

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 29, 1995

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.

NOTICE

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

**Nos.95-0800-CR-NM
95-0801-CR-NM**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD F. GREENO,

Defendant-Appellant.

APPEAL from orders of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed.*

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

PER CURIAM. Donald F. Greeno pleaded to one count of possession of cocaine within 1,000 feet of a school as a repeater in violation of §§ 161.41(3m), 161.48, and 161.495, STATS., and to three counts of burglary with one count subject to enhancement for habitual criminality, in violation of §§ 943.10(1)(a) and 939.62, STATS. Seven additional burglary-related charges and two additional drug-related charges were dismissed. The trial court

sentenced Greeno to one year in prison for the cocaine charge and to consecutive, five-year and four-year prison terms for two burglaries. The sentences were also made consecutive to a sentence Greeno was then serving. The sentence for the fourth burglary was withheld, and Greeno was placed on probation for ten years, concurrent with the four-year prison sentence. Greeno was also ordered to make restitution, to perform community service, and to pay a fine. His driver's license was revoked for six months.

The state public defender appointed Attorney Ellen M. Frantz to represent Greeno on appeal. Attorney Frantz filed motions for postconviction relief on Greeno's behalf. The motions sought modification of the sentence structure to allow Greeno earlier entry into a substance abuse treatment program at Racine Correctional Institute. The trial court denied the motions concluding that Greeno had presented no new factors which would warrant resentencing. Greeno filed notices of appeal from the orders denying the postconviction motions.

Attorney Frantz has now filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Greeno received a copy of the no merit report. He filed a response that asserts his need for, and his desire to obtain, treatment. The letter is substantially the same as the lengthy statement he made to the trial court at the time of sentencing.

The no merit report addresses whether the trial court erroneously exercised its discretion either when it originally sentenced Greeno or when it denied his request for sentence modification. Attorney Frantz concluded that these possible issues lack arguable merit. Based upon our independent review of the record, we conclude that Attorney Frantz's analysis of the issues is correct.

Sentencing is within the trial court's discretion, *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987), and the court is presumed to have acted reasonably, *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The defendant bears the burden of showing, from the record, that a sentence is unreasonable. *Id.* The trial court considered Greeno's serious addiction to cocaine, his lengthy criminal record, and the strong risk of

continued criminal activity which he posed to the community. The court acknowledged that Greeno needed treatment and concluded that he would get treatment in prison. The record does not show that the sentence was unreasonable or that the court erroneously exercised its discretion.

The trial court did not erroneously exercise its discretion when it denied sentence modification. The unavailability of immediate treatment is not a new factor because it is not a fact that was highly relevant to the imposition of the sentence but unknown to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it. *See State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). In the order denying the postconviction motions, the trial court specifically stated that it was aware at sentencing that Greeno was not immediately eligible for treatment because most treatment programs are not available until a prisoner approaches his mandatory release date.

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on Greeno's behalf would be frivolous and without arguable merit within the meaning of *Anders* and RULE 809.32, STATS. Accordingly, the orders are affirmed, and Attorney Frantz is relieved of any further representation of Greeno on these appeals.

By the Court. – Orders affirmed.