COURT OF APPEALS DECISION DATED AND RELEASED

June 26, 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

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

No. 95-0795-CR-NM

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEAN J. KENTOPP,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Dean J. Kentopp appeals from a judgment convicting him of arson. The state public defender appointed Attorney Gregory A. Petit as Kentopp's appellate counsel. Petit served and filed a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Kentopp filed a response. After an independent review of the record as mandated by ***Anders***, we conclude that any further appellate proceedings would lack arguable merit.

Kentopp pled no contest to arson, contrary to § 943.02(1)(a), STATS.[1] The trial court imposed a twenty-year sentence, to run consecutively to a sentence Kentopp was serving.

The no merit report addresses whether: (1) there were any nonjurisdictional defects in the judgment; (2) Kentopp's plea was entered knowingly, intelligently and voluntarily; (3) the presentence investigation report (PSI) was properly prepared; (4) the trial court erroneously exercised its sentencing discretion; and (5) Kentopp received ineffective assistance of trial counsel. Kentopp raises the sentencing issues in his response. Although we agree with appellate counsel's conclusion on each of these issues, we explain our conclusions on the issues raised by Kentopp.

The prosecutor agreed to recommend a twenty-year sentence concurrent to that Kentopp was serving because he had cooperated with the authorities. However, the PSI recommendation was for a twenty-year consecutive sentence. Kentopp's principal complaint is that the trial court imposed a consecutive, rather than a concurrent, sentence. However, at the plea and sentencing hearings, Kentopp expressly admitted to the trial court that he understood that it was not obliged to follow the prosecutor's sentencing recommendation.

Appellate counsel advises us that Kentopp objects to the PSI because it is unfair for the presentence investigator to contact the victim without contacting Kentopp before making a sentencing recommendation.[2] However, this contention is misleading because the PSI was merely updated from the previous year when Kentopp was sentenced for another crime. Because Kentopp does not assert any factual inaccuracies in the PSI, it would lack arguable merit to pursue this challenge.

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

[2] Section 972.15(2m), STATS., requires the presentence investigator to attempt to contact the victim.

Our review of the sentence is limited to whether the sentencing 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 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 sentencing court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). Likewise, it is discretionary whether to impose consecutive or concurrent sentences for multiple convictions. *See* ***id***. at 284-85, 251 N.W.2d at 69.

The trial court considered the primary sentencing factors. In considering the gravity of the offense, the trial court stated that arson "is probably about as serious as an offense as there can be." The trial court considered the character of the offender, his psychological problems and his lengthy criminal history, including the ten offenses which were read in for sentencing purposes. The sentencing court also noted that prior rehabilitation attempts were unsuccessful. The trial court emphasized the need for public protection because the offense was "extremely serious, life threatening."

The trial court applied the appropriate sentencing factors and explained the aggravating circumstances which support the twenty-year maximum sentence. It noted that it was not bound by sentencing recommendations and explained that it disagreed with the recommendations to impose a concurrent sentence because that would result in essentially "nothing [having] been done." We agree with counsel's description, conclusion and analysis that pursuing any appellate issues would lack arguable merit.

We have addressed the issues Kentopp has raised. Upon our independent review of the record as mandated by ***Anders*** and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further appellate proceedings would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Gregory A. Petit of any further appellate representation of Kentopp in this appeal.

By the Court.—Judgment affirmed.