COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 11, 1997

NOTICE

Nos. 96-0855-CR-NM
96-0872-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERALD J. McDOWELL,

Defendant-Appellant.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Jerald J. McDowell appeals from judgments of conviction for drug-related offenses and postconviction orders denying motions to withdraw his pleas. The state public defender appointed Attorney Ellen Henak as McDowell's appellate counsel. Attorney Henak served and filed a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE

809.32(1), STATS. McDowell did not respond, although Lawanda Ference filed correspondence which we construe as a response.[1] After an independent review of the records as mandated by ***Anders***, we conclude that any further proceedings would lack arguable merit.

McDowell pled guilty to two counts of possession of a controlled substance with intent to deliver, as a subsequent offense, contrary to §§ 161.16(2)(b)1, 161.41(1m)(cm)1 and 161.48, STATS., ("cocaine conviction"). The trial court imposed consecutive sentences of eight and ten years. McDowell also pled guilty to possession of a non-narcotic controlled substance, as a subsequent offense, contrary to §§ 161.16(2)(b)1, 161.41(3m) and 161.48, STATS., and to possession of a controlled substance, as a subsequent offense, contrary to §§ 161.01(14), 161.14(4)(t), 161.41(3r) and 161.48, STATS. ("lesser conviction"). The trial court imposed two, six-month sentences to run concurrent to each other and to the eighteen-year sentence imposed for the cocaine conviction.

The no merit report discusses the factual and procedural history of these cases[2] and addresses whether: (1) McDowell's pleas were entered knowingly, intelligently and voluntarily; (2) McDowell received ineffective assistance because trial counsel failed to advise him that he was not obliged to agree to a renegotiated plea bargain; and (3) the trial court erroneously exercised its sentencing discretion. We agree with counsel's description, analysis and conclusion that pursuing these appellate issues would lack arguable merit. However, we address the second and third issues because Ference raises them.

Ference claims that McDowell was tricked into pleading guilty to the cocaine charges because he believed that he was plea bargaining to the State's recommendation of a ten-year sentence. However, this was the focus of the postconviction motion for plea withdrawal where McDowell claimed that

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[1] From the context of Ference's correspondence, we assume that she is the mother of McDowell's child.

[2] Although McDowell appeals from both judgments and orders, it is the cocaine conviction, for which he received an aggregate sentence of eighteen years, which is the focus of the no merit report and response.

he received ineffective assistance. The postconviction court heard testimony from McDowell and his trial counsel. Trial counsel testified that McDowell "seemed dissatisfied" with the ten-year offer, so counsel attempted to negotiate a better agreement. Counsel then negotiated an agreement with the prosecutor who would offer no recommendation on the specific length of a prison term. The postconviction court found that McDowell authorized his counsel to continue negotiations to improve the original ten-year offer, and that before pleading guilty, McDowell knew about the State's agreement not to recommend a specific term of years.[3]

These findings are based on trial counsel's testimony at the postconviction hearing. Because the postconviction court heard that testimony and observed the witnesses, we defer to its findings on the witnesses' credibility,[4] and would not reverse those findings, unless they were clearly erroneous. Section 805.17(2), STATS. Because the postconviction court's findings are consistent with the testimony of trial counsel, it would lack arguable merit to challenge the trial court's postconviction orders and contend that McDowell: (1) did not knowingly, intelligently and voluntarily plead guilty to these charges; or (2) received ineffective assistance of trial counsel.

Our review of the sentence is limited to whether the trial court erroneously exercised its discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415

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[3] The records establish that McDowell understood that the sentencing court was not bound by any sentencing recommendation, and that he was facing a potential aggregate sentence of forty-three years. The postconviction court found that

> [McDowell] may not be happy with the outcome of what the sentencing court, in fact, gave him but he certainly knew what the negotiations were at the time he entered the plea and at the time of sentencing and by filling out the Guilty Plea Questionnaire and Waiver of Rights Form the court also would indicate that the court was not bound by any negotiations at all ....
>
> There is no indication that the Defendant was confused whatsoever as to what the recommendation was. The court also [finds that] the Defendant is not a novice to the criminal justice system ....

[4] *See e.g.*, ***In re the Estate of Dejmal,*** 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980).

N.W.2d 535, 541 (Ct. App. 1987). The primary factors are the gravity of the offense, the character of the offender, and the need for public protection. ***Id***. at 427, 415 N.W.2d at 541. The weight given to each factor is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The sentencing court considered the primary sentencing factors. It commented that these four drug-related charges were very serious when considered in the appropriate context. It extensively considered McDowell's background which "could easily justify imposing forty years in prison." It told McDowell that, despite his remorse, "this isn't about a second chance. This is about a four[th] or fifth chance." It acknowledged that McDowell was "at the bottom of the chain of people involved in distributing cocaine," but, also recognized the community's need for protection from drugs. To challenge the sentences imposed for an erroneous exercise of discretion would lack arguable merit.

Upon our independent review of the records, as mandated by ***Anders*** and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further appellate proceedings would lack arguable merit. Accordingly, we affirm the judgments of conviction and postconviction orders and relieve Attorney Ellen Henak of any further representation of Jerald J. McDowell.

By the Court.—Judgments and orders affirmed.