COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1997

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. 96-2496-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. John L. Williams appeals from a judgment entered after he pleaded no contest to three counts of armed robbery as a party to a crime. *See* §§ 943.32 and 939.05, STATS. He also appeals the trial court's order denying his postconviction motion to modify sentence. Williams argues that the trial court erroneously exercised its discretion in sentencing him to three consecutive

indeterminate terms of not more than ten years of imprisonment because he alleges: (1) that the trial court improperly focused on the gravity of the offense and failed to consider other sentencing factors; and (2) that the trial court imposed a sentence that was so excessive as to shock the conscience. Williams also argues that the lesser sentence received by his co-defendant subsequent to Williams's sentencing constitutes a new factor justifying modification of Williams's sentence, and therefore the trial court erroneously exercised its discretion in denying his postconviction motion to modify sentence.

I. BACKGROUND

From August 20, 1994, to August 22, 1994, Williams and his accomplices, Morani Veal, Lorenzo Webb, and Vernon Banks, committed a series of armed robberies, two of which resulted in injury to the victims. On February 27, 1995, Williams pleaded no contest to three counts of armed robbery in exchange for the dismissal of one other count of armed robbery and one count of theft.

The facts of the crimes to which Williams pleaded no contest are as follows. On August 20, 1994, at about 1:15 a.m., Williams and Banks approached Kiara Caldwell while she was using a pay phone. Banks grabbed Caldwell by the arm, placed a gun to her head and demanded her money. Caldwell responded that she did not have any money, at which time Banks hit her in the head with the butt of the gun, causing a laceration above her right eyebrow. Williams then pushed Caldwell to the ground, after which Banks grabbed her book-bag, and the two men ran off. Williams and Banks then returned to a vehicle in which Webb and Veal were waiting.

On August 22, 1994, at about 12:15 a.m., Williams and Banks approached Joy Gielczik as she was walking down the street. Banks told Gielczik not to move; he then grabbed her purse and handed it to Williams. Williams and Banks then returned to a nearby van in which Webb, the driver, was waiting. Veal and some others were also waiting nearby in a different van.

Finally, on August 22, 1994, at about 2:00 a.m., Williams and Banks approached Mary Dally. Banks pointed a gun at Dally and demanded her property. Dally attempted to retain some of her property, so Banks hit the side of her head with the gun. As Banks hit Dally, the gun discharged and a bullet grazed the side of Dally's head. Williams and Banks then fled and returned to a van in which Webb, Veal, and some others were waiting.

As noted, the trial court sentenced Williams to three consecutive indeterminate terms of not more than ten years. The same trial court sentenced Banks to three consecutive indeterminate terms of not more than ten years, but stayed one ten-year term and imposed probation. The same trial court sentenced Webb to three consecutive indeterminate terms of not more than ten years. The same trial court sentenced Veal to an indeterminate term of not more than sixty months.

II. DISCUSSION

Sentencing is left to the sound discretion of the trial court, and we are limited on review to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Harris,*** 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). We presume that the trial court acted reasonably in imposing sentence, and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. ***Id.***, 119 Wis.2d

at 622–623, 350 N.W.2d at 638–639. The primary factors to be considered in imposing sentence are the gravity of the offense, the rehabilitative needs of the defendant, and the protection of the public. *See* ***State v. Curbello-Rodriguez,*** 119 Wis.2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984). The trial court may also consider the defendant's criminal record; history of undesirable behavior patterns; personality, character, and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. ***Id.***

Williams argues that the trial court erroneously exercised its discretion in sentencing him to three consecutive terms of not more than ten years of imprisonment because, according to Williams, the trial court over-emphasized the gravity of the crimes and failed to consider Williams's character and rehabilitative needs. He cites ***State v. Thompson,*** 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992), for the proposition that a trial court erroneously exercises its discretion when it gives too much weight to one factor in the face of other contravening considerations.

The record discloses that the trial court did, in fact, consider both Williams's character and his rehabilitative needs, as well as many of the other factors that may be considered in sentencing. In imposing sentence, the trial court noted that Williams had no previous criminal record, and that he had admitted his involvement in the offense. The court also noted its duty to consider Williams's needs, his family, and his potential. The court further noted that it had a duty to protect the community from such violent offenses, and that additional charges of armed robbery and theft were not charged but were "read into the record." *See* ***Elias v. State,*** 93 Wis.2d 278, 285, 286 N.W.2d 559, 562 (1980) (trial court can

properly consider dismissed charges as an indication of defendant's character). Thus, even if the trial court placed more weight on the gravity of the crime than on other sentencing factors, there was no erroneous exercise of discretion because the trial court properly considered the other relevant factors. The weight afforded to each of the relevant factors is particularly within the wide discretion of the trial court. *See* ***Curbello-Rodriguez,*** 119 Wis.2d at 434, 351 N.W.2d at 768. "Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered." ***Id.***

Williams next argues that his sentence is excessive. The trial court has the discretion to determine whether sentences imposed in cases of multiple convictions are to run concurrently or consecutively, using the same factors in determining the length of a single sentence. ***Id.***, 119 Wis.2d at 436, 351 N.W.2d at 769. However, a trial court exceeds its discretion when it imposes a sentence so excessive as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***Thompson,*** 172 Wis.2d at 264, 493 N.W.2d at 732.

In support of his assertion that his sentence is excessive, Williams points to the sentences of his accomplices and argues that he received a more serious sentence despite an alleged lesser degree of culpability. However, a trial court need not impose equal sentences upon the accomplices to a crime, as long as the disparity is based upon factors relevant to the sentencing procedure. *See* ***Drinkwater v. State,*** 73 Wis.2d 674, 680, 245 N.W.2d 664, 667 (1976); ***Ocanas v. State,*** 70 Wis.2d 179, 186–187, 233 N.W.2d 457, 461–462 (1975); ***Ruff v. State,*** 65 Wis.2d 713, 729, 223 N.W.2d 446, 454–455 (1974).

The record discloses that the trial court considered the sentence it had imposed upon Williams in determining Banks's sentence, but it decided to impose a lesser sentence upon Banks based on factors relevant to Banks's circumstance. The trial court stated that it had some compassion for Banks due to his background and very troubled past. The trial court also noted the fact that Banks was only seventeen years old. These factors distinguished Banks from Williams, who was twenty, and justified, in the trial court's view, the imposition of a lesser sentence upon Banks. This was well within the trial court's discretion. With respect to the lesser sentence accomplice Veal received, the record discloses that Veal was being sentenced on only one conviction for armed robbery, and that Veal played a more passive role than did Williams in the commission of the crimes. Further, we note that Williams faced a potential of 120 years of incarceration for the three armed robberies, and that the trial court imposed only one-fourth of that possible maximum. In light of the foregoing considerations, we conclude that Williams's sentence is not excessive.

Lastly, Williams argues that the lesser sentence that his co-defendant, Banks, received subsequent to Williams's sentencing constitutes a new factor, and that Williams is therefore entitled to a sentence modification. A trial court has discretion to modify a criminal sentence upon a showing of a new factor. *See* ***State v. Michels,*** 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). A new factor is:

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Id. A new factor must also be an event or development which frustrates the purpose of the original sentence. ***Id.***, 150 Wis.2d at 97, 441 N.W.2d at 279. A

defendant has the burden to establish the existence of a new factor by clear and convincing evidence. ***Id.***

Williams has not satisfied his burden to show the existence of a new factor. The same trial court sentenced both Williams and his co-defendant, Banks, and was thus therefore able to consider each of the sentences in light of one another, thus avoiding an unintentional disparity of the sentences of the two defendants. The trial court's imposition of a lesser sentence upon Banks was not an unforeseen event and it did not frustrate the purpose of Williams's sentence. The trial court did not erroneously exercise its discretion in denying Williams's motion to modify his sentence.

By the Court.—Judgment and order affirmed.

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