COURT OF APPEALS
DECISION
DATED AND RELEASED

July 11, 1996

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. 96-0912-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRELL T. DALTON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Darrell T. Dalton, a.k.a. Darrell T. Simmons (Dalton), appeals from a judgment of conviction resulting from a guilty plea to a charge of first-degree reckless injury, while armed with a dangerous weapon, contrary to §§ 940.23(1) and 939.63, STATS. He was sentenced to ten years' imprisonment.

The state public defender appointed Ronald K. Niesen to represent Dalton on appeal. Niesen 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 Dalton. In compliance with ***Anders***, both Niesen and this court informed Dalton that he could respond to the report, but he has not 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. Dalton's conviction is affirmed, and we grant his counsel's motion to withdraw from further representation before this court.

Dalton could argue that there was no factual basis for the trial court to accept his plea. However, there would be no merit to this argument. A very extensive preliminary examination occurred, at which several witnesses appeared, including the victim. The witnesses gave essentially consistent testimony, from which it appears that Dalton hit the intended victim on the head with a gun, which apparently discharged into the air on impact. No bullet entered the victim, but he was diagnosed with a nonpenetrating gunshot wound.

Dalton could argue that his no contest plea was not made knowingly, intelligently and voluntarily. *See* ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). However, the trial court ascertained Dalton's age, past and present mental condition and employment, elicited that Dalton understood the charges against him, as well as the possible maximum term. The trial court also ascertained that Dalton understood that he was waiving his constitutional rights to trial, process, and witnesses. The court requested trial counsel's opinion on whether Dalton understood both the charge and the consequences of pleading guilty. Finally, the trial court ascertained that no promises or threats had been made to induce Dalton to plead no contest. Under these circumstances, we conclude that Dalton's plea of no contest was entered knowingly, voluntarily and intelligently.

Dalton could argue that the trial court did not properly exercise its discretion in sentencing him. However, sentencing lies within the trial court's discretion, and our review is limited to whether the trial court properly applied that discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors which the trial court must consider are the

gravity of the offense, the character of the offender, and the need for public protection. ***Id.*** at 426-27, 415 N.W.2d at 541. The weight to be given to each of these factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The trial court ordered and considered the presentence report, and the statements of counsel, as well as Dalton's personal statement. The trial court considered Dalton's record, noting that Dalton had been caught dealing drugs in two states other than Wisconsin. The court also considered the needs of the victim and society. Under these circumstances, the trial court acted within its discretion in sentencing Dalton.

Finally, Dalton could raise an ineffective assistance of counsel claim. To prevail on this argument, Dalton 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 688; *see also* ***State v. Ambuehl***, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988). We have carefully reviewed all the transcripts in the record, including that from the lengthy preliminary hearing. Trial counsel conscientiously argued on Dalton's behalf, and conducted a very thorough cross-examination of all the witnesses, including a cross-examination of the alleged victim. Under these circumstances, there would be no merit to a claim of ineffective assistance of 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 Niesen is relieved of further representation before this court.

By the Court.—Judgment affirmed.