COURT OF APPEALS
DECISION
DATED AND RELEASED

November 8, 1995

NOTICE

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.

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

No. 95-2126-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH C. REINSBACH,

Defendant-Appellant.

APPEAL from an order of the circuit court for Waukesha County: ROGER MURPHY, Judge. *Affirmed.*

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

PER CURIAM. The state public defender appointed Michael J. Hicks and John D. Surma to represent Joseph C. Reinsbach on a postconviction motion following his conviction of two counts of delivery of a controlled substance in violation of §§ 161.41(1)(b) and 161.16(2)(b)1, STATS. They filed a motion to modify sentence alleging a new factor. The trial court denied the motion. On appeal, Hicks and Surma have filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Reinsbach received a copy of the no merit report. He filed a response.

In 1989, Reinsbach appeared in court on five cases and entered ***Alford*** no contest pleas to seven counts of delivery of controlled substances and possession of controlled substances with intent to deliver. Some of the counts included mandatory minimum fines. Several additional counts were dismissed, including the two counts relevant to this appeal.

At the sentencing hearing, plea counsel advised the court that she had not considered the financial penalties when agreeing to the plea negotiations. Counsel asked that Reinsbach be allowed to withdraw his plea to two counts that carried mandatory fines. In exchange, the two counts of delivery of a controlled substance underlying this appeal would be reinstated, and Reinsbach would enter an ***Alford*** plea to those counts. The prosecution agreed with the proposal. When the trial court took the plea to the reinstated counts, Reinsbach indicated that he understood and agreed to the proceedings. On the record, the court reinstated the two counts, found Reinsbach guilty of them and granted Reinsbach's request to withdraw his plea to two other counts, which were dismissed.

In 1991, Reinsbach filed a *pro se* motion challenging the reinstatement of the two counts. The motion was denied in June 1991, and no appeal was taken.

Reinsbach filed *pro se* motions to modify sentence and for appointment of counsel in 1994. The public defender appointed Hicks and Surma to represent Reinsbach, and they filed a motion to modify sentence on his behalf. The latter motion alleged that a new factor existed because the record lacked a written order reopening the reinstated charges. The trial court denied this motion because the alleged error had been raised in the 1991 motion, because there was no constitutional requirement of a formal order reinstating the charges and because the lack of formal documents was not a new factor.

The no merit report addresses whether the reinstatement of and conviction on previously dismissed counts constituted a subsequent, unlawful prosecution; whether the failure to issue written orders reopening the case invalidated the convictions on those charges; whether Reinsbach may challenge the stipulation waiving the State's burden of proof and strict compliance with

procedures when he has accepted the benefits of the stipulation; and whether any other basis exists for sentence modification. Hicks and Surma conclude that these possible issues have no arguable merit. Based upon our independent review of the record, we conclude that their analysis of these issues is correct.

Reinsbach's response challenges the trial court's authority to reinstate the dismissed charges and find him guilty of them. Reinsbach is barred from presenting this claim.

The trial court's 1991 order decided this issue adversely to him. When Reinsbach did not appeal from the order, it became a final adjudication of the issue. If Reinsbach was dissatisfied with the decision, he should have appealed from the order. *See* ***State v. Braun***, 178 Wis.2d 249, 251, 504 N.W.2d 118, 119 (Ct. App. 1993), *aff'd*, 185 Wis.2d 152, 516 N.W.2d 740 (1994) (proper method of challenging the trial court's decision on motion is to appeal). Reinsbach may not raise the same issue again.

Additionally, judicial estoppel applies to prevent Reinsbach from advocating one position during the sentencing hearing, i.e., amendment of the dismissal order and plea to the reinstated counts, and then arguing on appeal that the trial court's acceptance of the position was error. *See* ***Coconate v. Schwanz***, 165 Wis.2d 226, 231, 477 N.W.2d 74, 75 (Ct. App. 1991). It is contrary to fundamental principles of justice and orderly procedure to allow a party to affirmatively contribute to court error and then obtain reversal because of the error. ***State v. Gove***, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989).

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on Reinsbach's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the order is affirmed, and Hicks and Surma are relieved of any further representation of Reinsbach on this appeal.

By the Court.—Order affirmed.