COURT OF APPEALS
DECISION
DATED AND RELEASED

July 6, 1995

No. 95-0694-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ENRIQUE AYALA TRUJILLO,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Enrique Ayala Trujillo appeals from a judgment of conviction for party to the crimes of possession of a controlled substance with intent to deliver as enhanced by § 161.49, STATS., and failure to obtain a tax stamp. Trujillo's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Trujillo received a copy of the report and was advised of his right to file a response, but has not

done so. Upon consideration of the report and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Trujillo was originally charged with two counts of possession of over 800 grams of cocaine and two counts of tax stamp violations. Numerous pretrial motions were filed on Trujillo's behalf by Attorney Bruce Rosen. Trujillo entered a no contest plea to one count of possession of cocaine with intent to deliver, such possession being within 1,000 feet of a city park, and one count of tax stamp violation. He was sentenced to twenty years in prison on the possession conviction, and a five-year concurrent term was imposed for the tax stamp conviction. Fines in excess of $200,000 were also imposed.

The first issue discussed by counsel in the no merit report is whether the plea was voluntarily, knowingly and intelligently made. Section 971.08(1)(a), STATS., mandates that when accepting a plea, a trial court must address the defendant personally to determine that the plea is made voluntarily with an understanding of the nature of the charge and the potential punishment if convicted. We have independently reviewed the record to determine whether the colloquy between Trujillo and the trial court met the requirements of § 971.08 and ***State v. Bangert***, 131 Wis.2d 246, 267-72, 389 N.W.2d 12, 23-25 (1986). We conclude that it did.

The trial court went over each of the constitutional rights waived by the entry of the no contest plea. Trujillo acknowledged an understanding of those rights, the charges, the potential penalties, that no promises or threats had been made to induce his plea, and the fact that the trial court was not bound by any sentencing recommendation. A factual basis was found to exist for the plea. The trial court also addressed the fact that entry of the plea could result in Trujillo's deportation. Additionally, prior to the plea hearing, Trujillo executed a "Plea Questionnaire and Waiver of Rights" form. A guilty plea questionnaire executed prior to a guilty plea can be used to ascertain a defendant's understanding and knowledge at the time of the plea. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987). Based on the record regarding the entry of Trujillo's plea, no arguable merit exists to support a claim that it was entered in violation of his constitutional or statutory rights.

Of note is that the waiver of pending motions was specifically addressed at the plea hearing. A plea of guilty or no contest, when knowingly and voluntarily made, waives all nonjurisdictional defects and defenses. ***State v. Andrews***, 171 Wis.2d 217, 223, 491 N.W.2d 504, 506 (Ct. App. 1992). An exception to this general rule permits review of trial court orders denying motions to suppress evidence or determining that statements of the defendant are admissible into evidence. *See* § 971.31(10), STATS.

The no merit report fails to explain the nature of the pending motions. We have independently reviewed them. Here, there were no motions to suppress evidence or the defendant's statements. However, numerous motions were still pending, including motions to dismiss various charges, to unseal search warrants, and to compel access to physical evidence. We need not address the potential success of these motions because they were waived by the entry of Trujillo's plea. Further, Trujillo expressed that he and his attorney had spoken about the motions and that he understood they would be deemed waived for all purposes. There would be no merit to a claim that the plea was defective because it might have been inadvisable given the pending motions.

The final question is whether there would be arguable merit to a challenge to the sentence. Sentencing is a discretionary function of the trial court. ***State v. Cooper***, 117 Wis.2d 30, 39, 344 N.W.2d 194, 199 (Ct. App. 1983). Appellate courts have a strong policy against interference with that discretion. ***Id.*** If the record contains evidence that discretion was properly exercised when imposing sentence, this court must affirm. ***Id.*** at 40, 344 N.W.2d at 199. The basic factors the trial court should consider in imposing a sentence are the gravity of the offense, the character of the offender and the need for protection of the public. ***State v. Stuhr***, 92 Wis.2d 46, 49, 284 N.W.2d 459, 460 (Ct. App. 1979).

Appellate counsel concludes, and we agree, that the trial court properly exercised its sentencing discretion and that an appeal on that question would be frivolous. The trial court recognized Trujillo as a well-educated, hard working and self-made man. It also explicitly took into consideration the fact that Trujillo had no prior convictions. However, the trial court could not ignore that the conviction was the result of the possession of a large amount of cocaine and that such possession required an extensive amount of planning.

The trial court concluded that Trujillo had punished society by not revealing his source of drugs. The no merit brief reports that Trujillo believes reliance on his failure to reveal his source was inappropriate because he did not do so out of fear for his family's safety. The refusal to name a drug supplier is an appropriate consideration after a defendant incriminates himself by pleading to the charges. *See* ***State v. Olson,*** 127 Wis.2d 412, 428-29, 380 N.W.2d 375, 383 (Ct. App. 1985). Additionally, there is no indication that the trial court placed undue emphasis on this factor. It was but a single remark. What is clear from the trial court's comments is that the sentence was imposed based on the severity of the crime, the need to protect the public, and to avoid minimizing the crime.

No basis exists for challenging the sentence or for upsetting the judgment of conviction. We conclude that any further proceedings on Trujillo's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Patrick Donnelly is relieved of any further representation in this appeal.

By the Court.—Judgment affirmed.

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