and worthless checks. He may challenge the amount of restitution or his ability to pay the amount when he is released from confinement. Martin was also ordered to provide a DNA specimen and to pay costs and fees.

The state public defender appointed Len Kachinsky to represent Martin on appeal. Attorney Kachinsky has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Martin received a copy of the no merit report and was advised of his right to file a response. He has not responded.

The no merit report addresses whether Martin's no contest pleas were knowingly, intelligently and voluntarily entered and whether the trial court erroneously exercised its discretion when imposing sentence. The no

merit report also notes that entry of no contest pleas waives non-jurisdictional defects and defenses. Kachinsky concludes that these possible issues have no arguable merit. Based upon our independent review of the record, we conclude that his analysis of the issues is correct.

In order to assure that a plea is knowingly, voluntarily and intelligently entered, the trial court is obligated by § 971.08(1)(a), STATS., to ascertain that a defendant understands the nature of the charges to which he or she is pleading, the potential punishment for those charges, and the constitutional rights being relinquished by entering a guilty or no contest plea. *See* ***State v. Bangert***, 131 Wis.2d 246, 260-62, 389 N.W.2d 12, 20-21 (1986). The plea colloquy between Martin and the trial court satisfied this standard. Additionally, the court adduced that an adequate factual basis existed for finding Martin guilty of the charges. *See* § 971.08(1)(b).

Sentencing is within the trial court's discretion, ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987), and the court is presumed to have acted reasonably, ***State v. Haskins,*** 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The defendant bears the burden of showing, from the record, that a sentence is unreasonable. ***Id.*** The trial court considered Martin's personal characteristics and the need for secure, close rehabilitative control over him. Regarding the sexual assault offenses, the court concluded that the gravity of the offenses and the need to protect the public were paramount and that they justified consecutive terms of incarceration. Because the bail-jumping charges arose out of property offenses, the court concluded that probation was appropriate.

Also as noted by counsel, a no contest plea, voluntarily and understandingly made, constitutes waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the entry of the plea. ***Bangert***, 131 Wis.2d at 293, 389 N.W.2d at 34. Although an exception exists for review of orders denying motions to suppress evidence and to determine the admissibility of a defendant's statements, *see* § 971.31(10), STATS., no such motions were filed in this case.

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on Martin's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the judgments of conviction are affirmed, and Kachinsky is relieved of any further representation of Martin in these appeals.

By the Court.—Judgments affirmed.