COURT OF APPEALS
DECISION
DATED AND RELEASED

January 10, 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(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. 95-1040-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. SELL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed*.

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

PER CURIAM. David A. Sell appeals from a judgment of conviction for delivery of cocaine as a repeat offender. Sell's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Sell received a copy of the report and has filed a lengthy response. Upon consideration of the report, a complete reading of Sell's various submissions, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Sell was charged with possession of marijuana and drug paraphernalia as a result of a search of his residence on January 27, 1994, and with the delivery of cocaine and the knowing use of a child for the delivery of a controlled substance as a result of a transaction with a police facilitator, Frankie Chiszar, on March 15, 1994. On December 2, 1994, Sell entered a no contest plea to the delivery charge. The marijuana possession and use of a child in delivery charges were dismissed and read in at sentencing.[1] As part of the plea agreement, charges of conspiracy to deliver cocaine and heroin in a subsequently filed complaint were also dismissed and read in at sentencing. Sell was sentenced to nine years in prison consecutive to the sentence he was then serving.

The first issue discussed in the no merit report is whether the plea was properly, voluntarily and intelligently made. The Constitution requires that a no contest plea be affirmatively shown to be knowing, voluntary and intelligent. ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). 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 Sell and the trial court met the requirements of § 971.08 and ***Bangert***. We conclude that it did.

Sell specifically argues that he was threatened to enter the plea. He asserts that the prosecutor informed his trial counsel that if Sell required the charges to go to trial, the prosecutor would make sure Sell received sixty-six years and would file additional charges on other matters. A letter from Sell to the trial court dated July 27, 1994, tends to substantiate Sell's contention as a contemporaneous record of what his trial counsel told him.[2] If the prosecutor commented that a greater sentence might result if the matter was taken to trial, it was a fair representation because Sell's exposure was greater on the three charges than on the one to which the plea was entered. Moreover, Sell was specifically asked at the plea hearing whether any threats had been made which caused him to enter into the plea agreement. Sell replied, "No." Sell entered his

[1] Sell was not bound over for trial on the charge of possession of drug paraphernalia.

[2] The letter is not part of the record but a copy is attached to Sell's response.

plea despite what he characterizes as a threat. Nothing suggests that the plea was entered involuntarily.

A guilty or no contest plea, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violations of constitutional rights prior to the entry of the plea. ***Mack v. State***, 93 Wis.2d 287, 293, 286 N.W.2d 563, 566 (1980). Sell has waived any claim regarding the prosecutor's alleged threat.

Having determined that there is no arguable merit to a claim that Sell's plea was invalid,[3] we turn to a number of Sell's contentions which lack merit because waived by the entry of the no contest plea. Sell claims that he was a victim of entrapment or illegal inducement. That was a defense known to Sell at the time he entered his plea. He waived it.

Sell argues that statements were illegally obtained by the police because he was under the influence of drugs and alcohol when questioned by the police, his request for an attorney during questioning was not honored, and he was forced to sign the statements and was put under duress. Sell also contends that he was illegally taken from his car without the reading of ***Miranda*** rights, that there was twice an illegal search of the little girl who accompanied Sell, and that there was illegal entry into the home of Sell's brother where the little girl was delivered after Sell's arrest.

An exception to the rule that a no contest plea constitutes a waiver of nonjurisdictional defects and defenses 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. Sell filed pro se motions to suppress evidence. These motions were voluntarily withdrawn by Sell at a hearing at which he was represented by counsel.[4] The trial court was

[3] Sell makes a one-sentence reference to the potential claim that there was an inadequate factual basis for the charge of using a child in the delivery of a controlled substance. The complaint alleged that Sell gave the buy money to the child with the intent of having her deliver it as payment to his drug source. The charge was dismissed and we need not consider whether the complaint provided an adequate factual basis.

[4] We concur with trial counsel's assessment that Sell's motions to suppress lacked merit and that

never asked to rule on the suppression of evidence. Therefore, the alleged illegal seizure of evidence and illegality of Sell's statements were waived by the entry of Sell's plea.

Further, there is no merit to a claim that Sell's plea was unknowingly entered because it was entered before a ruling on motions to suppress evidence. At the plea hearing, Sell was advised by the trial court that his statements were potentially subject to being excluded from evidence. Sell was asked whether he understood that by entry of his plea he was giving up the right to have the trial court determine the prosecution's ability to use statements against him. Sell replied that he understood.

Sell makes numerous claims about potential error at his preliminary hearing. As the no merit correctly points out, Sell's plea waived potential errors and after conviction there is no remedy for errors at a preliminary hearing. *See* ***State v. Webb***, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110, *cert. denied*, 502 U.S. 889 (1991) (holding that if alleged errors at a preliminary hearing were not pursued in an interlocutory appeal, there would be a waiver of the right to obtain postconviction relief for the alleged error). However, because Sell suggests that trial counsel was ineffective for failing to seek review of the potential errors or for failing to advise Sell of the necessity of doing so, we will address his contentions.

The first is that trial counsel was ineffective at the preliminary hearing for proceeding with a conflict of interest and for not calling witnesses on Sell's behalf. At the beginning of the preliminary hearing, Sell's retained attorney was advised by the prosecutor that another attorney in his firm had been appointed to represent Chiszar, the prosecution's key witness, in unrelated proceedings. The record is clear that up to that point Sell's attorney had no knowledge of the firm's representation of Chiszar and that the attorney had never had any contact with Chiszar.

To demonstrate the denial of the right to counsel because of a conflict of interest due to counsel's representation of multiple defendants, a

(..continued)
Sell did not have standing to raise some of his challenges.

defendant must show that counsel actively represented conflicting interests. ***State v. Kaye***, 106 Wis.2d 1, 9, 315 N.W.2d 337, 340 (1982). The trial court found that Sell's attorney did not possess any information from either Sell or Chiszar that was imparted only by virtue of the attorney-client relationship or from which an advantage could be gained for one at the expense of another. It determined that the preliminary hearing could go forward with Sell being represented by the attorney of his choosing and that the conflict could be resolved later. Sell's attorney conducted proper cross-examination of Chiszar at the hearing. There is no arguable merit to a claim that Sell was prejudiced, and thereby denied the effective assistance of counsel at the preliminary hearing by the representation by counsel who had a potential conflict of interest.[5]

Sell's contention that counsel performed deficiently at the preliminary hearing by not calling witnesses or impeaching Chiszar by prior convictions is also without merit. Credibility is not an issue at a preliminary hearing. ***State v. Dunn***, 121 Wis.2d 389, 397, 359 N.W.2d 151, 154 (1984). At a preliminary hearing the court is to ascertain the plausibility of a witness's story and whether, if believed, it supports a bindover. ***Id.***

Chiszar's credibility was not at issue at the preliminary hearing. Sell's repeated assertions that Chiszar lied at various points in his testimony, that he had prior convictions, and that he had arrest warrants outstanding which provided a motive to fabricate and assist the police are without consequence. The same is true of Sell's contention that he had "a few good witnesses that really could of helped" him. Whether those witnesses would have provided an explanation for Sell's involvement in the transaction with Chiszar does not matter. Chiszar's and the police officers' testimony and the reasonable inferences drawn therefrom support the conclusion that Sell probably committed a felony. Even if counsel had presented Sell's witnesses and the accounts of Sell's assistance to police officers, which Sell characterizes as exculpatory evidence, the result at the preliminary hearing would not have been different.

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[5] To prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) that his or her counsel's action constituted deficient performance, and (2) that the deficiency prejudiced his or her defense. ***State v. Hubanks***, 173 Wis.2d 1, 24-25, 496 N.W.2d 96, 104 (Ct. App. 1992), *cert. denied*, 114 S. Ct. 99 (1993).

Sell argues that the trial court improperly refused to admit a letter from Chiszar which explained that Sell had been set up and that the drugs Sell delivered were really Chiszar's and the payment was for another debt. Sell attaches a copy of the letter to several components of his response to the no merit report. The letter appears of dubious origin. It is undated, typed and does not even contain the handwritten signature of Chiszar. It is addressed to "To Whom It May Concern" and has the notation across the top, "Would you please give this to Dave Sell socila [sic] worker." It appears that the letter was transmitted by facsimile to the Green Bay Correctional Institution on July 21, 1994.

It is not clear in the record that the letter was ever offered to the trial court for admission and that the trial court refused to admit it. In the event the letter was available before the preliminary hearing, it only went to Chiszar's credibility—a matter not an issue at the preliminary hearing. If Sell was aware of the letter prior to the entry of his plea, he chose to enter the plea despite the potentially impeaching evidence and a waiver has occurred.[6] Finally, if the letter did not surface until after Sell's conviction, it does not constitute newly discovered evidence entitling Sell to withdraw his plea. The explanation in the letter is consistent with Sell's version of the transaction—a version Sell chose to abandon by entry of his plea. Further, newly discovered evidence is relevant only whether there has actually been a trial. Even if applicable to a decision to enter a no contest plea, discovery of new evidence which merely impeaches the credibility of a witness is not a basis for relief on that ground alone. *See* ***Simos v. State,*** 53 Wis.2d 493, 499, 192 N.W.2d 877, 880 (1972). There is no arguable merit to any potential claim related to Chiszar's letter.

Before addressing the final issue discussed by the no merit report, we briefly touch upon contentions Sell makes in passing. Sell claims that his right to a speedy trial was violated. The record does not demonstrate that a demand for a speedy trial was made. Although Sell contends that one of his early trial attorneys was ineffective for failing to file a motion for a speedy trial,[7]

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[6] Sell contends that the letter was sent by Chiszar from some undisclosed out-of-state location so Chiszar could avoid prosecution.

[7] After Sell's retained counsel withdrew because of a potential conflict of interest, the public defender appointed counsel for Sell. Appointed counsel was twice replaced. Thus, Sell had four attorneys prior to this appeal.

Sell waived his speedy trial right by entry of his plea. Sell also remarks that trial counsel was ineffective for failing to file motions for discovery and to test the legality of the complaint. Discovery motions were filed and discovery was had. Sell filed motions challenging the complaint which were withdrawn on the advice of counsel that they lacked merit. There is no arguable merit to a claim that trial counsel failed to file appropriate pretrial motions.

Sell asserts that "states are bound to schedule controlled substances in the same manner as the substances are scheduled by the federal government unless the states give notice of objection to the federal scheduling of a given substance." He suggests that jurisdiction was lacking because the trial court did not give notice of objection. There is no merit to this claim as a jurisdictional impediment.

Sell also argues that the subsequently filed conspiracy complaint was made up and that hearsay was the only evidence at the preliminary hearing on the charges in that complaint. Those charges were dismissed and are not before this court. Sell's complaint that the trial court would not let him file a civil complaint against the police is also not properly raised in this appeal from his criminal conviction.

The final question is whether there would be arguable merit to a challenge to the sentence. Appellate counsel concludes, and we agree, that the trial court properly exercised its sentencing discretion. The trial court relied on the basic factors it should consider in imposing a sentence: 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). Further, the trial court gave due consideration to the points Sell argues mitigate against the stiff sentence he received—the fact that he was set up to participate in the transaction and that the child was not really used in the deal. The trial court explained, however, that Sell was ultimately responsible for his participation in the transaction. Given Sell's lengthy criminal record and prior failed attempts at rehabilitation, the trial court concluded that a long sentence was justified.

Sell argues that the trial court did not sentence in accordance with the sentencing guidelines. There is no right to appeal on the ground that the sentence imposed does not fall within the sentencing guidelines. *See* ***State v.***

Elam, 195 Wis.2d 683, 685, 538 N.W.2d 249, 250 (1995). The sentence imposed here was at the upper range of that recommended by the sentencing guidelines.

Sell contends that the sentence was unduly harsh given that he was set up. We have already noted that the trial court considered the circumstances of the crime. Further, Sell could have received a sentence of up to twenty years because of his habitual criminality. We cannot conclude that the nine-year sentence is unduly harsh or excessive. Sell's contention is nothing more than unhappiness with the sentence. One cannot test the court's sentence and then seek to retreat from it when unhappy with the result. *See* ***Farrar v. State***, 52 Wis.2d 651, 661-62, 191 N.W.2d 214, 219-20 (1971).

The no merit report addresses Sell's contention that he was not given sentence credit for the year he sat in jail awaiting trial. Sell was imprisoned following the revocation of parole on earlier offenses. He was not entitled to sentence credit.

Finally, Sell contends that he is entitled to a sentence reduction because of his subsequent aid to authorities by testifying as a prosecution witness at a preliminary hearing concerning an alleged sexual assault in Clark County. As the no merit report discusses, a new factor justifying sentence modification must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 158 Wis.2d 458, 466, 463 N.W.2d 352, 356 (Ct. App. 1990). Sell's subsequent cooperation with prosecuting authorities is not related to the principle factors the trial court relied on in imposing the lengthy sentence. We agree with appellate counsel's assessment that there is no arguable merit to a motion for sentence modification based on Sell's testimony in the Clark County case.

Based on an independent review of the record, we find no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Robert T. Ruth is relieved of any further representation of Sell in this appeal.

By the Court.—Judgment affirmed.