

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 7, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1699-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-1748

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD T. HARDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Richard Harder appeals a judgment convicting him of one count of second-degree sexual assault with use of force as a habitual criminal and one count of burglary to a dwelling. He also appeals an order denying his postconviction motion. He argues: (1) that the circuit court misused

its discretion in sentencing him; and (2) that the circuit court erred in denying his motion to suppress. We affirm.

¶2 Harder challenges the circuit court’s sentencing decision on two grounds—that it is too harsh and that the circuit court placed undue weight on the need to protect the public. The circuit court sentenced Harder to forty years of imprisonment for sexual assault, with twenty-five years of initial confinement and fifteen years of extended supervision. The circuit court also sentenced Harder to fifteen years of imprisonment for burglary, with ten years of initial confinement and five years of extended supervision, to be served concurrently.

¶3 We will affirm the circuit court’s sentencing decision unless the circuit court erroneously exercises its discretion in imposing the sentence. *See State v. Thompson*, 172 Wis.2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). When sentencing a defendant, a circuit court must consider three primary factors: the gravity of the offense, the offender’s character, and the need to protect the public. *Id.* at 264. A circuit court misuses its discretion if it “gives too much weight to one sentencing factor in the face of other contravening considerations.” *Id.* “The weight given to each sentencing factor, however is left to the [circuit] court’s broad discretion.” *Id.* “A [circuit] court exceeds its discretion as to the length of the sentence imposed ‘only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.’” *Id.* (citation omitted).

¶4 The circuit court did not misuse its sentencing discretion. Harder brutally raped an elderly woman in her home. The victim suffered severe trauma from the attack that lasted until she died a year later. The victim was reluctant to

leave her home as a result of the attack and spent her last days in fear. Under these circumstances, the circuit court did not misuse its discretion in sentencing Harder to a lengthy term of imprisonment. Nor did the circuit court place too much emphasis on the need to protect society. The circuit court's sentencing comments show that the circuit court considered all the appropriate factors, but placed special emphasis on the threat Harder presented to the public, which was clearly within its discretion to do. *See id.*

¶5 Harder next argues that the circuit court should have suppressed DNA evidence taken from his toothbrush and, implicitly, that he should be allowed to withdraw his plea based on this error. We reject this claim because the State also obtained DNA evidence from a blood sample taken from Harder pursuant to a search warrant, and Harder did not seek suppression of the blood DNA test results. Given that the State obtained the same DNA evidence from an alternative source—one Harder did not challenge in the circuit court—Harder has not shown how the fact that the State also seized the evidence from an allegedly improper source, the toothbrush, would have caused him not to enter a plea in this case. *Cf. State v. Semrau*, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376 (the defendant must show a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

