COURT OF APPEALS
DECISION
DATED AND RELEASED

September 25, 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. 97-1599-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY A. TOLLEFSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

VERGERONT, J.[1] Appointed counsel for Larry A. Tollefson, Attorney Margaret A. Maroney, has filed a no merit report pursuant to RULE 809.32, STATS. Tollefson responded to it. Upon our independent review of the

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

record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal.

Tollefson was originally charged with misdemeanor battery and disorderly conduct for an incident in which he struck and poured beer on his girlfriend. Pursuant to a plea agreement, in September 1995 he pleaded no contest to the battery charge and the other charge was dismissed. The court withheld sentence and placed Tollefson on probation for one year. He did not appeal from that judgment. His probation was then extended for one year due to failure to obtain an AODA assessment, and eventually his probation was revoked. Tollefson now appeals from sentencing after revocation in November 1996.

The original judgment of conviction was a final judgment from which Tollefson could have appealed, and therefore it is not brought before us in this appeal from a later judgment unless Tollefson demonstrates good cause to extend the time to appeal from the original judgment. *See* ***State v. Drake,*** 184 Wis.2d 396, 399, 515 N.W.2d 923, 924 (Ct. App. 1994). No good cause to do so appears in the record. This means that the only issue in this appeal is whether Tollefson was properly sentenced after revocation of his probation.

The sentencing record includes a revocation summary prepared by Tollefson's probation agent. The summary describes various probation violations, including driving without a license, registering automobiles in the names of his minor children, failing to report, failing to obtain an AODA assessment, and consuming alcohol. The agent addressed the court at sentencing and recommended the maximum sentence. The prosecutor recommended a six-month sentence. Tollefson's attorney disputed some of the information in the revocation summary and argued for a sentence of sixty days. The court sentenced Tollefson

to nine months in jail, the maximum available. However, the court also provided that after serving sixty days Tollefson would be eligible for TAP, which appears to be an alcohol treatment program, and if he completes the program the remainder of his sentence would be permanently suspended.

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, 263-64, 493 N.W.2d 729, 732 (Ct. App. 1992). 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.*** The weight given to each sentencing factor is left to the trial court's broad discretion. ***Id.*** 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.***

When sentencing Tollefson, the court noted that it would not consider Tollefson's then-pending charges although he consumed alcohol and drove an automobile in violation of the rules. The court stated that Tollefson has a "severe" drinking problem, and that "he's pretty much flaunted the system." The court stated that its goal was to stop "the cycle before someone gets hurt or killed." The court also considered that the battery for which Tollefson was actually being sentenced was not the most serious battery.

In his response to the no merit brief, Tollefson argues that the sentence was unduly severe because of the "untruths and unfavorable feelings" of his probation agent. He then goes on to dispute the revocation summary and the agent's statement at sentencing, paragraph by paragraph. However, other than offering a different description of the facts, Tollefson's response includes no

proof, either by documents or affidavits from other persons, demonstrating that any of the agent's statements were incorrect. We also note that Tollefson was given an opportunity to address the court at sentencing, and could have raised these alleged errors at that time, but did not.

We conclude there is no arguable merit to an appeal from the sentence on the ground that the agent provided false information. First, Tollefson has not made a sufficient showing that the information was indeed false. Second, Tollefson does not appear to dispute the general points relied on by the sentencing court: that he consumed alcohol and drove during his probation. We conclude, after a review of the record, that there is no arguable merit to these issues. Our review of the record discloses no other potential issues for appeal.

By the Court.—Judgment affirmed.