

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 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. 98-2790-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JASON FREDERICK WORK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

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

PER CURIAM. Jason Frederick Work appeals from a judgment convicting him of armed robbery and aggravated battery while armed with a dangerous weapon, party to a crime. Work pled guilty and was sentenced to a maximum of fifteen years in prison for the armed robbery and a maximum of five years in prison for the aggravated battery, consecutive to the first sentence. Work

also appeals from an order denying his postconviction motion for sentence modification.

Attorney John H. Wallace III has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Work received a copy of the report and has filed a response. The no merit report raises the issue of whether the trial court erroneously exercised its discretion by sentencing Work to a total of twenty years in prison, when several co-defendants received only fifteen-year sentences. In his response, Work argues that the trial court erroneously exercised its discretion by not modifying his sentence based on the new factor of the co-defendants' lesser sentences. Work also argues that his sentence was unduly harsh. Upon our independent review of the record, and upon our review of the no merit report and Work's response, we conclude that an appeal would raise no potential issues of arguable merit.

We first conclude that Work has no arguable basis for withdrawing his plea. After sentencing, a plea may be withdrawn if the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice such as a plea that was involuntary or unsupported by a factual basis, failure of the prosecutor to fulfill a plea agreement, or ineffective assistance of counsel. See *State v. Krieger*, 163 Wis.2d 241, 249-51, 471 N.W.2d 599, 602 (Ct. App. 1991).

The trial court followed the proper procedures under § 971.08, STATS., and *State v. Bangert*, 131 Wis.2d 246, 267-72, 389 N.W.2d 12, 23-25 (1986), to establish that Work voluntarily and knowingly entered the plea. The court determined that Work reviewed and signed a plea questionnaire and waiver-of-rights form. The court ascertained that Work understood the proceedings, the

nature of the crimes to which he was pleading, and the potential punishments. It also determined that Work understood the rights he was waiving. Work stipulated that the criminal complaint and discovery material provided the factual basis for the plea. There is no indication that the State did not fulfill the plea agreement or that Work's representation was deficient.

We also conclude that a challenge to Work's sentence would have no arguable merit. The trial court did not erroneously exercise its discretion by sentencing Work to a total of twenty years in prison. In exercising its sentencing discretion, the trial court must consider the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. *See State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). The record demonstrates that the court considered each of these factors in determining its sentence.

In addition, the trial court did not erroneously exercise its discretion in denying Work's postconviction motion for a sentence modification. Whether a set of facts constitutes a "new factor" is a question of law, but whether a new factor warrants a sentence modification is within the trial court's discretion. *See State v. Michels*, 150 Wis.2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). The trial court stated that even if the lesser sentences of the other defendants were a new factor, it was not sufficient to warrant modifying Work's sentence. At the time of Work's sentencing, the trial judge knew of the evidence regarding the co-defendants because several of their cases were before him. Although Work was the first to be sentenced, the court based Work's sentence in part on its understanding of the roles of everyone involved in the crime.

Finally, Work's sentence was not unduly harsh or unconscionable. A trial court can modify a sentence without a new factor if it determines its sentence was unduly harsh or unconscionable. *See State v. Ralph*, 156 Wis.2d 433, 438, 456 N.W.2d 657, 659 (Ct. App. 1990). However, the fact that co-defendants received different sentences is not sufficient to show that a sentence was unduly harsh. *See State v. Perez*, 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App. 1992). The defendant must show that the sentencing disparity was arbitrary or based on improper considerations. *See id.* In this case, the court focused, in part, on Work's individual need for rehabilitation, which he could receive in prison. The trial court also believes that Work was the most culpable, and had influenced his younger co-defendants to do the crimes. Work was also charged with more crimes in another county. The difference in Work's sentence is not arbitrary or based on improper considerations.

Our review of the record reveals no other potential issues of arguable merit. We therefore affirm the judgment of conviction and the order denying postconviction relief, and order that Attorney Wallace is discharged from any further obligation to represent Work on this appeal.

By the Court.—Judgment and order affirmed.

