

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2783

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY J. WARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
RAYMOND F. THUMS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jeffrey Ward appeals an order denying his WIS. STAT. § 974.06 (1999-2000) postconviction motion in which he alleged that his twelve-year sentence was excessive and his postconviction counsel was ineffective for not challenging the sentence. Because the trial court properly exercised its sentencing discretion and Ward can establish neither deficient performance nor

prejudice from his counsel's failure to challenge the sentence, we affirm the order.¹

¶2 Ward was initially charged with eight counts of uttering forged instruments. Pursuant to a plea agreement, five of the counts were dismissed and read in, and Ward pled guilty to the remaining three counts. The maximum penalty for each offense was ten years in prison. The court withheld sentence and placed Ward on probation. After his probation was revoked, the court sentenced Ward to consecutive and concurrent terms totaling twelve years in prison.

¶3 The twelve-year sentence is not excessive. The trial court appropriately considered the seriousness of the offense, Ward's character and the need to protect the public. See *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court noted that Ward uttered ten forged checks from a group home for the elderly where he worked. This was not an isolated mistake, but rather a continuation of a pattern of criminal conduct. Ward had previously been convicted of armed robbery and served five years in prison. The court appropriately noted that Ward had not been rehabilitated by that prison experience or by the jail time imposed as a condition of probation in this case. The probation revocation summary included allegations of numerous violations including drinking, physical abuse and threats, failure to follow through with treatment and leaving a halfway house. On these facts, there is no arguable basis for challenging the sentence. See *McCleary v. State*, 49 Wis. 2d 263, 290, 182 N.W.2d 512

¹ Much of Ward's brief is devoted to his argument that a new factor, a change in parole policy, justifies sentence modification. That issue was not raised in his motion in the trial court and will not be considered on appeal. See *State v. Whitrock*, 161 Wis. 2d 960, 969, 468 N.W.2d 696 (1991).

(1971).² Therefore, Ward has established neither deficient performance nor prejudice from his counsel's failure to challenge the sentence.

¶4 Ward contends that the trial court inappropriately concluded that he had not been rehabilitated by his earlier prison sentence because he had been crime free for several years after completing that sentence. The trial court could reasonably conclude that Ward was not adequately rehabilitated by his previous prison experience as is shown by the crimes he committed since being released from prison.

¶5 Ward argues that the trial court should not have considered the allegations contained in the probation revocation summary because he was not charged with those crimes. The court at sentencing may consider uncharged and dismissed counts when determining a defendant's character and the pattern of his offenses. See *Elias v. State*, 93 Wis. 2d 278, 285-86, 286 N.W.2d 559 (1980).

¶6 Ward argues that the court incorrectly concluded that he had made no restitution when, in fact, part of the cash bond he posted was applied to the restitution payments. The sentencing court's reference to lack of restitution focused on Ward's lack of effort to make restitution. The record does not disclose any effort by Ward to make restitution payments.

¶7 Finally, Ward argues that his sentence is excessive compared to other inmates convicted of forgery. The fact that other forgers may have received a lesser sentence is immaterial. See, e.g., *State v. Lechner*, 217 Wis. 2d 392, 427,

² In *McCleary v. State*, 49 Wis. 2d 263, 290, 182 N.W.2d 512 (1971), the Wisconsin supreme court determined that a five-year sentence was appropriate for a first offense, \$50 forgery where the victim owed McCleary the money.

576 N.W.2d 912 (1998). Each case turns on its own merits. Ward's multiple violations, past prison experience, violations of probation and pattern of criminal behavior justify a more severe sentence.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

