COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 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.

Nos. 96-0205-CR-NM
96-0206-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS C. NELSON,

Defendant-Appellant.

APPEALS from judgments of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

ANDERSON, J. Counsel for Thomas C. Nelson has filed a no merit report pursuant to RULE 809.32, STATS. Nelson has filed a response challenging his counsel's conclusions and raising some additional issues. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

This appeal involves only the sentences that were imposed on December 8, 1994. On October 19, 1993, pursuant to a plea agreement, Nelson entered no contest pleas to charges of disorderly conduct, battery and resisting

an officer. Two other misdemeanor charges were dismissed but read in for sentencing. Sentence was withheld and Nelson was placed on probation. On July 22, 1994, pursuant to a plea agreement, Nelson entered a no contest plea to a charge of disorderly conduct as a repeater. A charge of battery as a repeater was dismissed but read in for sentencing. Sentence was again withheld and Nelson was placed on probation. Nelson did not begin the appeal process after entry of either of these judgments of conviction. Therefore, he has no right to challenge the underlying judgments of conviction.[1]

On November 21, 1994, Nelson's probation was revoked and he was sentenced to consecutive terms totaling forty-eight months in prison. Nelson filed a notice of intent to pursue postconviction relief to challenge the sentence. The court reporter subsequently informed this court that she had lost her transcription notes from the sentencing hearing. This court ordered the trial court to conduct a "reconstruction hearing" as described in ***State v. Perry***, 136 Wis.2d 92, 98-109, 401 N.W.2d 748, 751-56 (1987), and ***State v. DeLeon***, 127 Wis.2d 74, 81-82, 377 N.W.2d 635, 639-40 (Ct. App. 1985). After reconstructing the testimony, the arguments of counsel and the court's reasoning process, the trial court entered judgments of conviction and Nelson appeals.

The no merit report correctly concludes that the record was sufficiently reconstructed to allow this court to review the sentence. The trial court quoted at length from the victim's written statement. Nelson's trial attorney was present during this reading and conceded that the witness statement was generally consistent with the victim's testimony at the original sentencing hearing. The court then read a statement given by Nelson to the police. Both the prosecutor and Nelson's trial attorney agreed that the statement was generally consistent with Nelson's testimony at the original sentencing hearing. Nelson himself agreed that the judge had captured the essence of his testimony at the original sentencing hearing. Nelson then testified at the reconstruction hearing and conceded that his testimony was essentially the same as that given at the original sentencing hearing. The attorneys then summarized their arguments regarding sentencing and Nelson

[1] Nelson's response includes his version of the events that led to the criminal charges. Nelson denies culpability in some instances and minimizes his involvement in others. He also complains of the work he is required to do in prison. These arguments are beyond the scope of this appeal.

was given a final opportunity to address the court. The court found, as it had at the original sentencing hearing, that Nelson and the victim lied at the sentencing hearing. The court also noted that Nelson had been given substantial concessions at the outset because several charges had been dismissed pursuant to the plea agreement and because very little jail time had originally been imposed as a condition of probation. The court noted that Nelson continually violated his probation by consuming alcohol, smoking marijuana and having contact with the victim. He was also arrested while on probation. This reconstructed hearing provides an adequate basis for this court to review the exercise of the trial court's sentencing discretion.

In his response to the no merit report, Nelson argues that the reconstruction hearing did not reflect the trial court's statements made at the initial sentencing hearing. He alleges that the trial court stated that Nelson and the victim were both "lying their asses off" and that his "probation agent doesn't know a damn thing about [him]." Nelson describes the court's comments as judicial misconduct. We need not determine whether the trial court made these statements because, even assuming that Nelson's allegations of harsh language are true, there is no basis for challenging the sentence. The trial court has the right to determine the credibility of the witnesses who testified at the sentencing hearing. The use of harsh language does not provide a basis for challenging the sentence.

The trial court properly exercised its sentencing discretion when it imposed consecutive sentences totaling four years. The court properly considered Nelson's undesirable behavior patterns, his personality, character and social traits, his veracity and his failure to comply with the conditions of his probation. *See* ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984). The sentence was not so excessive, unusual or disproportionate to the crimes as to shock public sentiment. ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

By the Court.—Judgments affirmed.