COURT OF APPEALS
DECISION
DATED AND RELEASED

September 7, 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(1), 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. 94-2802-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY M. WESOLOSKI,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Jeffrey M. Wesoloski appeals from a judgment convicting him of escape contrary to § 946.42(3)(a), STATS. Wesoloski received a four-year sentence after he entered a guilty plea.

Wesoloski's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Wesoloski received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders***, we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we affirm the judgment of conviction.

Wesoloski was charged with felony escape after he failed to return to the Monroe County jail on September 30, 1993.[1] On that date, Wesoloski was incarcerated (with Huber privileges) under an August 25, 1993, nine-month sentence for misdemeanor battery. Additionally, Wesoloski was subject to a consecutive two-year probation term with sixty days in the Monroe County jail as a condition of probation.

Our review of the record discloses that Wesoloski's guilty plea was knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). The court confirmed that Wesoloski desired to plead guilty to felony escape but that the State had not offered a plea bargain. The court advised Wesoloski of the maximum possible punishment for this crime and confirmed his age, the extent of his education, and his understanding of the proceedings. The court reviewed the elements of the crime, enumerated the various constitutional rights Wesoloski would waive by his guilty plea and confirmed that Wesoloski understood those rights. The court ascertained that Wesoloski's counsel had had a sufficient opportunity to discuss the case and the plea decision with him and that Wesoloski was satisfied with the representation he had received. The court found an adequate factual basis for the plea based upon the evidence adduced at the preliminary hearing. The court then accepted Wesoloski's plea as having been knowingly, voluntarily and intelligently entered.

On the basis of the plea colloquy, we conclude that a challenge to Wesoloski's guilty plea as unknowing or involuntary would lack arguable merit. Furthermore, Wesoloski's plea waived any nonjurisdictional defects and

[1] Wesoloski was later found hiding in a friend's attic.

defenses, including claimed violations of constitutional rights. ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

We turn to the issue raised in the no merit report: whether the felony escape charge was barred by ***State v. Schaller***, 70 Wis.2d 107, 233 N.W.2d 416 (1975). In ***Schaller***, the court held that a probationer confined in a county jail as a condition of probation may not be convicted of escape under § 946.42, STATS. ***Schaller***, 70 Wis.2d at 113-14, 233 N.W.2d at 419-20.

This issue lacks merit because the facts of this case do not fall under ***Schaller***. At the time he failed to return to the jail, Wesoloski was serving a nine-month jail sentence; his probation term had yet to begin. Therefore, Wesoloski was not a probationer when he failed to return to the jail. ***Schaller*** does not apply.

We have also independently reviewed the sentence. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See* ***State v. Haskins***, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for protection of the public. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given to 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).

Our review of the sentencing transcript reveals that the court considered the appropriate factors. The court considered the gravity of the offense, escaping while on Huber privilege, and found that Wesoloski deliberately decided not to comply with the privilege offered to him. The trial court reviewed Wesoloski's history of criminal conduct and observed that probation had been ineffective on previous occasions. The court considered Wesoloski's character, noting that he was thirty-seven years old and had an alcohol problem. Finally, the court discussed the public's need to be protected from someone who fails to return to jail while on Huber release. The four-year sentence imposed by the trial court did not exceed the statutory maximum. The trial court properly exercised its sentencing discretion.

We affirm the judgment of conviction and relieve Attorney Ellen M. Thorn of further representation of Jeffrey M. Wesoloski in this matter.

By the Court.—Judgment affirmed.