

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 10, 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.

NOTICE

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

No. 97-0522-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT L. BARBER.

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

VERGERONT, J.¹ Brent L. Barber appeals from a judgment sentencing him for disorderly conduct and violating a domestic abuse restraining order as a repeater after revocation of his probation for these offenses. Barber's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and

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

Anders v. California, 386 U.S. 738 (1967). Barber 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.

Barber was convicted of the offenses which are the subject of this appeal in September 1995 and received probation. The no merit report addresses proceedings prior to his sentencing after revocation of probation: the entry of Barber's pleas, the sentence imposed at that time and whether Barber received effective assistance of counsel. We lack jurisdiction to address these issues. Barber did not appeal from the 1995 conviction and sentence and the time for doing so has expired. See *State v. Drake*, 184 Wis.2d 396, 399, 515 N.W.2d 923, 924 (Ct. App. 1994). On this appeal from sentencing after revocation, Barber is limited to raising issues relating to that sentence. Accordingly, we do not address the other issues raised in the no merit report.

We have independently reviewed the sentence after revocation. 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. See *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. See *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, Barber's past failure while on probation, his history of criminal activity, and the need to protect the public. The trial court properly exercised its sentencing discretion.

While our review of the sentencing after revocation reveals no basis for challenging trial counsel's performance, we note that it is well-settled that a claim of inadequate trial counsel must be raised in the trial court. *See State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Without an evidentiary hearing, a reviewing court cannot "determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *Id.* Therefore, we will not consider this issue further.

We affirm the judgment of conviction and relieve Attorney Ronald K. Niesen of further representation of Brent L. Barber in this matter.

By the Court.—Judgment affirmed.

