COURT OF APPEALS
DECISION
DATED AND RELEASED

March 13, 1997

NOTICE

No. 96-3498-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OBEA HAYES,

Defendant-Appellant.

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

ROGGENSACK, J.[1] Obea Hayes appeals from a judgment convicting him of one count of disorderly conduct with a dangerous weapon, as a repeater, contrary to §§ 947.01, 939.62(1)(a) and 939.63(1)(a)1., STATS. Counsel for Hayes has filed a no merit report under RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Hayes received a copy of the report and responded to it. Upon consideration of the report, the response, and an

[1] This is a one judge appeal under § 752.31(2)(f), STATS.

independent review of the record, as mandated by ***Anders***, this court concludes there is no arguable merit to any issue that could be raised on appeal. The judgment of conviction is affirmed.

The charge arose from an incident in which Hayes was alleged to have been playing cards with several others while intoxicated. He became angry and indicated a desire to fight with another, and took two punches at him, but missed. Hayes then shoved the man, went into a nearby kitchen, emerged with a butcher knife and said, "I'll cut you." Hayes put the knife down, but again pushed the man. Hayes pleaded no contest. The court sentenced him to three years in prison, consecutive to any other sentence.

When appointed counsel submits a no merit report, this court examines the report and any response from the defendant 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.

The report first addresses whether Hayes' plea was knowingly, voluntarily and intelligently entered. Before a no contest plea 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 promises or threats were made to the accused to obtain his plea; and (5) whether a factual basis existed to support conviction of the crime charged. ***State v. Bangert***, 131 Wis.2d 246, 266-72, 389 N.W.2d 12, 22-25 (1986). A proper inquiry by the trial court ensures that defendants enter their pleas knowingly, voluntarily and intelligently. ***Id.*** This court reviews the record *de novo* to determine whether the procedure used by the trial court in accepting the plea was sufficient. ***Id.*** at 286, 389 N.W.2d at 31.

During its plea colloquy with Hayes, the trial court reviewed the nature of the charge, the plea questionnaire, Hayes' education, and the constitutional rights he was waiving. The court obtained Hayes' admission that he was convicted of the felony upon which the allegation of habitual criminality was based. The court ascertained that no promises or threats were made. The

court determined that the complaint supplied a sufficient factual basis for the conviction. The colloquy satisfied the ***Bangert*** requirements.

In his response, Hayes argues that his plea was involuntary because he only accepted his attorney's advice to plead because he was depressed; he did not know what "no contest" meant; and he thought there was a plea agreement, although he does not say what he believed the terms of the agreement were. A defendant who wishes to withdraw a plea is not entitled to an evidentiary hearing if he or she does not allege sufficient facts to raise a question of fact, or if he or she presents only conclusionary allegations. ***State v. Bentley***, 201 Wis.2d 303, 309-311, 548 N.W.2d 50, 54-55 (1996). The facts alleged should allow a reviewing court to "meaningfully assess" the claim. ***Id.*** at 314, 548 N.W.2d at 55.

The transcript of the plea hearing provides no support for any of Hayes' allegations. Hayes was asked if he believed he was suffering from any mental illness of any kind, and he said he was not. The court asked Hayes whether he was entering the plea "entirely of your own free will," and Hayes replied that he was. The court told Hayes to let it know if anything was said or done during the hearing that he did not understand. Hayes said he would. Although the term "no contest" was used several times, Hayes never asked about it. The plea hearing transcript contains no reference to a plea agreement. Under these circumstances, we conclude that Hayes' response does not provide sufficient facts to obtain an evidentiary hearing, and therefore there would be no arguable merit to raising these issues.

The no merit report also addresses whether the trial court erroneously exercised its discretion in sentencing Hayes. The court sentenced him to the maximum available sentence, three years in prison.

We will not disturb a sentence imposed by the trial court unless the court erroneously exercised its discretion. ***State v. Thompson***, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). When imposing sentence, a trial court must consider the gravity of the offense, the offender's character, and the public's need for protection. ***Id.*** at 264-65, 493 N.W.2d at 732. A trial court erroneously exercises its discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives

too much weight to one sentencing factor in the face of other contravening considerations. ***Id***. at 264, 493 N.W.2d at 732. The weight given to each sentencing factor, however, is left to the trial court's broad discretion. ***Id.*** A trial court exceeds its discretion as to the length of the sentence imposed "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.***

Here, the trial court considered the fact that this crime was committed twelve days after Hayes was placed on probation for another offense, his lengthy criminal record, his education and employment history, the dangerousness of the offense and the need to protect the community. The sentence is not excessively long. There is no arguable merit to challenging the sentence on appeal.

Hayes' response also argues that the victim and witness allegations are "incredible" and that his actions were not disorderly conduct. However, these arguments go to the sufficiency of the evidence, which is an issue Hayes waived with his plea. *See* ***Mack v. State***, 93 Wis.2d 287, 293, 286 N.W.2d 563, 566 (1980) (guilty plea waives non-jurisdictional defects and defenses). Therefore, there is no arguable merit. Counsel is relieved of further representing Hayes in this matter.

By the Court.—Judgment affirmed.