

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 29, 1995

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. 94-2398-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD A. CHOLEWINSKI,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed.*

CANE, P.J. Gerald A. Cholewinski appeals from a judgment of conviction and a postconviction order.¹ The state public defender appointed Attorney Jack E. Schairer as Cholewinski's appellate counsel. Attorney Schairer served and filed a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Cholewinski filed a response. After an independent review of the record as mandated by *Anders*, this court concludes that any further appellate proceedings would lack arguable merit.

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

Cholewinski was charged with third-degree sexual assault and misdemeanor battery of his wife. However, the State amended the complaint and Cholewinski entered no contest pleas to three misdemeanors: (1) armed while intoxicated, contrary to § 941.20(1)(b), STATS.; (2) disorderly conduct, contrary to § 947.01, STATS.; and (3) negligent use of a weapon, contrary to § 941.20(1)(a), STATS.² The trial court withheld sentence and placed Cholewinski on probation for eighteen months. As conditions of that probation, he was precluded from having any unauthorized contact with his wife, and he was directed to have an Alcohol and Other Drug Abuse ("AODA") assessment and participate in recommended treatment and counseling. However, Cholewinski violated the conditions of probation by absconding from his halfway house placement. The AODA counselor characterized Cholewinski as "extremely dangerous" and believed he "[was] at high risk of re-offending." Cholewinski's probation was revoked and the trial court imposed two concurrent nine-month jail terms on the first two counts and a ninety-day consecutive jail term on the third count. At that hearing, the trial court mentioned that the original complaint resulted from a plea bargain in which a sexual assault charge was "bargained down."

Appellate counsel filed a no merit report and Cholewinski filed two responses. This court struck the no merit report and dismissed the appeal.³ In the dismissal order, appellate counsel was directed to move the trial court for clarification on whether the original sexual assault allegation was a factor in imposing sentence. The trial court reaffirmed its prior ruling and clarified that the sexual assault allegation did not affect the sentence it imposed. Appellate counsel filed a transcript of the hearing on the clarification motion and filed another no merit report. Cholewinski filed a response to this no merit report and referenced his two responses to the previous no merit report in case no. 94-1233-CR-NM, which was rejected.⁴

The no merit report addresses three sentencing issues, namely whether the trial court: (1) erroneously exercised its sentencing discretion; (2)

² A no contest plea means that the defendant does not claim innocence, but refuses to admit guilt. *Cross v. State*, 45 Wis.2d 593, 599, 173 N.W.2d 589, 593 (1970); § 971.06(1)(c), STATS.

³ *State v. Cholewinski*, No. 94-1233-CR-NM.

⁴ We address the issues Cholewinski raised in all three responses.

relied on inaccurate information when it sentenced Cholewinski; and (3) erred in denying his clarification motion. After reviewing the appellate record, this court agrees with counsel's description, analysis and conclusion that pursuing these appellate issues would lack arguable merit.

In his response, Cholewinski persists in the contention that he was sentenced on inaccurate information, principally the sexual assault allegation from the original complaint. He also contends that the trial court erroneously exercised its sentencing discretion. Cholewinski raises several issues which only have arguable merit if construed as ineffective assistance of trial counsel claims. Cholewinski criticizes trial counsel because: (1) he failed to correct inaccuracies in the revocation summary and in statements made by counsel and the trial court; (2) Cholewinski is hearing-impaired and he was unable to communicate fully with counsel; and (3) he failed to seek Judge Cameron's substitution.

Cholewinski's principal issue is the trial court's purported reliance at sentencing on erroneous information, namely that the plea agreement was "bargained down" from a sexual assault charge. However, this was precisely the issue this court directed the trial court to address on Cholewinski's motion for clarification. At that hearing, the trial court stated that:

I don't recall relying upon the alleged [sexual assault] as being the basis for the sentencing and, frankly, without the allegation, I think the sentence was appropriate and justified based upon what this Court knew about Mr. Cholewinski at the time of sentencing without regard of what the original charge was.

As appellate counsel noted, it would be frivolous to pursue this issue when the trial court expressly denied having considered that allegation at sentencing.

Cholewinski contends that the no merit report is inaccurate.⁵ He challenges the statement that his in-patient treatment was followed by

⁵ However, counsel's statement of the case, which Cholewinski criticizes as inaccurate, is

placement at Serenity House and he adamantly objects to the probation agent's characterization of him as "extremely dangerous." Cholewinski has the right to be sentenced on accurate information. *Bruneau v. State*, 77 Wis.2d 166, 175, 252 N.W.2d 347, 352 (1977). However, trial counsel discussed Cholewinski's "walk[ing] away from" Serenity House and explained the context of his conduct, in an attempt to minimize the characterization that he is "dangerous." Insofar as trial counsel did not correct these alleged inaccuracies, Cholewinski's only redress would have been to pursue an ineffective assistance of trial counsel claim.

Cholewinski also contends that the trial court erroneously exercised its sentencing discretion. On appeal, review of the sentence is limited to whether the trial court erroneously exercised its discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors to 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 given to each factor is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The trial court exercised its discretion in considering the sentencing factors. It characterized these offenses as dangerous because a weapon was involved. It focused on the character of the offender, and mentioned Cholewinski's "poor history" and his inability to successfully complete probation. The need for public protection also arose from Cholewinski's inability to comply with the conditions of his probation. The trial court told Cholewinski that "you are an individual who decides what you want to do and when you want to do it without regard to what society requires and you are putting your own interests first and that's not how things work out all the time." The trial court also mentioned the victim's continued fear of Cholewinski.

Cholewinski also contends that the trial court erroneously exercised its sentencing discretion in imposing a consecutive term on the third count. However, it is within the trial court's discretion whether to impose

(. . .continued)
substantiated by the revocation summary.

concurrent or consecutive sentences for multiple convictions. *Cunningham*, 76 Wis.2d at 284-85, 251 N.W.2d at 68-69.

The trial court exercised its discretion in imposing two concurrent jail terms and one consecutive jail term for the three convictions. Cholewinski's maximum sentencing exposure was twenty-one months. The prosecutor recommended an aggregate term of one year, whereas the probation agent recommended an aggregate term of nine months.⁶ Trial counsel recommended that Cholewinski be released for time served, or for 120 days, with credit for the fifty days already served.⁷ The trial court properly considered the sentencing factors, including Cholewinski's failure to comply with the conditions of his probation. A challenge to the sentencing court's exercise of discretion would lack arguable merit.

Cholewinski claims ineffective assistance of trial counsel.⁸ Cholewinski's ineffective claims include trial counsel's failure to object to inaccuracies in the revocation summary and erroneous statements made at sentencing.⁹ Cholewinski is hearing-impaired and contends that trial counsel did not discuss various matters with him and that this lack of information, coupled with his inability to understand the court proceedings in view of his disability, constituted ineffective assistance. Cholewinski also objects to Judge Cameron having presided over the case.¹⁰ However, trial counsel could have

⁶ Cholewinski contends that appellate counsel erroneously reported these recommendations. However, the sentencing transcript substantiates appellate counsel's rendition of the respective recommendations.

⁷ Cholewinski received sentence credit for the thirty-seven days he served on a probation hold. Although trial counsel sought credit for the twenty-two days Cholewinski was confined for in-patient treatment, the trial court recognized that it was not compelled to grant sentence credit for in-patient treatment and refused to do so.

⁸ In the plea questionnaire and waiver of rights form, Cholewinski indicated that he was satisfied with trial counsel's representation.

⁹ Cholewinski also contends that trial counsel should have objected to the court's use of the original complaint (with the sexual assault allegation), as a factual basis for his pleas. Trial counsel had stipulated to use of the original complaint, but only for purposes of accepting Cholewinski's pleas.

moved to substitute Judge Cameron because the record does not indicate that Cholewinski had yet exercised his right of substitution. Whether Cholewinski advised trial counsel of his objection to Judge Cameron is unknown since he failed to preserve his ineffective assistance claim.

"[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). It is inappropriate for this court to determine trial counsel's competency on unsupported allegations. *State v. Simmons*, 57 Wis.2d 285, 297, 203 N.W.2d 887, 894-95 (1973). Because there is no evidentiary record on these issues, this court will not review Cholewinski's ineffective assistance of trial counsel claims.

After having addressed each issue disclosed by Cholewinski, and having independently reviewed the record, as expanded by the clarification proceedings, this court concludes there are no other meritorious issues and that any further appellate proceedings would lack arguable merit. *Anders*, 386 U.S. 738; RULE 809.32(3), STATS. Accordingly, the judgment of conviction and postconviction orders are affirmed, and Attorney Jack E. Schairer is relieved of any further appellate representation of Cholewinski. RULE 809.32(3).

By the Court. – Judgment and order affirmed.

(. . continued)

¹⁰ Cholewinski claims that:

[Judge] Cameron presided over a divorce case between me and my wife at that time of which he granted to my wife. I did not attend the divorce proceedings because I was under an arrest warrant at that time. I still [do] not know to this day of what was said against me by [my] ex-wife at those proceedings at which could not [have] been good, if she was granted the divorce.

He also claims that Judge Cameron recused himself from a sexual assault case involving the judge's sister-in-law, which may have accounted for his strong feelings against Cholewinski, who was charged with sexual assault.