

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 3, 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. 95-3500-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY R. MAYS,

Defendant-Appellant.

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

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

PER CURIAM. Danny Mays appeals from a judgment of conviction for the attempted abduction of another's child. See §§ 948.30(2)(b) and 939.32, STATS. The judgment was entered on his no contest plea. Mays also appeals from an order denying his postconviction motion seeking resentencing.

Mays argues: (1) that the trial court relied on a factual error in sentencing him because the trial court assumed that he displayed a knife rather than a

screwdriver to the victim during the crime; (2) that the trial court erroneously based its sentencing decision on crimes he might have committed if the attempted abduction had succeeded; and (3) that the trial court erred in denying his request for an evidentiary hearing on his postconviction motion. We affirm.

Mays entered a no contest plea to the attempted abduction of another's child and was sentenced to 13 years in prison. The complaint indicated that Mays approached a 13-year-old girl "with a screwdriver or knife" and ordered her to get into his car. The complaint also contained a statement from an adult witness that indicated that Mays had a "6 or 7 inch bladed knife" in his hand as he demanded that the girl get into his truck.

At the plea hearing, the trial court summarized the complaint, stating that Mays "got out of his truck and approached her with a knife in his hand and tried to get her into the truck." Defense counsel did not object to or contest the trial court's characterization of the complaint's contents. During the sentencing hearing, the trial court again addressed the attempted abduction, stating "you [Mays] had a six or seven inch bladed knife in your hand at the time you exited the truck and made your personal attempt on foot to effectuate the abduction of the victim in this case." Again, trial counsel did not object to the trial court's summarization of the crime.

Following the sentencing hearing, Mays sought postconviction relief. Mays argued his sentence was excessive and harsh. He also argued that the trial court relied on a factual error in sentencing him because the trial court assumed that he used a knife in the attempted abduction. Mays argued that he would show at an evidentiary hearing that when he was apprehended, the police recovered only a screwdriver. Mays further argues that the trial court based its sentencing decision on crimes that he might have committed had he succeeded in abducting the child. The trial court denied Mays's postconviction motion without a hearing.

First, Mays argues that he is entitled to be resentenced because the trial court relied on erroneous information when it exercised its discretion in sentencing him. Specifically, Mays argues that the trial court based its sentencing decision on the belief that he committed the crime with a knife, when, in fact, no knife was recovered when he was arrested. Our standard

when reviewing a criminal sentence is whether or not the trial court erroneously exercised discretion. *State v. Wagner*, 191 Wis.2d 322, 332, 528 N.W.2d 85, 89 (Ct. App. 1995). There is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court acted reasonably. *State v. Thompson*, 146 Wis.2d 554, 564, 431 N.W.2d 716, 720 (Ct. App. 1988).

Mays had an opportunity to rebut the trial court's summarization of the allegations contained in the complaint before he entered his plea, and at the sentencing hearing. He did not. The trial court's use of this information during sentencing was not an erroneous use of discretion. See *State v. Johnson*, 158 Wis.2d 458, 470, 463 N.W.2d 352, 358 (Ct. App. 1990) (not a misuse of discretion for trial court to rely on alleged erroneous facts contained in a presentence report where defense counsel fails to object). Moreover, it is of little consequence whether the victim was threatened with a knife or a screwdriver.

Next, Mays argues that the trial court erroneously based its sentencing decision on crimes he might have committed if the attempted abduction had succeeded. The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. *Wagner*, 191 Wis.2d at 333, 528 N.W.2d at 89. The weight to be given each factor is within the trial court's discretion. *Id.*

In sentencing Mays, the trial court noted that although he did not have a prior criminal history he committed "an extremely serious and aggravated offense." The trial court also considered the serious psychological injury Mays's conduct caused his victim. Although Mays showed remorse, he was unable to explain his actions. The trial court also concluded that Mays represented a substantial risk to the community.

Contrary to Mays's assertion, he was not punished for crimes he may have committed if the attempted abduction had succeeded. Although the trial court stated that "nobody knows what would have occurred had you been successful in abducting this young girl," there is no indication in the transcript that the trial court punished Mays for "what would have occurred had he been successful." The record reveals that the trial court appropriately considered the aggravated nature of the crime, the need to deter others from attempting to

abduct children, and the need to give Mays a “sufficient opportunity in a confined setting to work on whatever it is that is motivating you to commit this kind of crime.” The trial court reasonably exercised its discretion in sentencing Mays.

Finally, Mays argues that the trial court should have granted an evidentiary hearing on his postconviction motion. In order to warrant an evidentiary hearing on a postconviction motion, counsel must allege facts which, if true, warrant the relief sought. *State v. Bentley*, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996). If the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its discretion deny the motion without a hearing. *State v. Washington*, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993).

Here, the trial court correctly concluded that if Mays took issue with the trial court's summarization of the contents of the complaint, he should have gone to trial or raised the issue before sentencing. The trial court also correctly concluded that Mays's sentence was based on proper factors and not for what might have happened had he successfully abducted the child. Mays failed to allege any facts that required an evidentiary hearing.

By the Court. – Judgment and order affirmed.

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