

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 27, 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. 96-2028-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRUCE JOHNSEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Bruce M. Johnsen¹ pled no contest to one felony, possession of a firearm by a felon, and to two misdemeanors, disorderly

¹ The correct spelling of the appellant's name is unclear. While this court's records, derived from the notice of appeal, refer to the appellant as "Bruce Johnson," the judgment of conviction and other circuit court records, refer to the appellant as "Bruce M. Johnsen." Throughout this opinion, we will refer to the appellant as "Bruce M. Johnsen," and we

conduct while armed with a dangerous weapon and intentionally pointing a firearm at a person. The court sentenced Johnsen to two years in prison on the felony and to nine months in jail on each misdemeanor, to run consecutively.

Johnsen's appellate counsel, Attorney Richard J. Steffens, has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 734 (1967). Counsel personally served a copy of the report on Johnsen, and advised him of the right to respond. Johnsen has not filed a response. As required by *Anders*, this court has independently reviewed the record. Because that review reveals no arguable appellate issues, we affirm.

In the no merit report, appellate counsel addresses several issues that are not preserved for appellate review. Johnsen did not challenge the sufficiency of the complaint at the circuit court level.² Therefore, he waived any objection to the complaint. See *Day v. State*, 52 Wis.2d 122, 124-25, 187 N.W.2d 790, 791-92 (1971). A challenge to the bindover order was waived by Johnsen's no contest plea. See *State v. Webb*, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 (1991). Johnsen filed a pretrial suppression motion, and the resultant order would be reviewable under § 971.31(10), STATS. However, the State dismissed several counts in response to Johnsen's motion, and Johnsen then withdrew the motion as it pertained to the remaining counts. Therefore, no suppression issue remains.

Appellate counsel also discusses Johnsen's competency to proceed. Initially, Johnsen entered a not guilty by reason of mental disease or defect plea. Johnsen was examined by Dr. Frederick Fosdal, who concluded that Johnsen did not lack the "substantial capacity to understand the proceedings or assist in his ... defense." Section 971.13(1), STATS. Furthermore, Dr. Fosdal's report did not support Johnsen's NGI plea. See generally § 971.15(1), STATS. On

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direct the clerk of this court to amend its records accordingly.

² Johnsen did move to dismiss Count Eight for lack of probable cause. As part of the plea agreement, that count was dismissed and read in at sentencing.

the question of Johnsen's competency, we agree with appellate counsel's conclusion that no arguably meritorious issue exists.³

We now turn to the plea colloquy to determine if there is arguable merit to a postconviction challenge to the validity of the plea. Johnsen entered his no contest plea after negotiations with the State. Johnsen agreed to plead no contest to three counts, and the remaining counts would be dismissed and read in for sentencing purposes. The court explained the elements of each crime that was being pled to and their maximum penalties. The court reviewed the various constitutional rights that Johnsen would waive by his no contest plea. Johnsen indicated that he understood the proceedings and the effect of his plea. Occasionally, Johnsen expressed some hesitancy, and on each occasion, the court inquired further into the reasons for Johnsen's equivocal response until Johnsen had clarified that he understood and wanted to proceed with the plea. The court reviewed Johnsen's plea questionnaire. The questionnaire contained some equivocal answers, and the court reviewed those topics at length with Johnsen until the uncertainty was resolved.

Prior to sentencing, Johnsen filed a motion to withdraw his no contest plea and to reinstate his NGI plea.⁴ At the motion hearing, however, Johnsen withdrew the motion and indicated his desire to proceed to sentencing. Again, the court questioned Johnsen at length about his motivation, understanding and willingness to plead. Johnsen told the court that he believed he could successfully pursue an NGI defense, but that he wanted to proceed with the no contest plea.

In sum, the plea colloquy reveals that, at times, Johnsen's intentions were unclear and that his desire to plead no contest wavered. Ultimately, however, Johnsen advised the court that he understood the proceedings and that he was pleading no contest voluntarily. When Johnsen filed a motion to withdraw his pleas, the court again addressed Johnsen's concerns. Johnsen's decision to go forward to take advantage of the benefit of the plea agreement is reasonable, and the record shows that Johnsen made that

³ The impact of Johnsen's mental health on his ability to intelligently, voluntarily and knowingly enter a no contest plea will be discussed below.

⁴ Johnsen also asked for and received substitute counsel.

decision knowingly, voluntarily and intelligently. Further challenge to the validity of the plea would lack arguable merit.

We next address Johnsen's sentence. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. See *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. See *id.*

The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given the various 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 record shows that the court considered the appropriate sentencing factors. The court considered Johnsen's criminal record and emphasized his longstanding possession of firearms despite his status as a felon. The court felt that incarceration was necessary to protect the public from further criminal behavior and that probation would depreciate the seriousness of these offenses.⁵

⁵ Although the court's comments extend beyond these, the following paragraph summarizes the court's rationale:

I think the only appropriate sentence is a significant period of incarceration to protect society as long as possible from further criminal activity by this defendant. I don't believe he can be supervised in the community and certainly I don't think placement in the county jail is appropriate. Also considering the gravity of this offense, it's just fortunate that this didn't turn out to a situation where somebody was harmed or died as a result of discharge of a firearm. So both the gravity of the offense and the protection of the public, I think, outweigh any personal characteristics of the

Based on an independent review of the record, this court finds no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of *Anders* and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and appellate counsel is relieved of any further representation of the defendant on this appeal.

By the Court.—Judgment affirmed.

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defendant. And certainly if you look at the characteristics of the defendant, he hasn't exhibited any remorse or repentance and has continued to possess firearms over a numbers of years.