

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 31, 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. 95-2858-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JOHN T. NEITA,**

**Defendant-Appellant.**

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. John T. Neita appeals from a judgment convicting him of possession of cocaine base with intent to deliver and from orders denying his postconviction motions. The State Public Defender appointed Attorney Lynn M. Bureta as Neita's appellate counsel. Attorney Bureta served and filed a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967) and RULE 809.32(1), STATS. Neita filed several responses. After an independent

review of the record as mandated by *Anders*, we conclude that any further appellate proceedings would lack arguable merit.

Neita pled guilty to possession of cocaine base with intent to deliver, as a party to the crime, and as a subsequent offense, contrary to §§ 161.14(7)(a), 161.41(1m)(cm)4, 939.05 and 161.48, STATS., 1991-92. The trial court imposed a fourteen-year sentence and denied Neita's postconviction motions for sentence modification and other relief.

The no merit report addresses whether: (1) there was a sufficient factual basis to support Neita's guilty plea; (2) Neita entered his guilty plea knowingly, intelligently and voluntarily; and whether withdrawal of that plea is necessary to correct a manifest injustice; (3) the trial court erroneously exercised its sentencing discretion; and (4) Neita received ineffective assistance of trial counsel. In his response, Neita raises these issues: (1) problems with the bench warrant; (2) abuse of prosecutorial discretion; (3) his mental illness/incompetence; (4) that his treatment needs constitute a new factor entitling him to sentence modification; and (5) ineffective assistance of appellate counsel.

Neita claims that there was an insufficient factual basis to support his guilty plea. However, when Neita entered his guilty plea, his counsel stipulated to use of the complaint as a factual basis and the trial court asked Neita directly if he had "read the complaint where it says what you did" and if that "[i]s ... what happened?" Neita responded, "yes. Substantially." While Neita now raises issues challenging the sufficiency of the factual basis, such as whether the substance was cocaine base, it would lack arguable merit to pursue these issues because Neita waived these challenges.

Neita raises a variety of issues which we address together because these nonjurisdictional challenges and potential defenses were waived by Neita's guilty plea. Neita challenges the bench warrant as violative of §§ 968.03 and 968.04, STATS. He also claims that there was an abuse of prosecutorial discretion because the evidence was "physically abused," the complaint was "rewritten," documents were altered, discovery was withheld, the facts were misrepresented to preclude an entrapment defense and there was a delay in

prosecution. We have nothing but Neita's unsubstantiated, nonspecific allegations of prosecutorial wrongdoing which he waived by pleading guilty.

A guilty plea waives all nonjurisdictional defects and defenses. *State v. Bangert*, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). Neita admitted the accuracy and validity of the State's charges and waived all procedural rights which he may have otherwise invoked, by pleading guilty. Consequently, we review the record independently to determine whether any arguable basis exists for Neita to challenge his plea.

The trial court must comply with the requirements for accepting a plea. Section 971.08, STATS.; *Bangert*, 131 Wis.2d at 261-62, 389 N.W.2d at 21. The trial court must determine the defendant's education and general comprehension and establish his understanding of the nature of the crimes and the applicable range of punishment. *Id.*, 131 Wis.2d at 261-62, 389 N.W.2d at 21. It also must ascertain whether there were any promises or threats relating to his appearance and his proposed plea. *Id.* at 262, 389 N.W.2d at 21.

The trial court addressed Neita personally and advised him that by pleading guilty he was waiving his constitutional rights. The trial court confirmed that no promises or threats induced his guilty plea. The trial court asked Neita to restate the charges in his own words. The trial court advised Neita that there was a presumptive minimum sentence and that it was not obliged to follow the prosecutor's recommendation.

The trial court discussed Neita's signed guilty plea questionnaire and waiver of rights form ("plea questionnaire"). Neita told the trial court that he reviewed the plea questionnaire with his attorney before he signed it. Neita indicated in the plea questionnaire that he was waiving his constitutional rights, including his rights to a jury trial and a unanimous verdict, to present evidence on his behalf and to confront his accusers. Additionally, he understood that he waived his right to have the State prove every element of the crime beyond a reasonable doubt. Neita indicated that he was thirty-five years old with an eleventh-grade education. He also indicated that he was not currently using drugs or alcohol that would interfere with his understanding of the court's proceedings. Trial counsel described his "mental health problems" as "a slight

learning disability."<sup>1</sup> He also indicated that the range of punishment was a twenty to sixty-year sentence.

The trial court determined that Neita understood the proceedings and the ramifications of his plea and found that he pled guilty knowingly, intelligently and voluntarily. Upon our independent review of the plea questionnaire and the transcript of the plea hearing, we agree with appellate counsel's conclusion that any challenge to Neita's guilty plea would lack arguable merit.

Neita did not move to withdraw his plea. He merely raises that issue in his response. He claims that he was misled because the mandatory minimum sentence was changed from ten to twenty years and he unfairly received a harsher sentence because he possessed cocaine base, rather than cocaine.<sup>2</sup> The record belies Neita's claims. Our independent review of the record reveals no arguable basis to pursue an issue of plea withdrawal.

Our review of the sentence is limited to whether the trial 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).

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<sup>1</sup> Neita claims that his plea was infirm "[f]or mentally ill or incompetent reasons." The trial court was aware of Neita's "slight learning disability" and questioned Neita directly before accepting his guilty plea. At sentencing, defense counsel explained why he enlisted the assistance of a social worker and a forensic clinical neuropsychologist to file sentencing memoranda. To pursue this conclusory claim of mental incompetence would lack arguable merit.

<sup>2</sup> These reasons are insufficient to withdraw a plea which was otherwise entered properly. However, the trial court expressly decided to "treat [this conviction] as if it was a ten year presumptive of being consistent with the legislative intent not to distinguish between base and powder cocaine or cocaine hydrochloride."

The trial court considered the primary sentencing factors. The sentencing court commented that drug dealing "at any level" is serious, and particularly in such quantity.<sup>3</sup> The trial court considered the character of the offender and concluded that Neita's background is "horrible." The trial court balanced Neita's treatment needs against the risk to the community and concluded that Neita's prior record, coupled with his background, could justify imposition of the maximum, sixty-year, sentence. Because Neita was not a primary participant in this crime, the trial court declined to impose a sixty-year sentence.

Neita complains that his sentence is unduly harsh because his accomplices received significantly shorter sentences. However, the sentencing court explained that Neita's accomplices did not have his prior record.<sup>4</sup> The trial court applied the sentencing factors and explained the mitigating circumstances which supported its sentence. We agree with appellate counsel's description, analysis and conclusion that challenging the sentence would lack arguable merit.

Neita moved for sentence modification based on the importance of treatment addressed in a psychological evaluation. The trial court denied the motion because it had considered that evaluation. It further emphasized that "the defendant's risk to the community outweighed any treatment requirements." Neita also filed postconviction motions on his own behalf. The trial court denied the *pro se* motions without prejudice because Neita was represented by counsel. Our review of the record persuades us that any challenge to the trial court's postconviction orders would lack arguable merit.

Neita raises numerous complaints which could be considered ineffective assistance of trial counsel. Appellate counsel concluded that any challenge to the effectiveness of trial counsel would lack arguable merit. "[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). It is inappropriate for this court to determine the

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<sup>3</sup> Seventy-six grams.

<sup>4</sup> The sentencing court reminded Neita that he previously had been convicted of drug-dealing and possession, rape, sexual assault and armed robbery.

competency of trial counsel on unsupported allegations. *State v. Simmons*, 57 Wis.2d 285, 297, 203 N.W.2d 887, 894-95 (1973). Because there is no evidentiary record on this issue, we cannot review Neita's claims of ineffective assistance of trial counsel.

Neita also claims that appellate counsel was ineffective for failing to raise issues he believed were meritorious.<sup>5</sup> Ineffective assistance of appellate counsel must be pursued by a petition for a writ of habeas corpus in this court. *State v. Knight*, 168 Wis.2d 509, 522, 484 N.W.2d 540, 545 (1992). We will not review that claim on direct appeal. See *id.* at 512-13, 484 N.W.2d at 541.

We have addressed the issues Neita 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 postconviction orders and relieve Attorney Lynn M. Bureta of any further representation of Neita in this appeal.

*By the Court.*—Judgment and orders affirmed.

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<sup>5</sup> We assume that Neita raised these issues in his responses.