COURT OF APPEALS
DECISION
DATED AND RELEASED

October 9, 1997

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. 96-2729-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JERRY L. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: GEORGE NORTHRUP, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Jerry L. Anderson pleaded no contest and appeals from a judgment convicting him of felony possession of tetrahydrocannabinol with intent to deliver and misdemeanor possession of cocaine contrary to §§ 161.41(1m)(h)1 and 161.41(3m), STATS., as a repeat offender. Anderson received a two-year sentence on each count to be served concurrently.

Anderson's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Anderson received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders***, we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we affirm the judgment of conviction.

Our review of the record discloses that Anderson's no contest guilty pleas were knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). The court confirmed that the agreement described by counsel was consistent with Anderson's understanding of the agreement. The court confirmed that Anderson reviewed and understood the plea questionnaire and waiver of rights form he signed and that he had no questions about the document. The court advised Anderson of the elements the State would have to prove if Anderson went to trial, confirmed the details of Anderson's prior conviction for purposes of sentencing as a repeat offender, and found that the preliminary examination provided a factual basis for the pleas.

Based on the plea colloquy, we conclude that a challenge to Anderson's no contest pleas as unknowing or involuntary would lack arguable merit. Furthermore, Anderson's pleas waived any nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984). However, Anderson may assert matters raised at a suppression hearing. Section 971.31(10), STATS.

We have also independently reviewed the sentence. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See* ***State v. Haskins***, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). Anderson received the sentence recommended by the plea agreement. The record does not reveal an erroneous exercise of the trial court's sentencing discretion.

Finally, we have reviewed the suppression hearing and discern no arguable merit to an appellate challenge to the trial court's refusal to suppress drug evidence taken from Anderson's vehicle. At the suppression hearing, Detective Donald Bates testified that he responded to a domestic violence report where one of the involved parties was suspected of having a gun and dealing drugs. Anderson's girlfriend told police that he might have a gun and drugs in his automobile which was parked outside of the apartment building. The police found drug paraphernalia in the apartment during a "protective sweep."

After searching the apartment and while Anderson was handcuffed in the back of the patrol car, police asked Anderson for consent to search his vehicle. Anderson initially refused to give consent. The detective started to close the patrol car door while remarking to another officer that they would have to get a search warrant.[1] Anderson then stated that the officers could look in his vehicle and that he did not have anything to hide. Anderson gave the officers his car keys from his pocket and officers searched the interior of the vehicle, locating drugs and drug paraphernalia in the passenger area and trunk. The detective testified

[1] The detective denied that the search warrant remark was made in a threatening manner or that he brandished his gun or other weapon at the time he made the remark.

that he was aware drugs had been found in the apartment prior to asking Anderson for consent to search his vehicle.

Based on this evidence, the trial court ruled that there was probable cause to search and that Anderson gave his consent to search the vehicle. The trial court found that the officers' stated intention to obtain a search warrant did not coerce Anderson to consent.

The trial court's suppression ruling was correct. Its ruling on consent is not clearly erroneous. *See* ***State v. Xiong,*** 178 Wis.2d 525, 531, 504 N.W.2d 428, 430 (Ct. App. 1993). The record supports our independent conclusion that Anderson's consent was voluntary because it "was given in the 'absence of actual coercive, improper police practices designed to overcome the resistance of a defendant.'" ***Id.*** at 532, 504 N.W.2d at 430 (quoted source omitted). Being asked for consent to search while in police custody is not per se coercive, *see* ***State v. Nehls,*** 111 Wis.2d 594, 598-600, 331 N.W.2d 603, 605-06 (Ct. App. 1983), and the record does not indicate other coercive circumstances. There is also no evidence that police took "subtle advantage" of Anderson's personal characteristics such that coercion occurred. *See* ***Xiong,*** 178 Wis.2d at 534, 504 N.W.2d at 431. Anderson did not testify or offer any evidence at the suppression hearing.[2]

[2] Having upheld the consent ruling, we need not address the trial court's probable cause ruling.

We affirm the judgment of conviction and relieve Attorney Ronald K. Niesen of further representation of Jerry L. Anderson in this matter.

By the Court.—Judgment affirmed.