

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 19, 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. 95-1643-CR-NM

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KERRY R. TELLER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: N. PATRICK CROOKS, Judge. *Affirmed.*

CANE, P.J. Kerry Teller appeals from a judgment of conviction for misdemeanor criminal damage to property and criminal trespass to dwelling, both as a party to the crime, and from an order denying her postconviction motion to withdraw her no contest plea. Teller's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Upon consideration of the report, Teller's response to the report, and an independent review of the record, this court concludes that there is no arguable merit to any issue that could be raised on appeal.

Teller was originally charged with party to the crime of armed robbery which subjected her to a potential imprisonment of up to forty years. She entered a no contest plea to the reduced charges of misdemeanor criminal damage to property and criminal trespass to a dwelling. Sentence was withheld, and Teller was placed on two years' concurrent probation for each conviction with six months in jail as a condition of probation. Other conditions of probation are completion of an alcohol assessment and recommended treatment, continued psychiatric treatment and counseling, and 100 hours of community service. Teller's jail time was stayed pending this appeal.

The no merit report first addresses whether the trial court erroneously exercised its discretion in denying Teller's motion to withdraw her plea. In order to withdraw a guilty plea after sentencing, a defendant must show that a manifest injustice would result if the withdrawal were not permitted. *State v. Booth*, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). The defendant bears the burden to establish manifest injustice by clear and convincing evidence. *Id.* at 237, 418 N.W.2d at 22. A motion to withdraw a plea is addressed to the trial court's discretion, and we will reverse only if the trial court has failed to properly exercise its discretion. *Id.*

Teller's motion to withdraw her plea was based on her allegation that the plea was not knowingly, voluntarily and intelligently entered. In her response, Teller maintains that she was badgered into changing her mind and that her depression impaired her ability to make an independent decision. A manifest injustice is established when a plea was involuntary or entered without knowledge of the charge or the potential penalties. *State v. Rock*, 92 Wis.2d 554, 558-59, 285 N.W.2d 739, 741-42 (1979).

The record reflects that when the plea was taken, the trial court conducted a colloquy with Teller which established her understanding of the waiver of constitutional rights and the potential penalties. The elements of the offenses were outlined on a "Plea Questionnaire and Waiver of Rights Form" which Teller acknowledged that she signed. 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).

Teller contends that she did not read the waiver of rights form and that she only answered the trial court's inquiries as to her understanding in the affirmative because she was instructed to do so by her attorney. At the postconviction motion hearing the trial court considered these contentions. It found that Teller's plea was knowing, intelligent and voluntary. It acknowledged evidence that Teller reluctantly changed her mind but found that she did so with an understanding of the implications, including the benefit of reduced penalties.

It is noted that on the plea questionnaire Teller indicated that she was taking Prozac and Klonopin as medication for emotional problems. When taking the plea, the trial court did not address the potential influence of these drugs on Teller's ability to understand the proceedings. However, at the postconviction motion hearing, Teller explained that she had been on the drugs for six years in regulation of her emotional problems. Further, trial counsel testified that the medications did not impair Teller's ability to understand his discussions with her or the nature of her plea. Additionally, the trial court found that after a lengthy discussion with her attorney, Teller decided to accept the plea agreement on a Friday and did not enter her plea until the following Monday. Implicitly the trial court found that Teller had adequate opportunity to consider her plea.

There is no arguable merit to a claim that Teller established by clear and convincing evidence that withdrawal of her plea was necessary to prevent a manifest injustice. The trial court did not erroneously exercise its discretion in denying her motion to withdraw the plea.

The no merit report also addresses 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 sentence is based on the facts of record and appropriate considerations.

In her response, Teller asserts that her rights were violated at a postconviction hearing held November 29, 1995. Contrary to Teller's belief, the function of that hearing was not to review her sentence but to determine her request for a stay of the sentence pending appeal. Also, an attorney did represent Teller by appearing telephonically. Teller's contention that the trial

court was obligated to stay the actual sentence, meaning the two years' probation and the conditions, pending appeal is wrong. Section 969.01(2)(b), STATS., only obligates the trial court to provide release pending appeal. The trial court acted pursuant to the statute when it stayed Teller's jail time.

A review of the record discloses no other potential issues for appeal. This court concludes that any further proceedings on Teller's behalf would be without arguable merit within the meaning of *Anders* and RULE 809.32(1), STATS. Accordingly, the judgment of conviction and order denying postconviction relief are affirmed, and Attorney Leonard Kachinsky is relieved of any further representation of Teller on this appeal.

By the Court. – Judgment and order affirmed.