

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 9, 1996

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

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No. 95-0657-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN THOMAS,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Brian Thomas appeals from a judgment of conviction for two counts of first-degree sexual assault. Thomas was sentenced to fifteen years on each count, to run consecutively. Thomas also appeals from orders denying postconviction relief and sentence modification.

Thomas's appellate counsel, Attorney Patricia Flood, has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Thomas has filed a response. We have conducted the independent review of the record that is required by *Anders*. After considering the no merit report and Thomas's response, we conclude that further appellate proceedings would lack arguable merit.

Thomas was charged with two counts of first-degree sexual assault. On February 8, 1994, Thomas entered guilty pleas to both charges. However, on May 5, 1994, Thomas filed a *pro se* motion to withdraw his pleas. In that motion, Thomas suggested that he did not understand the plea proceeding because of "possible mental deterioration" arising from his HIV-positive condition. Thomas also requested and received a new attorney.

At new counsel's request, a competency evaluation was performed. After the psychiatric opinion was filed with the court, a June 1, 1994 hearing was held. Thomas's attorney withdrew her competency objection. Thomas also withdrew his *pro se* motion to withdraw his pleas. In response to extensive questioning by the trial court, Thomas admitted that, "at the time," he voluntarily, intelligently and knowingly entered his pleas. Thomas said that he wanted to "go ahead" and that "I'm more -- more aware of everything now. I feel more comfortable. I have had ... time to discuss it and ... I'm more sure of what's happening now." Thomas told the court that he still wanted to plead guilty and that no promises or threats had been made.

Thomas was sentenced on June 27, 1994. Much of the discussion at sentencing focused on Thomas's HIV-positive status. The State viewed that as an aggravating factor, pointing to the fact that Thomas knew he was HIV-positive when he committed these assaults on the nine-year-old daughter of a friend. Thomas noted that he had a decreased life expectancy, and asked the court to impose a lenient sentence in recognition of that fact. The court imposed consecutive fifteen-year sentences.

After conviction, appellate counsel was appointed to represent Thomas. Despite that appointment, Thomas filed two *pro se* motions with the trial court. The first motion, filed on July 28, 1994, asked the court to "reconsider the stiffness of your sentence." Thomas expressed remorse for the victim and

emphasized his cooperation with authorities by acknowledging his HIV condition. On August 19, 1994, the trial court denied Thomas's motion, noting that Thomas had not shown any "new factors or circumstances" that would support the modification of sentence.¹

On October 10, 1994, Thomas moved to withdraw his pleas. Thomas asserted that he was denied effective assistance of trial counsel because of his attorneys' "failure to make any kind of factual investigation" into the possibility that an HIV-related illness or condition led him to commit these offenses. Thomas attached to the motion a July 15, 1994 medical report showing that he had tested positive for cytomegalovirus, which Thomas says could have caused a brain infection.

On October 31, 1994, the court denied Thomas's motion. The court held that the report did "not establish that [Thomas] was under a handicap at the time he entered his plea [and it] provides no support for his conclusion that his attorneys did not provide effective assistance on his behalf." The court also held that Thomas's assertion that his attorneys failed to fully investigate this matter was insufficient to warrant an evidentiary hearing. See *State v. Washington*, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993).

In her no merit report, counsel discusses whether there would be arguable merit to further challenges to the validity of Thomas' guilty pleas, and concludes that arguable merit would be lacking. Because Thomas continues to seek withdrawal of his guilty pleas in his response, we will address in detail whether the trial court erred in denying Thomas' *pro se* motion.

A trial court must hold an evidentiary hearing on a defendant's postconviction motion to withdraw a guilty plea if the motion alleges facts which, if true, would entitle the defendant to relief. *State v. Bentley*, No. 94-3310-CR, slip op. at 5-6 (Wis. May 22, 1996), (citing with approval *Nelson v. State*,

¹ We recognize that Thomas's filing of a sentence modification motion could be construed as a waiver of other postconviction relief. See § 973.19(5), STATS. Because this is an appeal brought under RULE 809.32, STATS., we do not hold Thomas to such waiver, and in the interest of completeness, we will address Thomas' other assertions.

54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972)). Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law. *Bentley*, slip op. at 6. If the motion fails to allege sufficient facts, a reviewing court applies the deferential erroneous exercise of discretion standard of review to the trial court's denial of a hearing. *Id.*

[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Washington, 176 Wis.2d at 215, 500 N.W.2d at 336.

We conclude that the trial court was not required to conduct an evidentiary hearing on Thomas's motion to withdraw. A defendant must allege facts supporting plea withdrawal in the motion, and he "cannot rely on conclusory allegations, hoping to supplement them at a hearing." *Bentley*, slip op. at 9 (*quoting Levesque v. State*, 63 Wis.2d 412, 421, 217 N.W.2d 317, 322 (1974)). "The nature and specificity of the required supporting facts will necessarily differ from case to case. However, a defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim." *Id.* at 9-10. A defendant seeking to withdraw a plea because of ineffective assistance of counsel must allege facts showing "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 8 (*quoting Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

In this case, Thomas asserted that his attorneys did not fully investigate his health status at the time he entered his pleas. Thomas failed, however, to allege any facts that would support an assertion that he would not have pleaded guilty if his attorneys had conducted additional investigation. Without those facts, Thomas's allegation "amounts to merely a self-serving

conclusion." *Id.* at 12; *see also Washington*, 176 Wis.2d at 215, 500 N.W.2d at 336 (an assertion that counsel failed to completely and fully investigate is inadequate). Thomas's reliance on a postconviction medical report is misplaced in the absence of any facts suggesting that Thomas was affected by cytomegalovirus when the pleas were entered.² Because Thomas failed to allege facts in his motion which, if true, would entitle him to withdraw his plea, the trial court was not required to conduct an evidentiary hearing.

We also conclude that the trial court properly exercised its discretion when it denied Thomas's motion without a hearing. A court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process. *Bentley*, slip op. at 15. When addressing a motion to withdraw a plea without a hearing, the court should "form its independent judgment after a review of the record and pleadings and ... support its decision by written opinion." *Id.* (quoting *Nelson*, 54 Wis.2d at 498, 195 N.W.2d at 633). However, as with any discretionary decision of the trial court, this court will not reverse if the record contains facts which would support the decision had the court fully exercised its discretion. *State v. Gulrud*, 140 Wis.2d 721, 734, 412 N.W.2d 139, 144 (Ct. App. 1987).

In this case, the court focused on Thomas's dissatisfaction with his attorneys' performance. As we have noted above, the court properly addressed Thomas's complaints. Moreover, we have reviewed the rest of the record and find additional support for the court's denial of the motion.

When viewed in conjunction with the plea questionnaire completed by Thomas, the plea colloquy meets the requirements set forth in *State v. Bangert*, 131 Wis.2d 246, 267-72, 389 N.W.2d 12, 23-25 (1986), and § 971.08, STATS.³ Thomas moved to withdraw his plea prior to sentencing on

² Thomas's argument, made in his response to this court, that he might have been affected by cytomegalovirus at the time of the offenses, and that his criminal acts may have been attributable to a CMV infection, is similarly bereft of supporting factual assertions.

³ In her no merit report, counsel suggests that the plea colloquy was inadequate but that an appellate issue is not presented because Thomas did not challenge the adequacy of the colloquy in his *pro se* postconviction motion. We disagree with counsel's analysis of the plea colloquy. While the court did not personally and systematically make all of the inquiries set forth in *Bangert*,

grounds similar to those asserted in his postconviction motion. When Thomas withdrew the motion at the June 1, 1994 hearing, he admitted that he voluntarily and intelligently had entered his pleas, and he reassured the court that he wanted to proceed with his guilty pleas. Based on a review of the trial court's decision and the record, we conclude that the court did not erroneously exercise its discretion in denying the motion without a hearing.

The other issue discussed by counsel is whether the court properly exercised its sentencing discretion. We conclude that a challenge to the sentence would lack arguable merit.

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 trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *See id.*

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 the protection of the public. *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given the various factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The record shows that the court considered Thomas's background and character. Thomas had prior sexual assault convictions, and committed these assaults on a young girl with full knowledge of his HIV-positive condition. The court could properly consider that circumstance as an

(.continued)

Thomas had completed and signed a plea questionnaire. The points that counsel suggests were not addressed by the court in the colloquy were adequately addressed in the questionnaire. A court may rely on a defendant's plea questionnaire to determine whether a plea is entered voluntarily, intelligently and knowingly. *State v. Moerderdorfer*, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987). The questionnaire also defeats Thomas's belated argument, made in his response to the no merit report, that he did not understand the elements and nature of the offense when he entered his guilty pleas.

aggravating factor. Because the court considered the appropriate sentencing factors, it did not erroneously exercise its discretion.

Based on an independent review of the record, this court finds no basis for reversing the judgment of conviction or postconviction orders. Any further appellate proceedings would be without arguable merit within the meaning of *Anders* and RULE 809.32, STATS. Accordingly, the judgment of conviction and postconviction orders are affirmed, and appellate counsel is relieved of any further representation of Thomas on this appeal.

By the Court. – Judgment and orders affirmed.