

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 20, 1997

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. 96-0879-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**KEVIN D. WAITE,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Dane County:  
MARK A. FRANKEL, Judge. *Affirmed.*

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

PER CURIAM. Kevin Waite appeals from his convictions for burglary, robbery, false imprisonment, fleeing an officer, and conspiracy to commit robbery, the first four convictions as a party to the crime. He pleaded no contest to the charges and received concurrent and consecutive sentences totaling forty-four years in prison. Waite's convictions resulted from a one-day crime spree in which he and an accomplice broke into the rural home of a

young woman and her eleven-day-old baby. They terrorized the woman, held a handgun to her head, taped her to a chair with duct tape, stole her car for use in a bank robbery, and led police on a highway chase at speeds over one hundred miles per hour. Waite's counsel has filed a no merit report under *Anders v. California*, 386 U.S. 738 (1967). Waite received a copy of the report and has filed a response.

Counsel's no merit report raises two basic arguments: (1) the prosecution improperly charged Waite twice for the same offense; and (2) the sentence was excessive for various reasons. In his response, Waite challenges his sentence on various grounds. We will address counsel's and Waite's pro se sentencing arguments together. Upon review of the record, we are satisfied that the no merit report properly analyzes these issues, that Waite's response raises no viable issues, and that the appeal has no arguable merit. Accordingly, we adopt the no merit report, affirm the convictions, and discharge Waite's appellate counsel of his obligation to represent Waite further in this appeal.

Waite's counsel first argues that the prosecution may have improperly charged Waite with both robbery as a party to the crime and with conspiracy to commit robbery. Section 939.72(2), STATS., bars such twin charges for the same offense. The record shows, however, that the prosecution did not pursue such dual charges. The robbery charge embraces Waite's theft of the victim's car. The conspiracy charge embraces the planned robbery of the bank. If Waite and his accomplice had succeeded in carrying out their plans, the two completed robberies would have involved different acts against different victims. In short, this argument provides no basis for further proceedings. See also *Austin v. State*, 86 Wis.2d 213, 222-23, 271 N.W.2d 668, 672 (1978).

Waite and his counsel next challenge various aspects of Waite's sentence. The trial court's sentencing decision was discretionary. *State v. Macemon*, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983). Sentencing courts have discretion to determine the weight to give to each of the relevant factors, *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975), and may base their sentences on any of the factors after all have been reviewed. *Anderson v. State*, 76 Wis.2d 361, 366-67, 251 N.W.2d 768, 771 (1977). Relevant sentencing factors include the gravity of the offense, the protection of the public, the rehabilitative needs of the defendant, and the interests of deterrence. *State v. Sarabia*, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984).

Other relevant factors are the defendant's age, character, personality, social traits, remorse, repentance, cooperativeness, educational level, employment background, degree of culpability, demeanor at trial, need for close rehabilitative control, the rights of the public, and the vicious or aggravated nature of his crime. *State v. Killory*, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). Like other discretionary matters, sentencing decisions must have a reasonable basis in the record and demonstrate a logical process of reasoning applying proper legal standards to the facts of record. *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971).

Waite first argues that no one told him that the sentencing matrix did not bind the trial court. Waite is not arguing that this made his plea involuntary. Rather, in essence, he is asserting that the trial court erroneously failed to follow the sentencing matrix. He wants to apply the sentencing matrix to reduce his sentence. This argument provides no basis for further postconviction proceedings. Waite may not appeal the trial court's departure from the matrix. See *State v. Dietzen*, 164 Wis.2d 205, 214, 474 N.W.2d 753, 756 (Ct. App. 1991); § 973.012, STATS. The legislature has barred appellate courts from considering such issues in reviewing sentences. As a result, Waite may not attack his sentence on the ground that the trial court failed to follow the sentencing matrix.

Waite states that he did not know he had the right to call witnesses at the sentencing hearing. This provides no basis for resentencing. If Waite is claiming ineffective assistance of trial counsel, he needs to show not only that trial counsel omitted relevant evidence, but also that the evidence's absence was prejudicial to his case's outcome. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Waite has not shown that he had any witnesses who could provide relevant testimony and bring about a lower sentence. He has not identified any witnesses or what their testimony would have been. Litigants may not base postconviction claims on vague fact-based allegations. See *State v. Saunders*, 196 Wis.2d 45, 49-50, 538 N.W.2d 546, 548 (Ct. App. 1995).

Waite states that his accomplice falsified facts at the accomplice's sentencing hearing and that Waite lacked a meaningful opportunity to respond to these falsifications at his own sentencing. At the accomplice's sentencing hearing, the accomplice's counsel portrayed Waite as the leader in the incident. This provides no basis for further proceedings. Waite does have a right to

sentencing on the basis of correct information. See *State v. Perez*, 170 Wis.2d 130, 138, 487 N.W.2d 630, 633 (Ct. App. 1992). Here, however, the record contains no indication that the trial court based Waite's sentence on the information from the accomplice's sentencing hearing. Rather, the trial court relied on information from Waite's case, such as the victim's account and Waite's admitted significant role in the crimes.

Waite next claims a disparity in sentencing. He points out that his accomplice received a lesser sentence despite the fact that the accomplice had a criminal record, while Waite had none. Not every disparity in sentencing is impermissible. Sentencing courts have the power to issue different sentences after applying the relevant sentencing factors. See *Perez*, 170 Wis.2d at 144, 487 N.W.2d at 635. Here, we see no impermissible disparity. As the trial court noted, Waite provided the weapons and masks, committed the terrorizing acts against the young baby's mother, drove the bank-robbery vehicle, and conceived the plans for the crimes. These factors can outweigh such factors as comparative criminal records, justifying a greater sentence. Sentencing courts have the power to issue harsher sentences to co-perpetrators who assume the leading role in a crime.

Waite next states that the sentencing court minimized mitigating factors and issued a sentence that shocks the public's conscience. Waite points out that he had a good work history and no prior criminal record. He also claims that the crimes constituted one continuous offense. Trial courts may not issue sentences that shock the public's conscience. See *State v. Killory*, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). Here, however, the trial court based its sentence primarily on the seriousness of the offense, the public's need for protection, and the interests of deterrence. This analysis represented a proper exercise of sentencing discretion. Considered against these factors, Waite's commendable work history, his crime-free background, and the crimes' unified progression gave the court relatively little mitigation to consider. Waite's forty-four year sentence does not shock the public conscience.

Finally, Waite argues that the trial court improperly based his sentence on his unproven association with militia-type, paramilitary organizations. At the beginning of the sentencing hearing, the trial court expressed considerable concern over Waite's possible militia-group connection. The trial court then adjourned the hearing to allow the prosecution to

investigate Waite's paramilitary activities, which the court stated cast a cloud over him. At that time, the trial court hypothesized that it would view the same crimes in a substantially different cast when committed by "two drunken guys smoking pot" than when committed by paramilitary-group members to finance their organizations and operations. In the trial court's view, the same crimes, when committed by militia-group members for such purposes, posed a broader, more serious social threat than the crimes would when committed by drunken pot smokers. Later, the trial court incidentally referred to militia groups as "right-wing," indirectly using a political term extraneous to sentencing proceedings.

After reviewing the record, we are satisfied that the trial court punished Waite on the basis of factors other than a possible militia-group connection. Near the close of the sentencing hearing, the trial court clarified the role that Waite's militia-group sympathies had taken in the court's sentencing calculus. The trial court reviewed the evidence on the subject and explicitly stated that it was not basing Waite's sentence on his possible militia-group connection. The court continued that it saw no direct nexus between Waite's crimes and an attempt to finance paramilitary organizations. In the court's view, this fact eliminated Waite's possible militia-group activities as a relevant sentencing factor. The court's remaining sentencing findings concentrated on the gravity of Waite's crimes, his character, and the public's need for protection, with no reference to militia-group activities. Viewed in their entirety, the court's findings make plain that Waite's possible militia-group activities or sympathies ultimately had no bearing on his sentence.

Further, when the trial court made its militia-group comments, we believe that the court was intrinsically referring only to militia groups engaging in illegal activities, not law-abiding militia groups or militia groups per se. We do not read trial court findings in a vacuum. See *Movable Offshore, Inc. v. M/V Wilken A. Falgout*, 471 F.2d 268, 272 (5th Cir. 1973). Here, the trial court made its comments in the weeks after the April 1995 Oklahoma City federal-building bombing, and the parties spent part of the initial sentencing hearing discussing news coverage of the Michigan Militia, which some in the news media suspected might have had a role in the bombing. Underlying the court's entire discussion was a concern over terrorism, with which Waite's particular crimes were consistent. Understood in this context, the trial court's militia comments reflect a legitimate concern over terrorist militia groups, not law-abiding militia

groups or militia groups in general. Accordingly, Waite's appellate counsel is discharged.

*By the Court.*—Judgment affirmed.