

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-0272-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES A. KOHLWEY,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Counsel for James Kohlwey has filed a no merit report pursuant to RULE 809.32, STATS. Kohlwey has not responded to the report. 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. We therefore affirm the trial court's judgment.

This proceeding involved seven consolidated prosecutions, in which the State charged Kohlwey with a total of eighteen felonies and misdemeanors. Pursuant to a plea bargain, Kohlwey pled guilty to felony charges for delivery of cocaine and bail jumping, and to misdemeanor charges for disorderly conduct (two counts) and issuing worthless checks. In exchange for his plea, the State dismissed the remaining charges, which were then read in at sentencing. The court sentenced Kohlwey to a five-year prison term for delivering cocaine, concurrent with two ninety-day jail sentences on the disorderly conduct convictions. Kohlwey received concurrent five- and three-year probation terms on the other two charges, consecutive to his prison term.

Kohlwey cannot succeed on a motion to withdraw his plea because he knowingly and voluntarily pled guilty. Before accepting the plea, the court established that Kohlwey understood and waived his rights to a jury trial, confrontation and protection against self-incrimination. The court adequately informed Kohlwey of the elements of the crime charged and the potential punishment. The court also properly inquired as to Kohlwey's ability to understand the proceedings and the record independently establishes that he understood the proceedings. The State did not improperly induce Kohlwey to plead guilty and Kohlwey exercised his free will in accepting the plea bargain. Finally, the court determined that an adequate factual basis existed for the charges. The court therefore complied with the requirements set forth in *State v. Bangert*, 131 Wis.2d 246, 261-62, 389 N.W.2d 12, 21 (1986), to ensure a knowing and voluntary plea.

The trial court properly sentenced Kohlwey. The trial court properly exercises its sentencing discretion if the sentence is not excessive and the court relies on proper factors. *State v. Krueger*, 119 Wis.2d 327, 336-37, 351 N.W.2d

738, 743 (Ct. App. 1984). We presume that the trial court acted properly in sentencing the defendant, and the burden is on the defendant to prove otherwise. *Id.* at 336, 351 N.W.2d at 743. Here, the court primarily considered the number and severity of Kohlwey's repeated criminal acts, the relatively short period of time in which the crimes were committed, and the pendency of some offenses when others were committed. Under these circumstances, the court reasonably determined that a prison term was necessary to protect the public from further criminal acts. Because Kohlwey faced maximum prison terms totaling over sixteen years, he cannot reasonably contend that five years' imprisonment followed by probation was an excessive sentence. Additionally, the trial court not only considered proper factors but fully explained its reliance on them at the sentencing hearing.

Counsel's no merit report also addresses whether any new factors exist justifying a motion to modify Kohlwey's sentence, whether Kohlwey was given an opportunity to correct any inaccuracies in his presentence investigation report, and whether he received effective assistance of counsel. We conclude that counsel's analysis of these issues is correct in all respects, as is his conclusion that none would have merit.

Our review of the record discloses no other potential issues for appeal. We therefore affirm the trial court's judgment and relieve counsel of further representation of Kohlwey in this matter.

By the Court.—Judgments affirmed.

