COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3104-CRNM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

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

PER CURIAM. Nathaniel Harris appeals from a judgment convicting him of possession of tetrahydrocannabinols (marijuana) with intent to deliver, contrary to § 961.41(1m)(h), STATS. After Harris pleaded no contest to the charge, the trial court withheld sentence and gave him a three-year term of probation.

Harris's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). The no merit report addresses whether Harris knowingly, voluntarily and intelligently pleaded no contest and whether the trial court misused its sentencing discretion. Harris received a copy of the report and has filed a response. 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 Harris's no contest plea was 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 Harris desired to plead no contest and that he understood the plea agreement and proposed sentence of probation. The court confirmed that Harris had reviewed and executed a Plea Questionnaire and Waiver of Rights form and that Harris had adequate time to consult with counsel. The court advised Harris of the maximum possible punishment for this crime, the constitutional rights waived by the no contest plea, the elements of the crime and that the criminal complaint would form the factual basis for the plea. The court clarified "intent to deliver" at Harris's request, and Harris confirmed that he desired to plead no contest. The court then accepted Harris's plea as having been knowingly, voluntarily and intelligently entered.

Based on the plea colloquy, we conclude that a challenge to Harris's no contest plea as unknowing or involuntary would lack arguable merit. Furthermore, the plea waived any nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

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). The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for protection of the public. *See* ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The court accepted the parties' joint recommendation of probation. During the plea and sentencing hearing, the State advised the court that it was not seeking jail time because Harris's health condition would be burdensome upon the jail to manage. Although the court did not explicitly consider the sentencing factors, the record of the plea and sentencing hearing supports the trial court's exercise of sentencing discretion.

In his response to the no merit report, Harris criticizes counsel for concluding that an appeal would not have merit. He argues that the filing of the no merit report violates his Sixth and Fourteenth Amendment rights. We disagree. A no merit report is a constitutional means of discharging the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis.2d 587, 605-06, 516 N.W.2d 362, 367 (1994), and the cases cited therein.

Harris's response largely focuses on what he contends was an illegal arrest. The record reflects that trial counsel filed a motion to suppress evidence arising from the arrest. However, it appears that the motion was abandoned in favor of a plea agreement. *See* ***State v. Wilkens***, 159 Wis.2d. 618, 624, 465 N.W.2d 206,

209 (Ct. App. 1990). Because Harris did not litigate his motion to suppress, the issues raised therein are waived for appeal.[1]

We affirm the judgment of conviction and relieve Attorney William E. Schmaal of further representation of Nathaniel Harris in this matter.

By the Court.—Judgment affirmed.

[1] Had Harris litigated his motion to suppress and lost, he would have preserved the suppression issue for appeal notwithstanding his no contest plea. *See* § 971.31(10), STATS.