

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 26, 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. 96-0971-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CURTIS DORTCH, JR.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County:
J. RICHARD LONG, Judge. *Affirmed.*

ROGGENSACK, J. Curtis Dortch appeals from a judgment convicting him of three misdemeanors. Counsel for Dortch has filed a no merit report pursuant to § 809.32, STATS. Dortch received a copy of the report, but he has not responded. Upon consideration of the report and an independent review of the record, as mandated by *Anders v. California*, 386 U.S. 738 (1967),

this court concludes there is no arguable merit to any issue that could be raised on appeal. The judgment of conviction is affirmed.¹

BACKGROUND

The State charged Dortch with three misdemeanors: intentionally pointing a firearm at another, obstructing an officer and disorderly conduct. Dortch pled no contest to all three counts. In exchange for his plea, the State agreed to recommend that he be sentenced to time served. However, the trial court withheld sentence and placed Dortch on probation for three years. As a condition of probation, it required Dortch to serve nine months in jail. The trial court provided that Dortch could be released early from his jail term, if he completed the Rock County Education and Criminal Addictions Program.

DISCUSSION

Scope of Review.

When an appeal has been filed and a no merit report submitted by defendant's counsel, this court examines the report and conducts an independent review of the record to determine whether there are any issues which have arguable merit. *Anders*, 386 U.S. at 744.

Dortch's counsel has addressed whether Dortch's plea was knowingly, voluntarily and intelligently given and whether Dortch's sentence was too severe for the crimes charged. This court reviews the record *de novo* to determine whether the procedure used by the trial court in accepting the plea was sufficient. *State v. Bangert*, 131 Wis.2d 246, 286, 389 N.W.2d 12, 31 (1986). However, sentencing is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. *State v. Kennedy*, 190 Wis.2d 252, 257, 528 N.W.2d 9, 11 (Ct. App. 1994).

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

Dortch's Plea.

In a case such as this, before a plea of no contest can be accepted, the trial court must determine: (1) the extent of the accused's education and general ability to comprehend; (2) the accused's understanding of the nature of the crimes charged and the potential punishments the court could impose; (3) the accused's understanding of the constitutional rights he is waiving; (4) whether either promises or threats were made to the accused to obtain his plea; and (5) whether a factual basis existed to support convictions of the crimes charged. *State v. Bangert*, 131 Wis.2d at 266-72, 389 N.W.2d at 22-25 (1986). A proper inquiry by the trial court ensures that defendants enter their pleas knowingly, intelligently and voluntarily. *Id.*

Dortch cannot successfully withdraw his plea because the trial court's inquiries established he knowingly, intelligently and voluntarily pled no contest. Before accepting the plea, the trial court established that Dortch had sufficient intelligence and education to understand the proceedings. And, although it did not detail each constitutional guaranty, it did engage in a sufficient colloquy with Dortch to establish that by signing the waiver form, he knew he was waiving his constitutional rights. The trial court also established that the plea had been agreed to without a threat made or a promise given, and that Dortch understood the nature of the crimes charged, including the potential punishments the trial court could impose. The trial court also established that there was an independent factual basis to support Dortch's convictions of the crimes charged. The trial court followed *Bangert's* mandate. Dortch's pleas were properly accepted.

Dortch's Sentence.

Sentencing is a discretionary determination by the trial court. *McCleary v. State*, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). A trial court properly exercises its sentencing discretion if the sentence is not excessive; it relies on the proper factors; and the correct legal standards are applied. *State v. Krueger*, 119 Wis.2d 327, 336-37, 351 N.W.2d 738, 743 (Ct. App. 1984). This court presumes the trial court acted properly in sentencing Dortch, and the burden is on Dortch to prove otherwise. *Id.*

In sentencing Dortch, the trial court commented on the seriousness of pointing a loaded gun at another person, and it took note of Dortch's previous misdemeanor conviction and his juvenile record. The trial court also considered Dortch's level of education and lack of work history. Thereafter, it concluded that sentencing Dortch to time served would not sufficiently deter him from future criminal activity. These are proper factors for the court to consider.

Additionally, the sentence falls within the statutory limits. A defendant convicted of three misdemeanors may be placed on three years probation. Section 973.09(2)(a)2, STATS. The court may impose reasonable and appropriate conditions of probation, § 973.09(1), STATS., including a jail term of up to one year. Section 973.09(4), STATS. The trial court properly exercised its discretion. See *Kennedy*, 190 Wis.2d at 257, 528 N.W.2d at 11.

Appellate counsel's review of the record disclosed no other potentially meritorious issues. This court's independent review of the record, as mandated by *Anders*, demonstrates there are no issues arguable on their merits, and any further proceedings would be frivolous. Accordingly, the judgment of conviction is affirmed and Dortch's counsel is relieved of any further representation of Dortch.

By the Court.—Judgment affirmed.