COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2409-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY J. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

EICH, C.J.[1] Timothy J. Johnson appeals from a judgment convicting him of operating a motor vehicle while intoxicated (fourth offense) contrary to § 346.63, STATS., after a bench trial, and obstructing an officer contrary to § 946.41,

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

STATS., upon his guilty plea. Johnson received a fine for obstructing and 180 days in jail and a fine for operating while intoxicated.

Johnson's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Counsel made repeated attempts to serve a copy of the report on Johnson, but Johnson moved and did not advise counsel of his new address. Counsel's investigator has not been able to locate Johnson.

Upon consideration of the report and an independent review of the record as mandated by ***Anders***, we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we affirm the judgment of conviction.

The no merit report addresses whether prosecuting Johnson for operating while intoxicated subsequent to the administrative suspension of his driver's license violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Our supreme court recently rejected this argument in ***State v. McMaster***, 206 Wis.2d 30, 556 N.W.2d 673 (1996).

The no merit report also addresses whether the trial court misused its sentencing discretion. 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 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 protection of the public. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight given to 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).

Our review of the sentencing transcript reveals that the court properly exercised its discretion. Although the trial court did not specifically address the sentencing factors when it fined Johnson for obstructing, the transcript reveals that the trial court considered the offense to be "minimal." Its sentence was appropriate under the circumstances.

In sentencing Johnson for operating while intoxicated, the court considered the gravity of the offense and Johnson's character, and imposed a sentence less than that called for by the sentencing guidelines. The trial court properly exercised its sentencing discretion.

Our independent review of the record discloses that Johnson's guilty plea to obstructing was knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). The court confirmed Johnson's desire to plead guilty to obstructing an officer. It reviewed the elements of the crime, enumerated the various constitutional rights Johnson would waive by his guilty plea and confirmed that Johnson understood those rights. The court found an adequate factual basis for the plea based upon the probable cause section of the amended criminal complaint, and found that Johnson had read and signed a Notice of Rights and Waiver of Rights form. It accepted Johnson's plea as having been knowingly, voluntarily and intelligently entered. From the plea colloquy, we conclude that a challenge to Johnson's guilty plea as unknowing or involuntary would lack arguable merit. Furthermore, Johnson's plea waived any nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

With regard to the bench trial for operating while intoxicated, our independent review of the record indicates that the trial court questioned Johnson about his decision to waive a jury trial and confirmed Johnson's understanding of the proceedings to be held on this charge. The trial court accepted the probable cause section of the amended criminal complaint as the factual basis for its decision that Johnson committed the charged offense. The trial court's finding that Johnson operated while intoxicated as a fourth offense comports with the requirements of § 346.65(2)(d), STATS.

We affirm the judgment of conviction and relieve Attorney Michael J. Olds of further representation of Timothy J. Johnson in this matter.

By the Court.—Judgment affirmed.