COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1092-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD SEAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL B. TORPHY, Judge. *Affirmed.*

DEININGER, J.[1] Gerald Seay appeals from: (1) a 1995 judgment of conviction entered on a plea of no contest to one count of contributing to the delinquency of a minor, and one count of disorderly conduct; and (2) a 1997 sentencing order imposing a sentence on those counts after Seay's probation was

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

revoked. The State Public Defender appointed Steven D. Phillips to represent Seay on appeal. Attorney Phillips has filed a no merit report with this court, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32, STATS., and reports that a copy has been sent to Seay. In compliance with ***Anders***, both Attorney Phillips and this court informed Seay that he could respond to the report, and he has done so. After an independent review of the record as mandated by ***Anders***, we conclude that any further proceedings in this matter would be wholly frivolous and without arguable merit. Seay's conviction and sentence are affirmed, and we grant his counsel's motion to withdraw from further representation before this court.

In 1995, Seay pled no contest to the charges. As part of his plea agreement, the information was amended to allege lesser offenses than originally charged. Sentence was withheld, and probation with conditions imposed. In 1997, after allegations that Seay violated the terms of his probation, probation was revoked, and the court imposed consecutive sentences of nine months and ninety days. Counsel has filed a no merit report discussing the validity of the sentencing. Based on counsel's report, and our independent review of the record, we affirm the underlying conviction, as well as the sentencing.[2]

[2] Citing ***State v. Drake***, 184 Wis.2d 396, 515 N.W.2d 923 (Ct. App. 1994), counsel has not analyzed the underlying convictions. ***Drake*** holds that a challenge to a post-revocation sentence does not automatically bring up for review the underlying conviction. *Accord,* ***State v. Tobey***, 200 Wis.2d 781, 548 N.W.2d 95 (Ct. App. 1996).

Neither ***Drake*** nor ***Tobey*** precludes a RULE 809.82 motion to extend the time for filing a notice of intent to file for postconviction relief (and ***Drake*** explicitly recognizes such a possibility). ***Anders*** imposes on counsel an obligation to consider every possibly meritorious argument, which obligation did not exist under the circumstances of ***Drake*** or ***Tobey***. Counsel is apparently aware that a motion to extend the time to appeal the underlying conviction is possible, but states only that he is aware of no basis to extend the time without offering any analysis of why no basis exists. We have independently examined the record, and, as discussed in the body of this decision, we conclude that there is no basis to request an extension to challenge the underlying conviction.

Seay, a man in his fifties, was accused of making a gift of a ring to an eight-year-old girl, telling her to lie to her parents as to where she had obtained it, asking her to be his "girl," and leading her to a secluded spot where he hugged and kissed her. At a preliminary hearing, the victim gave testimony that Seay's hug immobilized her arms and occurred just above her "seat," and that Seay's kiss was near her lips, in a place characterized by the judge as being approximately where a person's mustache would end. The victim also testified to the seclusion of the location, testimony which was supported by a police officer's description of the site. At his plea hearing, Seay pled no contest, supporting his plea with a completed, signed plea questionnaire.

Although Seay now challenges his plea as having been defective, we reject this argument. The plea was made knowingly, intelligently and voluntarily, as required under ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). Specifically, Seay acknowledged the elements of the crime and the rights he was giving up, and indicated that he was freely and voluntarily giving up those rights. Seay also acquiesced in using the factual allegations of the complaint to support the pleas. After the plea was accepted, the court asked Seay if there was anything he would "like to add," and Seay responded "[n]o, sir." Under these circumstances, Seay's plea of no contest was entered knowingly, voluntarily and intelligently under ***Bangert***. Further, a completed plea questionnaire is competent evidence of a knowing and voluntary no contest plea. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987). We therefore conclude that there is no ground to request an extension order under RULE 809.82, STATS., to challenge the underlying conviction.

After conviction, Seay's sentence was originally withheld, and two consecutive two-year terms of probation were imposed. Counseling was made a condition of probation. In 1997, Seay's probation was revoked because Seay violated the terms. When asked whether he had any comments, Seay offered a version of the underlying events which tended to exonerate him: he alleged that the victim solicited the gift of the ring, that he had been hugging her to provide support for her in a dispute with her little friends, that the victim's parents had affected her testimony, that his ex-wife had prejudiced his neighbors against him, and the like. The court rejected these explanations, noting that Seay's actions had been "serious," and noting Seay's long history of illicit sexual contact with children, which led to a prison sentence served, as well as a record of other crimes. The court sentenced Seay to consecutive sentences of nine months and ninety days.

Sentencing lies within the circuit court's discretion, and our review is limited to whether the court misused that discretion. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987) (cite omitted). The primary factors which the circuit court must consider are the gravity of the offense, the character of the offender, and the need for public protection. *See* ***id.*** at 426-27, 415 N.W.2d at 541. The weight to be given to each of these factors is within the court's discretion. *See* ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). The circuit court considered the statements of counsel, Seay's personal statement and his record. The court also noted that children were not safe around Seay, and that society had an interest in seeing that children were not molested in the future. Finally, the sentence was within the maximum allowed by law. Under these circumstances, the court acted within its discretion in sentencing Seay.

In his response, Seay challenges various aspects of the trial court proceedings. However, because Seay entered a valid no contest plea, he has waived these nonjurisdictional issues. *See* ***Belcher v. State***, 42 Wis.2d 299, 308-09, 166 N.W.2d 211, 216 (1969). We do not consider these issues further.

Seay also attempts to raise an ineffective assistance of counsel claim. To prevail on this argument, Seay would have to show that (1) his counsel's performance was deficient, and (2) that deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We must scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 687-88; *see also* ***State v. Ambuehl***, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988).

With regard to the underlying conviction, Seay originally faced a felony charge of child enticement. As a result of a plea bargain, he was charged with far less serious crimes, and was placed on probation. As the circuit court pointed out at sentencing after revocation, Seay was very fortunate that the charges were reduced, because if he had been convicted of the felony of child enticement, the sentence could have been up to ten years. Further, under the "present sexual offender's act," Seay "might never have been released at all." It thus appears that the negotiated plea agreement was beneficial to Seay. In addition, our independent review of the record reveals that trial counsel conscientiously argued on Seay's behalf, as well as conducting Seay's defense in a professional manner, including a thorough cross-examination of the alleged victim at the preliminary hearing. Under these circumstances, there would be no merit to a claim of ineffective assistance of trial counsel, and consequently, no grounds to move to extend the time to challenge the underlying conviction.

Seay's sentencing counsel argued conscientiously on his behalf that the original crimes had been exaggerated, and requested that the sentence be limited to the time already served while on probation hold. The arguments revealed preparation and a professional demeanor. Under these circumstances, there would be no merit to a claim of ineffective assistance of sentencing counsel.

Based on our independent review of the record, we conclude that any further appellate proceedings would be without arguable merit, and would be wholly frivolous within the meaning of ***Anders***, as well as RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Phillips is relieved of further representing appellant Seay.

By the Court.—Judgment and order affirmed.