

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 98-3088-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FECTORY E. SPEARS,

DEFENDANT-APPELLANT.

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

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Fectory Spears appeals his convictions for one count of armed robbery and two counts of recklessly endangering safety with a dangerous weapon, all as a repeater and a party to the crime, having pleaded no contest to all three charges. Spears and three co-assailants robbed and physically abused four victims during a house robbery. One of the co-assailants fired a gun during the

incident, and some of the victims suffered bleeding head wounds. The surrounding facts suggested that the crimes resulted from a gone-awry drug transaction. The trial court sentenced Spears to thirteen and one-half years on the armed-robbery charge, concurrent with an Illinois sentence he was serving. The trial court withheld sentence on the remaining two charges, imposing fifteen years' concurrent probation on those two and making the probation concurrent to the armed-robbery sentence.

Spears' counsel has filed a no merit report under *Anders v. California*, 386 U.S. 738 (1967). Spears received a copy of the report and has filed a response. Counsel's no merit report discusses two issues: (1) the plea procedures were inadequate; and (2) the sentence was excessive. In his response, Spears claims that the trial court gave his three co-assailants dramatically lesser sentences; the shot-firing co-assailant received two years' imprisonment, while another received probation and a third a five-year prison term. Upon review of the record, we are satisfied that the no merit report properly analyzes the issues it raises, that Spears' response raises no meritorious issues, and that the appeal has no arguable merit. Accordingly, we adopt the no merit report, affirm the conviction, and discharge Spears' appellate counsel of his obligation to represent Spears further in this appeal.

We first conclude that the plea procedures were adequate. Trial courts should not accept pleas unless they are intelligent and voluntary. *See State v. Bangert*, 131 Wis.2d 246, 257, 389 N.W.2d 12, 19 (1986). Here, the trial court followed the proper procedures to establish that Spears' plea was intelligent and voluntary. The trial court extensively questioned Spears about his plea. It ascertained his knowledge of the proceedings, the elements of the crimes, and the range of punishments. The trial court also advised Spears of his constitutional rights and reviewed the factual basis for the plea. In addition, Spears signed a written plea questionnaire and waiver-of-rights form that further apprised him of his

constitutional rights, including the right to remain silent, to confront witnesses, to compel witnesses to testify, to have a jury trial with a unanimous verdict, and to require the prosecution to prove his guilt beyond a reasonable doubt. In short, we see no defects in the plea proceedings.

We also see nothing excessive in Spears' combined sentences. The trial court imposed a thirteen-and-one-half-year prison term, with fifteen years' concurrent probation. The trial court's sentence was discretionary, dependent on the gravity of the offense, the character of the defendant, the public's need for protection, and the interests of deterrence. *See State v. Sarabia*, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Here, the trial court accepted the parties' joint sentencing recommendation; both thought that the combined sentences supplied a proportionate sanction for Spears' crimes. The trial court also took into account the manifest danger Spears posed to the community and the need for deterrence of such crimes. The trial court sought to issue a sentence that gave the public sufficient protection. We are satisfied that the sentence was commensurate with Spears' culpability, the severity of his crime, the public's need for protection, and the need to deter Spears and other like-minded wrongdoers from such crimes. In sum, we see no misuse of trial court sentencing discretion.

Last, Spears claims in his response that his co-assailants received dramatically lesser sentences than he did. He also states that the prosecutor misinformed the trial court that one co-assailant had received a fifteen-year sentence for the same incident, and that the co-assailant actually received probation. Not all sentencing disparities are unlawful. *See State v. Perez*, 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App. 1992). Courts may tailor sentences for co-assailants' differences in dangerousness, culpability, criminal records, and acceptance of responsibility. *See id.* at 142-43, 487 N.W.2d at 634-35. In other words, Spears

must show some unreasonable or unjustifiable basis in the record for the disparate sentences. *See State v. Macemon*, 113 Wis.2d 662, 670, 335 N.W.2d 402, 407 (1983).

Here, the trial court did not fully explain the differences in sentences. However, the other co-assailants evidently cooperated with authorities, and this would explain to some extent the more lenient sentences. In addition, the prosecution never told the trial court that any co-assailant got a fifteen-year sentence for this crime. Rather, the prosecution told the trial court that one co-assailant got a fifteen-year sentence on “something else” and that the “something else” was disposed of at the same time as his crimes with Spears. That “something else” was a conviction for attempted first-degree intentional homicide arising from another incident. Read in context, the prosecution’s remarks, though somewhat imprecise, plainly sought to refer to the co-assailant’s consolidated sentencing proceedings for both incidents, by which the co-assailant received fifteen years for the attempted homicide charge and probation for his crimes with Spears. None of this required the trial court to give Spears probation.

We note that Spears agreed to his sentence in advance, and this makes his challenge to his sentence self-contradictory, if not forfeited altogether. Spears evidently felt that the sentence constituted a fair exchange for his decision to surrender his right to make a defense, and he must now stand by the bargain he made. Last, Spears has not shown that his co-assailants had comparable levels of overall dangerousness or comparable criminal records. The trial court was aware of Spears’ extensive criminal record, and the prosecution considered the sentence lenient when viewed from that standpoint. In short, the trial court’s sentence deserves a strong presumption of validity, *see State v. Setagord*, 211 Wis.2d 397, 418, 565 N.W.2d 506, 514 (1997), and we see no basis for resentencing.

Accordingly, we discharge counsel of his obligation to represent Spears further in this appeal.

By the Court.—Judgment affirmed.

