COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0995-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN E. BRAXTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

ROGGENSACK, J. Shawn E. Braxton appeals from a judgment of conviction for criminal trespass, criminal damage to property, and battery.[1] The State Public Defender appointed Attorney Susan E. Alesia as Braxton's appellate counsel. Attorney Alesia served and filed a no merit report pursuant to ***Anders v.***

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

California, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Braxton filed correspondence directed to Circuit Court Judge John W. Roethe which we construe as a response to the no merit report. After an independent review of the record as mandated by ***Anders***, we conclude that any further proceedings would lack arguable merit.

These convictions resulted from a violent argument Braxton had with his girlfriend. After Braxton beat his girlfriend, she ran to a friend's house. Braxton pursued her and broke into the friend's house to continue the beating. A friend intervened and Braxton fled, but he returned several hours later to beat the friend. Braxton also destroyed several pieces of furniture during the fight. The police were summoned and they arrested Braxton, who then attempted to kick out the rear window of the squad car. To subdue Braxton, the police used oleoresin capsicum spray.

Braxton entered no contest pleas to criminal trespass to a dwelling, contrary to § 943.14, STATS., criminal damage to property, contrary to § 943.01(1), STATS., and battery, contrary to § 940.19(1), STATS.[2] Each count was enhanced for habitual criminality, contrary to § 939.62, STATS. The circuit court imposed a three-year consecutive sentence on each count, resulting in a collective sentence of nine years.

In the no merit report, counsel addresses whether Braxton's pleas were entered knowingly, intelligently and voluntarily, and whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel's

[2] A no contest plea means that the defendant does not claim innocence, but refuses to admit guilt. *See* Section 971.06(1)(c), STATS.; ***Cross v. State***, 45 Wis.2d 593, 599, 173 N.W.2d 589, 593 (1970).

description and analysis, and we independently conclude that pursuing these issues would lack arguable merit.

We have independently reviewed the "Plea of No Contest to Misdemeanor Charges and Waiver of Rights Form" and the transcript of the plea hearing. Braxton confirmed to the circuit court that he understood that by entering no contest pleas, he would forfeit the constitutional rights set forth in that form. The circuit court explained the elements of the offenses to which Braxton would plead, and we conclude that colloquy satisfied the requirements of § 971.08(1), STATS., and ***State v. Bangert***, 131 Wis.2d 246, 267-72, 389 N.W.2d 12, 23-25 (1986). We independently conclude that challenging Braxton's no contest pleas would lack arguable merit.

In his response, Braxton challenges the sentences imposed. He expresses remorse, but claims not to remember precisely what occurred because he was intoxicated. He explains that his conduct was prompted by the abuse of alcohol for which he now has been treated. Because he has completed all of the prison treatment programs, he contends that his further rehabilitation depends upon his release on probation or parole, to allow him to participate in more suitable treatment programs which would then be available to him. Braxton also claims that a nine-year sentence is disproportionately harsh because these crimes are only misdemeanors.

We conclude that pursuing the issues Braxton identifies would lack arguable merit because: (1) they are not legally meritorious; and (2) they do not demonstrate an erroneous exercise of sentencing discretion. Braxton's explanation of his efforts to rehabilitate himself and his progress within the correctional setting are not new factors, as required for sentence modification. *See* ***State v. Krueger***, 119

Wis.2d 327, 335, 351 N.W.2d 738, 742 (Ct. App. 1984) (favorable consideration of defendant's progress in the rehabilitation system and a positive change in defendant's attitude are factors which should be considered by the department, however, they do not constitute new factors, which are necessary for sentence modification). We also reject Braxton's contention that a nine-year sentence is disproportionately harsh for the commission of misdemeanors, because it does not account for his having pleaded no contest to his status as an habitual offender for each crime. Section 939.62(1)(a), STATS., provides that "[a] maximum term of one year or less may be increased to not more than 3 years." Consequently, it is Braxton's history as an habitual offender which supports the sentences imposed. We conclude that the issues Braxton identifies do not warrant further briefing since they do not provide a legal basis to modify the sentences imposed.

Our review of the sentences is limited to whether the circuit court erroneously exercised its discretion. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *See* ***id.*** at 427, 415 N.W.2d at 541. It is within the circuit court's discretion to determine how much weight to assign each factor. *See* ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). It also is within the circuit court's discretion to determine whether to impose multiple sentences consecutively or concurrently. *See* ***Larsen***, 141 Wis.2d at 427, 415 N.W.2d at 541.

The circuit court addressed the gravity of the offenses. It characterized the facts as "outrageous" and emphasized the severity of the beating and the injuries which Braxton inflicted. The circuit court also considered the character of the offender. It noted that Braxton had a lengthy criminal record, was

charged as an habitual criminal for each offense, and had spent much of his adult life in the criminal justice system. The circuit court also addressed the need to protect the public. It specifically ruled that Braxton was a treatment risk outside the prison system and his confinement was required for the public safety and "to affect some level of deterrence [to] members of the community." At sentencing, the circuit court explained to Braxton that "the egregiousness, the outrageous[] character of this offense ... and your previous criminal record [compel the imposition of the maximum sentences]." We independently conclude that challenging the sentences would lack arguable merit.

Upon our independent review of the record as mandated by ***Anders*** and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further proceedings would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Susan E. Alesia of any further representation of Shawn E. Braxton in this appeal.

By the Court.—Judgment affirmed.

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