COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 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. 96-2904-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TRACEY LEON WHEELER,

DEFENDANT-APPELLANT.

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

DEININGER, J.[1] Tracey Wheeler appeals a judgment convicting him of one count of obstructing an officer, contrary to § 946.41(1), STATS.

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[1] This appeal is decided by one judge, as provided by § 752.31(2)(f), STATS.

Wheeler entered his no contest plea to the misdemeanor charge after the State dismissed a related charge of attempted armed robbery pursuant to the parties' plea agreement. The trial court imposed a ninety-day sentence to be served consecutively to any sentence being served by Wheeler. Wheeler's appellate counsel, Attorney Jennifer L. Huebner, has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Wheeler was served with a copy of the no merit report and informed of his right to respond to it. Wheeler elected not to respond.

The no merit report identifies two potential issues for appellate review: (1) whether Wheeler should be allowed to withdraw his no contest plea to correct a "manifest injustice"; or (2) whether the judgment should be vacated in the interest of justice under § 752.35, STATS. We have also examined the trial court's exercise of discretion at sentencing.

A defendant is entitled to withdraw a plea following imposition of sentence if he or she shows, by clear and convincing evidence, that the withdrawal of the plea is necessary to correct a manifest injustice. ***State v. Spears,*** 147 Wis.2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). A manifest injustice may be established if the record fails to affirmatively show that the defendant understood the specific constitutional rights waived by the entry of a no contest plea. *See* ***State v. Bartelt,*** 112 Wis.2d 467, 474-75, 334 N.W.2d 91, 94 (1983). In ***State v. Bangert,*** 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986), the supreme court placed the initial burden on the defendant to show that a plea was accepted contrary to § 971.08(1), STATS.,[2] or other procedures mandated by ***Bangert.*** If the

[2] Section 971.08(1), STATS., provides in pertinent part:

(continued)

defendant makes that showing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. ***Id.*** at 274-75, 389 N.W.2d at 26-27. A waiver-of-rights form may be used to determine whether the defendant understood the constitutional rights he was giving up. ***State v. Moederndorfer,*** 141 Wis.2d 823, 826-29, 416 N.W.2d 627, 629-30 (Ct. App. 1987).

The record in this case demonstrates that the trial court questioned Wheeler at length about the proposed plea and the various constitutional rights that Wheeler would waive by the plea. Wheeler indicated that he understood his rights and that his no contest plea would waive those rights. Further, the trial court explained the maximum penalty for the crime. The record contains a "PLEA(S) OF NO CONTEST TO MISDEMEANOR CHARGE(S) - WAIVER OF RIGHTS" form signed by Wheeler and his trial attorney. *See* ***Moederndorfer,*** 141 Wis.2d at 827-28, 416 N.W.2d at 629-30. In light of the record of the plea colloquy between Wheeler and the trial court and Wheeler's execution of the waiver-of-rights form, this court concludes that the requirements of § 971.08,

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> **Pleas of guilty and no contest; withdrawal thereof. (1)** Before the court accepts a plea of ... no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

STATS., and ***Bangert*** were met. It follows that an appellate challenge to the validity of the guilty plea would lack arguable merit.

The second issue identified by the no merit report is whether this court should exercise its power of discretionary reversal and order a new trial. We may reverse a circuit court judgment and remand a matter for a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Section 752.35, STATS. Several principles have emerged from the Wisconsin Supreme Court's efforts to identify the scope of our discretionary power under § 752.35. The court has recognized two circumstances to fall under the "real controversy not fully tried" category:

> (1) the jury was not given an opportunity to hear important testimony that bore on an important issue in the case, or
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> (2) the jury had before it testimony or evidence which had been improperly admitted, and this material obscured a crucial issue and prevented the real controversy from being fully tried.

State v. Schumacher, 144 Wis.2d 388, 400, 424 N.W.2d 672, 676 (1988). The court held further that under the second category, a "miscarriage of justice," a discretionary reversal was appropriate if the court concluded "that there would be a substantial probability that a different result would be likely on retrial." ***Id***. at 400-01, 424 N.W.2d at 676-77. None of these or similar circumstances are present in this case. Accordingly, this court concludes that an argument directed to this court's discretionary power to order a new trial pursuant to § 752.35 would be without merit.

The trial court sentenced Wheeler to one-third of the maximum sentence for obstructing an officer. Sentencing lies within the trial court's discretion. ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). If the trial court properly exercised its discretion, this court will uphold the sentence. *See* ***id.*** The primary factors for the court's consideration are the gravity of the offense, the character of the offender, and the public's need for protection. ***Id.*** at 427, 415 N.W.2d at 541. We have reviewed the record and conclude that the trial court considered the relevant factors and properly exercised its discretion in imposing sentence in this case.

Based on the record before us, we conclude that any further appellate proceedings on behalf of Wheeler would be frivolous and wholly without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, we affirm the judgment of conviction. Attorney Huebner is relieved from further representation of Wheeler in this appeal.

By the Court.—Judgment affirmed.