COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 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. 97-3182-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON K. DITTBERNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

ROGGENSACK, J. Brandon K. Dittberner appeals from a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (.21) as a third offense contrary to § 346.63(1)(a), STATS., and from an order denying his sentence modification motion. Dittberner received a 165-day sentence with Huber privileges after he entered a guilty plea.

Dittberner's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Dittberner 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 and postconviction order.

The no merit report addresses the following possible appellate issues: (1) whether Dittberner knowingly, voluntarily and intelligently entered his guilty plea; (2) whether the trial court misused its discretion in sentencing Dittberner; and (3) whether the trial court erred in denying Dittberner's sentence modification motion because he did not demonstrate the existence of a new factor.

Our review of the record discloses that Dittberner's guilty 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 Dittberner desired to plead guilty, advised Dittberner of the maximum possible punishment for this crime, and reviewed the elements of the crime. The court confirmed that Dittberner had reviewed the various constitutional rights he would waive by his guilty plea as set forth in the Guilty Plea Questionnaire and Waiver of Rights form he signed. The court ascertained that Dittberner had had a sufficient opportunity to discuss the case with counsel and that Dittberner was satisfied with the representation he had received. The court confirmed that this was Dittberner's third operating while intoxicated offense. The court found an adequate factual basis for the plea based upon the amended complaint and discussion at the plea hearing regarding the facts. The court then accepted Dittberner's plea as having been knowingly, voluntarily and intelligently entered. Based on our review of the record, we conclude that the plea

colloquy met the requirements of § 971.08, STATS., and ***Bangert,*** 131 Wis.2d at 267-72, 389 N.W.2d at 23-25.

Additionally, the Guilty Plea Questionnaire and Waiver of Rights form Dittberner signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis.2d 823, 827-29, 416 N.W.2d 627, 629-30 (Ct. App. 1987). Any other possible appellate issues are waived because a guilty plea waives the right to raise 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).

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. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given to these factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

Our review of the sentencing transcript reveals that the court considered the gravity of the offense, Dittberner's history of operating while intoxicated, and the need to protect the public. The 165-day sentence did not exceed the statutory maximum. The trial court properly exercised its sentencing discretion.

Dittberner filed a motion for sentence modification claiming that his acceptance into the La Crosse County OWI Sanctions Program constituted a new factor. A new factor is a fact relevant to the imposition of the sentence and

unknown to the trial court at the time of sentencing, *see* ***State v. Kaster,*** 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989), or which frustrates the sentencing court's intent. *See* ***State v. Michels,*** 150 Wis.2d 94, 100, 441 N.W.2d 278, 281 (Ct. App. 1989). At the motion hearing, the trial court stated that it was aware of the program when it sentenced Dittberner. However, the court reasoned that its sentence was appropriate under the circumstances and that Dittberner was not a candidate for this program. There would be no arguable merit to a challenge to the trial court's refusal to modify Dittberner's sentence.

Our independent review of the record does not reveal any issue which would have arguable merit on appeal. Accordingly, we affirm the judgment of conviction and the postconviction order and relieve Attorney Susan E. Alesia of further representation of Brandon K. Dittberner in this matter.

By the Court.—Judgment and order affirmed.