

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 27, 1996

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.

No. 95-2481-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. ACHENBACH,

Defendant-Appellant.

APPEAL from orders of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ David A. Achenbach, *pro se*, appeals from an order denying his request for sentence credit and an order clarifying the record. Achenbach claims the trial court erred in denying his motion for sentence credit and that the “clarification” was actually an improper modification of his sentence. Because the trial court did not err in denying Achenbach's motion and because the clarification of the sentence was not improper, this court affirms.

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

I. BACKGROUND

Achenbach was convicted of three counts of lewd and lascivious behavior. On February 11, 1994, he was sentenced on each count. The trial court imposed a nine-month term on count one, a nine-month term on count two (consecutive to count one), and a nine-month term, stayed, with three years probation on count three.

On August 29, 1995, Achenbach brought a motion for sentencing credit. He had served the two nine-month terms for counts one and two and essentially argued that because count three was concurrent with count one, he should be granted sentencing credit for that count. The trial court denied his motion, indicating that count three was intended to be consecutive to the other counts. The trial court explained that imposing a nine-month term, stayed, with probation *concurrent* to the other terms would lead to an absurd result. The trial court determined that the sentencing transcript was ambiguous and the record should be clarified so that the sentence for the third count was consecutive to the others. Achenbach now appeals.

II. DISCUSSION

Achenbach argues that the trial court erred in denying his motion and that the clarification was actually an improper modification of his sentence. The supreme court has recently considered the issue of trial court sentencing:

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. We recognize a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." This court is reluctant to interfere with a trial court's sentence because the trial court has a great advantage in considering the relevant factors and the demeanor of the defendant. The defendant must show some unreasonable or unjustifiable basis in the record for the sentence imposed.

The trial court must articulate the basis for the sentence imposed on the facts of record. There should be evidence in the record that discretion was in fact exercised.

The primary factors the trial court must consider in imposing sentence are: (1) the gravity of the offense, (2) the character and rehabilitative needs of the offender, and (3) the need for protection of the public. As part of these primary factors the trial court may consider: the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse,

repentance, and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Echols, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640-41 (1993) (citations omitted). Achenbach does not argue that the trial court failed to consider the proper factors in sentencing. Rather, he claims the trial court cannot modify the sentence eighteen months after the original sentence was imposed. Nonetheless, this court's review is still limited to whether the trial court erroneously exercised its discretion.

In considering whether the trial court erroneously exercised its discretion in clarifying the record, this court independently reviewed the record in its entirety. It is clear from the original sentencing transcript that the sentence for count three was to be served consecutive to the other counts. Although it would be preferable for the trial court to have specifically stated this at the time of sentencing, this court agrees that there is no other reasonable interpretation.

This court does not agree that the *clarification* of the record was actually a *modification* of the sentence. Achenbach's sentence on count three did not change. From the time of the original sentencing, it clearly was intended that the sentence be served consecutively. As noted by the trial court, imposing a concurrent, but stayed sentence with probation would be absurd. The purpose for staying a sentence and imposing probation is to encourage the defendant to comply with the probation terms in order to avoid having to go back to serve the stayed sentence. Accordingly, this court concludes that the trial court did not erroneously exercise its discretion because it is allowed to clarify the sentence. *Krueger v. State*, 86 Wis.2d 435, 272 N.W.2d 847 (1979).

By the Court. – Orders affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.