

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2009

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP3114-CR

Cir. Ct. No. 2007CF3279

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND L. MORRISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: WILLIAM SOSNAY and M. JOSEPH DONALD, Judges.¹

Affirmed.

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

¹ The Honorable William Sosnay accepted Raymond L. Morrison's guilty pleas, sentenced him, and entered the judgment of conviction. The Honorable M. Joseph Donald issued the orders denying Morrison's postconviction motion.

¶1 FINE, J. Raymond L. Morrison appeals a judgment entered after he pled guilty to two counts of robbery with the use of force. *See* WIS. STAT. § 943.32(1)(a). He also appeals orders denying his motion for postconviction relief. Morrison claims that the circuit court: (1) erred when it denied his ineffective-assistance-of-counsel claim without a hearing under *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979); (2) erroneously exercised its sentencing discretion; and (3) erroneously determined that he was ineligible for the Challenge Incarceration and Earned Release Programs. We affirm.

I.

¶2 Morrison was charged with robbing Sarah Bare on June 21, 2007. According to the complaint, Morrison went into the bookstore where Bare was working, took out a box cutter, and told Bare to give him money. After Morrison took the money, he grabbed a telephone and threw it across the room.

¶3 Morrison was also charged with robbing Christina Cruz on July 3, 2007. According to the complaint, Morrison went into an ice cream shop and asked Cruz for change. When Cruz opened the cash drawer, Morrison punched her, took money from the drawer, and ran away. After Morrison ran away, Cruz went outside and told several people that Morrison had just robbed her. They ran after Morrison, who was eventually caught by the police.

¶4 On July 4, 2007, four witnesses, including Bare and Cruz, viewed a line-up. All of the witnesses identified Morrison as the robber.

¶5 As noted, Morrison pled guilty to two counts of robbery with the use of force. The circuit court sentenced him to consecutive sentences of eight years and four months of imprisonment, each with an initial confinement of four years

and two months and four years and two months of extended supervision. Morrison's postconviction motion claimed, for the reasons that we discuss below, that his trial lawyer gave him ineffective representation.

II.

A. *Alleged Ineffective Assistance of Counsel.*

¶6 Morrison claims that the circuit court erred when it denied his ineffective-assistance claim without a *Machner* hearing. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defendant claiming ineffective assistance must establish that: (1) the lawyer gave the defendant deficient representation; and (2) the defendant suffered prejudice as a result). A circuit court must hold a *Machner* hearing if the defendant alleges facts that, if true, would entitle him or her to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. *Ibid.* If, however, “the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Ibid.* Morrison's postconviction motion does not pass *Allen* muster.

¶7 In his postconviction motion, Morrison claimed that his trial lawyer should have moved to suppress the witness identifications because the line-up, he contends, was impermissibly suggestive. In support, Morrison attached to the motion three police reports. In the first report, Detective Joanne Blake wrote that on July 4, 2007, she gave the witnesses a “lineup identification instructions” form that they “completed during the course of the live lineup.” (Capitalization

omitted.) According to Blake, “[u]pon completion of the lineup,” she interviewed Amy Daroszeski, a witness to the ice-cream-shop robbery. During the interview, Daroszeski identified Morrison as the robber.

¶8 According to the second report, written by Detective Peter Panasiuk, when Bare viewed the line-up, she circled “yes” to Morrison and “no” to the other subjects on her form. Panasiuk then talked to Bare, who told him that “she [was] 100 percent positive” that Morrison was the robber.

¶9 In the third report, Panasiuk wrote that when Jennifer Clark, a witness to the ice-cream-shop robbery, viewed the subjects, she circled the number for Morrison on her form. According to Panasiuk, he then interviewed Clark, who told him that she had initially circled “no” on the form because Morrison was not wearing a headband, but changed her answer to “yes” and that “she was 100 percent positive” that Morrison was the robber.² Panasiuk also wrote that when Cruz viewed the line-up, she circled “yes” for Morrison on her form when Morrison entered the room. According to Panasiuk, after the line-up Cruz told him that she was “absolutely sure” that Morrison was the man who robbed her.

¶10 Morrison also attached two affidavits executed by him to his motion for postconviction relief. In the first affidavit, he claimed that “[f]rom [his] observations during the line up,” he believed that all of the witnesses were in the line-up room at the same time and were able to “communicate with ... or ... influence each other’s choices in some fashion.” Morrison further averred that:

² It is not clear from the Record whether the headband references when Clark saw Morrison during the robbery or during the line-up.

The report does not state that the line up for each witness occurred separately or that the witnesses were sequestered or instructed not to talk to each other. In fact, I could tell from the room I was in through the window that there were six people in the viewing room.

In his second affidavit, Morrison claimed, without elaboration, that Clark changed her answer from “no” to “yes” because she “had influence from the other witnesses.”³ He also asserted that he “was only in the line up room one time. Less than one minute. That is not enough time for all four witnesses to view me separately,” and claimed that he “counted six shadows behind the window. Wich [sic] four were the witnesses, and two were (Detective Blake) and (Detective Panasiuk).”

¶11 Based on these materials, Morrison argued that the line-up was unduly suggestive because the witnesses viewed the line-up at the same time and orally discussed their identifications with the detectives.⁴ We disagree.

¶12 A defendant seeking to suppress the evidence of an eyewitness identification bears the initial burden of establishing that the identification procedure was impermissibly suggestive. *Powell v. State*, 86 Wis. 2d 51, 65–66, 271 N.W.2d 610, 617 (1978). “[T]he fact that more than one witness is present during a lineup does not necessarily invalidate the procedure. Everything depends on the particular circumstances.” *United States v. Corgain*, 5 F.3d 5, 9 (1st Cir.

³ Morrison claimed that Daroszeski changed her answer. The Record shows it was Clark, not Daroszeski, who changed her answer.

⁴ In his brief-in-chief on appeal, Morrison contends that the line-up was “flawed” because he was “in the same position for the simultaneous viewing instead of holding three different line ups and placing him in different positions.” He did not raise this issue in his postconviction motion. Accordingly, we do not address it. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (generally, an appellate court will not review an issue raised for the first time on appeal).

1993) (citation omitted); *see also State v. Benton*, 2001 WI App 81, ¶8, 243 Wis. 2d 54, 61, 625 N.W.2d 923, 926 (“[W]hether an identification procedure is impermissibly suggestive must be decided on a case-by-case basis.”).

¶13 Morrison’s claim that the line-up was impermissibly suggestive is conclusory and undeveloped, and is based wholly on his self-serving speculation—he does not present any evidence, by affidavits executed by the witnesses or otherwise, that the witnesses improperly communicated with each other. Indeed, the Record shows that the witnesses wrote their answers on individual pieces of paper and did not talk to the detectives about those answers until the line-up was complete. Accordingly, Morrison has not alleged facts sufficient to show that, had his lawyer filed a motion to suppress, he would have prevailed. *See Corgain*, 5 F.3d at 9–10 (group viewing of line-up not unduly suggestive where witnesses did not speak to each other and identification was by secret ballot); *Gregory-Bey v. Hanks*, 332 F.3d 1036, 1048–1049 (7th Cir. 2003) (line-up not unduly suggestive when two witnesses whispered to each other during line-up concerning fear that suspect might be able to see them). The circuit court properly denied Morrison’s postconviction motion without a *Machner* hearing.⁵

⁵ In a one-sentence argument, Morrison also claims that his trial lawyer did not “explain any of the legal principles and constitutional protections to his client so his client could make an informed decision of whether he would agree with counsel’s waiver of constitutional rights at the plea and waiver of pretrial motions.” Morrison does not provide any legal authority to support this argument or explain how this information would have affected his decision to plead guilty. Accordingly, we do not address the issue further. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (court will not consider inadequately developed arguments).

B. *Sentencing Discretion.*

¶14 Morrison contends that the circuit court erroneously exercised its discretion because it did not: (1) apply the sentencing objectives to the facts of this case or explain the length of Morrison’s sentences, particularly in light of his rehabilitative needs, *see State v. Gallion*, 2004 WI 42, ¶43, 270 Wis. 2d 535, 558, 678 N.W.2d 197, 207 (sentencing court must “identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision”); or (2) adequately consider what he alleges are mitigating character traits, including his age, family background, alleged remorse and acceptance of responsibility, and his post-arrest cooperation with the police.⁶ We disagree.

¶15 Sentencing is within the discretion of the circuit court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. *McCleary v. State*, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also Gallion*, 2004 WI 42, ¶68, 270 Wis. 2d at 569, 678 N.W.2d at 212 (“circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision”). The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

⁶ Morrison also claims that the circuit court erroneously exercised its discretion because it failed to “explain” why it did not impose the lesser sentences recommended by his lawyer. A sentencing court, however, is not bound by sentencing recommendations. *See State v. Johnson*, 158 Wis. 2d 458, 469, 463 N.W.2d 352, 357 (Ct. App. 1990) (court need not explain why its sentence differs from any particular recommendation as long as discretion was exercised).

“(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant’s personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant’s culpability; (7) defendant’s demeanor at trial; (8) defendant’s age, educational background and employment record; (9) defendant’s remorse, repentance and cooperativeness; (10) defendant’s need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.”

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted); *see also Gallion*, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main *McCleary* factors—the seriousness of the crime, the defendant’s character, and the need to protect the public—to Gallion’s sentencing). The weight given to each of these factors is within the circuit court’s discretion. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶16 The circuit court considered the appropriate factors when it sentenced Morrison. It correctly described the crimes as being “very serious,” noting that Morrison used a box cutter during the bookstore robbery and punched the victim of the ice-cream-store robbery.

¶17 The circuit court also considered Morrison’s character, including his age, employment skills, acceptance of responsibility, and “severe cocaine addiction.” It commented that while Morrison had a young daughter “who does need a father,” this was not enough “to dissuade [him] from continuing to use cocaine.” The circuit court also noted that Morrison had a significant criminal record going back to 1987, and that despite “numerous occasions” for treatment, he had been “unwilling to deal with [his] cocaine problem”:

I don’t doubt in any way the severity of how addictive cocaine is. However if you can’t deal with it and you continue to commit crime, society has no alternative. We

have treatment programs apparently that can deal with this, and however good those programs are, unless the person that has the addiction is willing to follow through on them, they are of no avail, and I believe you are in that classification at this point until such time as you show us that you mean it and will refrain free of drugs.

It determined that Morrison had “significant rehabilitative needs” which had not been “accomplished through supervision” and needed to be addressed “in a confined setting.”

¶18 Finally, the circuit court found that Morrison was a “threat to the community”: “[H]e has not shown that he can deal with [his cocaine addiction], and as a result of that he is a threat to the community which is exhibited by the two victims in these two crimes.” It explained, based on all of the factors, that probation was “clearly not appropriate” and that periods of supervision were necessary to “transition [Morrison] back into ... and ... protect the public.” It concluded that consecutive sentences were warranted because the crimes were “separate offense[s] committed days apart.” The circuit court fully explained Morrison’s sentences and the reasons for them.

C. Eligibility for Earned Release and Challenge Incarceration Programs.

¶19 A circuit court’s determination of whether a defendant is eligible for the Challenge Incarceration or Earned Release Program involves: (1) a threshold determination of whether the defendant is statutorily eligible under WIS. STAT. §§ 302.045(2) or 302.05(3)(a), and then, (2) an exercise of discretion showing the circuit court’s reasons for its decision on the defendant’s ultimate eligibility. *See* WIS. STAT. § 973.01(3g), (3m); *State v. Steele*, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 749, 632 N.W.2d 112, 115.

¶20 The circuit court determined that Morrison was not “eligible for either the boot camp [Challenge Incarceration Program] or Earned Release Program because of the serious nature of these offenses.” The nub of Morrison’s argument is that the circuit court erroneously exercised its discretion because it did not explain its reasons for finding him ineligible. We disagree.

¶21 While a circuit court must state whether the defendant is eligible or ineligible for the Challenge Incarceration and Earned Release Programs, it is not required to make “completely separate findings” as long as “the overall sentencing rationale also justifies” its eligibility determination. *State v. Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 234, 713 N.W.2d 187, 189. As discussed above, the circuit court more than adequately explained the factors underlying its sentencing decision, including the seriousness of the crimes, Morrison’s extensive criminal history and inability to follow through with treatment, and the need to protect the public. *See id.*, 2006 WI App 75, ¶10, 291 Wis. 2d at 234–235, 713 N.W.2d at 190 (circuit court could infer from defendant’s “past apathy” toward treatment that defendant was “neither sincere about wanting substance abuse treatment nor likely to succeed in the treatment program”); *Steele*, 2001 WI App 160, ¶11, 246 Wis. 2d at 750–751, 632 N.W.2d at 116 (circuit court’s determination that defendant was ineligible for the Challenge Incarceration Program “due to the seriousness of the offenses” proper exercise of discretion). The circuit court did not erroneously exercise its discretion in determining that Morrison was not eligible for the programs.⁷

⁷ Morrison also claims that the circuit court erroneously exercised its discretion when it denied his postconviction motion for sentence modification. For the reasons discussed above, the circuit court properly denied Morrison’s postconviction motion.

By the Court.—Judgment and orders affirmed.

Publication in the official reports is not recommended.

