COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2789-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY MCMAHON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Counsel for Jerry McMahon has filed a no merit report pursuant to RULE 809.32, STATS. McMahon has not responded to the report. 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. We therefore affirm.

The State charged McMahon with two counts of first-degree sexual assault of a child. Pursuant to a plea bargain, McMahon pleaded no contest to one count of second-degree sexual assault of a child.

The court accepted the plea and, over McMahon's objection, ordered a presentence investigation. With the benefit of the presentence investigation report and other information on McMahon's prior criminal record, the court subsequently imposed a maximum twenty-year prison term.

McMahon cannot succeed on a motion to withdraw his plea because he knowingly and voluntarily pleaded no contest. Before accepting the plea, the court established that McMahon understood and waived his rights to a jury trial, confrontation and protection against self-incrimination. The court adequately informed McMahon of the elements of the crimes charged and the potential punishments. The court also properly inquired as to McMahon's ability to understand the proceedings, and the record independently establishes that he understood the proceedings. The State did not improperly induce McMahon to plead no contest, and McMahon exercised his free will in accepting the plea bargain. Finally, the court determined that an adequate factual basis existed for the charges. The court therefore complied with the requirements set forth in ***State v. Bangert***, 131 Wis.2d 246, 260-62, 389 N.W.2d 12, 20-21 (1986), to ensure a knowing and voluntary plea.

The trial court properly exercised its sentencing discretion. The trial court properly exercises that discretion if the sentence is not excessive and the court relies on proper factors. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). We presume that the trial court acted properly in sentencing the defendant, and the burden is on the defendant to prove otherwise.

State v. Krueger, 119 Wis.2d 327, 336, 351 N.W.2d 738, 743 (Ct. App. 1984). In sentencing McMahon, the court considered his extensive record of criminal acts, including prior sexual offenses, his lack of remorse, his refusal to acknowledge or understand the harm done to his eight-year-old victim, and the likelihood that he would reoffend. Those were proper factors to consider in imposing the maximum allowable prison sentence. Additionally, the court adequately explained its reliance on them at the sentencing hearing.

Counsel identifies as a potential issue, and as the only issue that McMahon expressly wishes to raise, the question of whether McMahon should be allowed to withdraw his plea because the court erroneously ordered a presentence investigation over his objection. McMahon's objection was understandable, in retrospect, as the presentence investigation report provided the court with substantially damaging information that it might not have received otherwise. However, the court may order a presentence investigation in its discretion and on its own authority. *See* § 972.15(1), STATS.; ***Byas v. State***, 55 Wis.2d 125, 128-29, 197 N.W.2d 757, 759 (1972). Additionally, courts are highly encouraged to order presentence investigations, especially in cases resolved by pleas. *See* ***State v. Schilz***, 50 Wis.2d 395, 401-02, 184 N.W.2d 134, 138 (1971). McMahon has no recognized right to veto the court's exercise of its discretion in this matter.

On our independent review, we have also considered whether McMahon received effective assistance of trial counsel and whether the State breached the plea bargain. We conclude that neither of those issues has any potential merit. Because the record discloses no other potentially meritorious issues, any further proceedings would be frivolous and without arguable merit. Accordingly, we affirm the judgment of conviction and relieve McMahon's counsel of any further representation of him in this appeal.

By the Court.—Judgment affirmed.