COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 1999

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. 98-2399-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARIELL D. CROSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Dariell D. Cross appeals from a judgment convicting him of battery by a prisoner contrary to § 940.20(1), STATS. Cross received a two-year sentence after he entered a guilty plea.

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

The no merit report addresses the following possible appellate issues: (1) whether Cross knowingly, voluntarily and intelligently entered his guilty plea; (2) whether the circuit court misused its discretion in sentencing Cross; and (3) whether the circuit court erred in dismissing Cross's motion to dismiss on double jeopardy grounds. We agree with counsel's analysis of these issues.

Our review of the record discloses that Cross'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 advised Cross of the maximum possible punishment for this crime, confirmed his age and the extent of his education and that he understood the proceedings and his attorney. The court reviewed the crime, referred to the various constitutional rights Cross would waive by his guilty plea, and stated that it was not bound by any sentencing recommendation. The court found an adequate factual basis for the plea based upon the criminal complaint. The court then accepted Cross's plea as having been knowingly, voluntarily and intelligently entered.

Based on the plea colloquy, we conclude that a challenge to Cross's guilty plea as unknowing or involuntary would lack arguable merit. Furthermore, Cross's 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 circuit 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 weight to be given to these factors is within the trial court's discretion. *See* ***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 appropriate factors. The court considered the gravity of the offense, determined that probation was not appropriate and that deterrence would be served by a sentence. The two-year sentence imposed by the trial court did not exceed the statutory maximum. The trial court properly exercised its sentencing discretion.

Cross sought dismissal on the ground that double jeopardy precluded prosecution for battery because he had already been subject to prison discipline for the incident. Based upon the state of the law, trial counsel declined to pursue the motion. Counsel was correct. Prosecution for conduct which is also the subject of prison discipline does not present a double jeopardy problem. *See* ***State v. Fonder,*** 162 Wis.2d. 591, 598-99, 469 N.W.2d 922, 926 (Ct. App. 1991), *cert. denied,* 502 U.S. 993 (1991).

Our independent review of the record does not disclose any arguably meritorious issue for appeal. Therefore, we affirm the judgment of conviction and

relieve Attorney William E. Schmaal of further representation of Dariell D. Cross in this matter.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.