

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 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

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

No. 95-1932

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN W. RODGERS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL LENZ, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. John Rodgers appeals a judgment convicting him of possessing cocaine with intent to deliver and sentencing him to seventy-six months in prison. He argues that the police lacked probable cause for his arrest, that the trial court should have released the identity of a confidential informant and that the sentence is grossly disproportionate to the sentence imposed on his co-defendants. We reject these arguments and affirm the judgment.

The Wisconsin State Patrol received a teletype from the Drug Enforcement Administration stating that Rodgers and two other individuals would be transporting cocaine from Detroit to Minneapolis in the spare tire of a leased car. The teletype specifically identified the car, including the license number. It stated "THIS INFORMATION IS GIVEN FROM RELIABLE SOURCE THIS VEHICLE MAY BE STOPPED AND SEARCHED." At a suppression hearing, the Detroit DEA agent testified that a paid, confidential informant who had no pending charges gave him the information contained in the teletype. The agent had worked with the informant before and found him to be reliable. His identity was kept confidential because the agent feared retribution and compromise of other on-going investigations.

A state trooper spotted the car and stopped it. When his backup arrived, the trooper handcuffed the suspects and placed them in separate squad cars. Approximately thirty-five minutes after the initial stop, a narcotics detection dog arrived on the scene. The dog indicated that drugs could be found in the vehicle. The dog handler testified that the dog is accurate 97% to 98% of the time. The officers then searched the trunk of the car and found cocaine in a bicycle tire.

Rodgers filed motions to suppress evidence and to dismiss the case based on an illegal arrest. The trial court denied those motions and Rodgers pled guilty, preserving his right to challenge the order denying suppression under § 971.31(10), STATS.

Rodgers argues that he was placed under arrest at the time he was handcuffed and held in the squad car, before the officers had probable cause to make an arrest. He argues that the trial court should have dismissed the charges against him because of the invalid arrest and that any evidence seized should have been suppressed as the fruit of a search incident to an unlawful arrest. We need not determine whether Rodgers was placed under arrest at the time he was detained because, even if the arrest was made without probable cause, Rodgers is entitled to no relief.

An illegal arrest is not a jurisdictional defect. See *State v. Smith*, 131 Wis.2d 220, 240, 388 N.W.2d 601, 610 (1986). The remedy for an arrest made without probable cause is suppression of evidence seized as a result of the

illegal arrest. *Id.* Rodgers, as a passenger in the car, does not have standing to challenge the search of the car. See *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978). Furthermore, the search of the car was not a search incident to Rodgers' arrest. It was not conducted for the safety of the officers or to prevent the destruction of evidence. See *Preston v. U.S.*, 376 U.S. 364, 367 (1964). The justification for the search does not depend on the arrest. Rather, the search was based on probable cause provided by the teletype, with details confirmed by the state trooper and the narcotics detection dog. Because the troopers had probable cause to believe that the car contained contraband, they could search the car and its containers without a warrant. See *State v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993); *State v. Tompkins*, 144 Wis.2d 116, 128, 423 N.W.2d 823, 828 (1988). The search of the vehicle was not a "search incident to arrest" but rather an automobile search based on probable cause. See *Chambers v. Maroney*, 399 U.S. 42, 48 (1970).

Rodgers waived his right to challenge the trial court's refusal to order disclosure of the confidential informant's identity. A valid guilty plea waives all nonjurisdictional defects and defenses. See *State v. Aniton*, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994). Disclosure of the informant's identity was not a part of the suppression hearing in this case and does not fall within the purview of § 971.31(10), STATS.

The trial court properly exercised its sentencing discretion. Rodgers has not properly preserved the issue of disproportion of sentencing because he has not filed a motion in the trial court seeking relief from the sentence. See *State v. Chambers*, 173 Wis.2d 237, 261, 496 N.W.2d 191, 200 (Ct. App. 1992). As a result, a complete record has not been made regarding the special circumstances that may apply to his co-defendants. Nonetheless, the record contains sufficient information to allow this court to affirm the trial court's discretionary decision on the basis of statements made by the trial court at sentencing. The difference between Rodgers and one co-defendant, Patton, is illustrated by their own attorneys' sentence recommendation. Rodgers' attorney recommended five years, based in part on two prior felony convictions, one of which was drug related. The sentencing guidelines called for a sentence of five to seven years. Patton's attorney recommended a three-year sentence, based on sentencing guidelines that suggested a sentence between thirty-six and forty-two months. The court sentenced Rodgers to seventy-six months in prison. Patton was sentenced to forty months in prison. The trial court considered Rodgers' prior criminal record a significant factor, noting that he was released

only two months before he was arrested in this case. The third co-defendant pled guilty to a lesser charge of possession of cocaine and was sentenced to time served. The circumstances of that plea and sentencing are not included in the record on appeal.

By the Court.—Judgment affirmed.

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