

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 7, 1997

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. 96-1357-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL HILL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MC MAHON and LEE E. WELLS, Judges. *Affirmed.*

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

PER CURIAM. Michael Hill appeals from a judgment of conviction for first-degree reckless injury while armed, as a party to the crime. The state public defender appointed Attorney Patricia Flood as Hill's appellate counsel. Attorney Flood served and filed a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Hill did not respond but Attorney Flood identifies the issues Hill considers problematic.

After an independent review of the record as mandated by *Anders*, we conclude that any further appellate proceedings would lack arguable merit.

Hill entered a guilty plea to first-degree reckless injury while armed, as a party to the crime, contrary to §§ 940.23(1), 939.63 and 939.05, STATS. These charges arose from Hill's participation in a severe beating which left the victim permanently brain damaged and totally disabled. The trial court imposed a fourteen-year sentence.

The no merit report addresses whether Hill should be permitted to withdraw his plea to correct a manifest injustice, and whether the trial court erroneously exercised its sentencing discretion. Although we agree with counsel's description, analysis and conclusion that pursuing these appellate issues would lack arguable merit, we address the specific issues which Hill raised in his discussions with appellate counsel.

Hill contends that the plea transcript establishes a *prima facie* failure to comply with § 971.08(1)(a), STATS., because the trial court did not define the elements of the crimes, nor did it specifically enumerate the constitutional rights Hill would waive by pleading guilty. However, as appellate counsel explains, to pursue a challenge to the plea would lack arguable merit because Hill does not claim that he did not understand the charges against him, or the rights he would waive. *State v. Giebel*, 198 Wis.2d 207, 216, 541 N.W.2d 815, 818-19 (Ct. App. 1995).

The trial court did not explain the elements of the crimes to Hill, once it established that trial counsel had. Hill and his trial counsel signed the Guilty Plea Questionnaire and Waiver of Rights Form ("plea questionnaire") in which Hill acknowledged that trial counsel had read the complaint and the information to him and that he "understand[s] the elements of the offense and their relationship to the facts in this case and how the evidence establishes [his] guilt." Trial counsel admitted that the principal discussion was about Hill's culpability as an accomplice because Hill was having difficulty understanding how he could be guilty of reckless injury when his cohorts were more culpable than he was. The trial court specifically questioned Hill on accomplice culpability, which prompted Hill to admit that it was this charge to which he was particularly reluctant to plead guilty. The record supports Hill's claim that

the trial court did not explain each constitutional right which Hill waived by pleading guilty. However, these rights were enumerated in the plea questionnaire which Hill signed.

A defendant seeking an evidentiary hearing to withdraw his plea must establish: (1) a *prima facie* violation of § 971.08(1)(a), STATS.; and (2) that he did not understand the information which should have been provided at the plea hearing. *Giebel*, 198 Wis.2d at 216, 541 N.W.2d at 818. Although Hill has established the former requirement, he has not established the latter. Hill does not contend that he was never told about the elements of the crimes and the identification of each constitutional right he would forfeit, but that trial counsel and the trial court did not repeat everything he had acknowledged in the plea questionnaire. This type of repetition is not required. *State v. Moederndorfer*, 141 Wis.2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987). Moreover, Hill has not demonstrated that he would not have pled guilty had the elements and each applicable constitutional right been repeated to him by trial counsel and the trial court. Consequently, it would lack arguable merit on this record to pursue the technical issue of whether trial counsel's discussion with Hill was adequate, when Hill claims no lack of understanding, as required by *Giebel*.

Hill also inquired about challenging his fourteen-year sentence because it is only one year less than the maximum sentence for these crimes. Hill asserts that this is an erroneous exercise of sentencing discretion because the trial court did not adequately consider the mitigating factors, namely that this was his first criminal offense as an adult and that he is being used as a "scape goat" for his accomplices. However, the trial court considered the sentencing factors and acknowledged that others were involved.

On appeal, 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 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 trial court considered the primary sentencing factors. These are extremely serious offenses. The victim is very seriously injured, both mentally and physically. Although Hill has no prior criminal record as an adult, the sentencing court considered Hill's prior juvenile record, which included the same type of violent offenses and noted that "there's kind of a tradition here of solving problems by either violence or going with the wrong people or doing the wrong kinds of things." Here, Hill was participating in criminal activity with the "wrong people." The sentencing court also concluded that Hill's history posed a threat to the public. It would lack arguable merit to challenge Hill's sentence.

Upon our independent review of the record, 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 judgment of conviction and relieve Attorney Patricia Flood of any further appellate representation of Hill.

By the Court. – Judgment affirmed.