COURT OF APPEALS DECISION DATED AND FILED

November 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-2731-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY S. MOEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Timothy Moen appeals from a judgment of conviction resulting from a plea of no contest to a felony charge of possession of a controlled substance (THC) with intent to deliver, as a repeat offender, contrary to §§ 161.41 (1m)(h) and 161.48, STATS. He was sentenced to five years'

imprisonment, but the sentence was stayed, and he was placed on four years of probation.

The state public defender appointed Thomas Olson to represent Moen on appeal. Attorney Olson has filed a no merit report with this court, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32, STATS., and reports that a copy has been sent to Moen. In compliance with ***Anders***, both Attorney Olson and this court informed Moen that he could respond to the report, and he has done so. After an independent review of the record as mandated by ***Anders***, we conclude that any further proceedings in this matter would be frivolous and without arguable merit.[1] Moen's conviction is affirmed, and we grant Attorney Olson's motion to withdraw from further representation before this court.

At the preliminary hearing, law enforcement officials testified that on July 25, 1995, Moen was the driver of a car that a confidential informant had told officials would arrive from Rockford, Illinois, with drugs on board. When the car came into view of waiting law enforcement officials, Moen's brother, Ray, a passenger in the car, was seen throwing a brown grocery bag out the window. When retrieved from a ditch, the bag was found to contain about a pound of marijuana. Moen voluntarily confessed to police that he knew what was in the bag, and that he had traveled to Illinois to acquire the marijuana.

The no merit report addresses Moen's plea, as well as whether he was entitled, as a matter of law, to receive the same sentence as his co-defendant

[1] The only questionable item in the record is the caption on the transcript of the July 26, 1995, bond hearing: "The State of Iowa vs. Timothy S. Moen." However, having carefully read all the transcripts, we are confident that reference to Iowa is a typographical error.

brother. By his response, Moen claims that his written statement was coerced, that his car was illegally searched, and that his voluntary statement concerning possession of the marijuana was a "smart ass" statement which he did not mean. He also alleges that his trial counsel indicated a belief that the police were lying at the preliminary hearing, apparently implying that due to counsel's failure to prove that police were lying, he received ineffective assistance of counsel. We consider these arguments below and conclude that there is no merit to any of these claims. Therefore, we affirm the conviction.

With respect to the plea before the court, the testimony from law enforcement officials, combined with Moen's own voluntary statements when apprehended, form a sufficient factual basis for a plea of no contest. Prior to making the plea before the court, Moen signed a plea questionnaire form. A completed plea questionnaire is competent evidence of a knowing and voluntary no contest plea. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987). In addition, the circuit court conducted a colloquy with Moen, advising him of the rights he was giving up and ascertaining that he was able to understand the proceedings and had not been threatened or tricked into pleading no contest. Under ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), Moen's no contest plea was entered knowingly, voluntarily and intelligently. Further, once he pled no contest, he waived all nonjurisdictional issues. ***Belcher v. State***, 42 Wis.2d 299, 308-09, 166 N.W.2d 211, 216 (1969).

With respect to sentencing, Moen filed a motion to receive the same sentence as his brother and also argued for this at sentencing. However, sentencing lies within the trial court's discretion, and our review is limited to whether the trial court erred in the exercise of that discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors

which the trial court must consider are "the gravity of the offense, the character of the offender and the need for public protection." ***Id.*** at 427, 415 N.W.2d at 541. The weight to be given to each of 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). Here, the court heard argument that Moen's criminal record was different from his brother's and that he had lied to cover up his brother's involvement in the offense. At sentencing, Moen changed his story *after* pleading no contest, denying that he had any idea what was in the bag, contrary to his previous voluntary statements to law officials. Under these circumstances, the circuit court did not err in the exercise of its discretion in sentencing Moen differently from his brother.

Moen's claim that his written statement was coerced is similarly meritless. The written statement followed the voluntary oral statement, which already was strong evidence against him.[2] The law enforcement officials had no motive to coerce further statements from Moen. In fact, the prosecutor primarily relied upon the oral statement in support of the plea and to refute Moen's after-the-fact claims of involuntariness. Significantly, Moen never raised this argument during his plea colloquy, when the court specifically asked if anyone had coerced him.

We also reject as meritless Moen's claim that his car was illegally searched. The drugs his brother ejected from the car were the basis of the charge against him.

[2] Moen's oral statement to other officers was particularly significant because it corroborated the pick-up and drop-off details of the drug transaction the confidential informant provided.

Moen claimed, at his sentencing hearing *after* he pled no contest, that his voluntary statement acknowledging possession was actually made in jest. He raises this issue again, and we reject it. The prosecutor refuted Moen's contention, reading into the record portions of two police reports which contained a more complete text of his voluntary statement, including details of the planned pick-up and drop-off of the drugs. The police reports demonstrate that Moen was not making the comment in jest, but that he knowingly purchased the marijuana for delivery to others. We find no merit in his after-the-fact attempt to recharacterize his admittedly voluntary statement.

Finally, we turn to Moen's apparent claim of ineffective counsel. Even assuming his trial counsel believed the police were not being truthful on the stand, failure to prove a theory does not constitute ineffective assistance. To prevail, Moen must show that: (1) his counsel's performance was deficient; and (2) that deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. *See also* **State v. Ambuehl**, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988). Our independent review of the record reveals that trial counsel conscientiously argued on Moen's behalf and conducted his defense in a professional manner, including a competent examination of the police officers at the preliminary examination. Under these circumstances, we find no merit to a claim of ineffective assistance of counsel.

Based on our independent review of the record, we conclude that no other issues for review exist. Any further appellate proceedings would be without arguable merit and would be wholly frivolous, within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and

Attorney Olson is relieved from further representing Timothy Moen before this court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.