

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2012

A. John Voelker
Acting 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. 2010AP3002-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF655

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD H. MCKAY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Edward McKay, Jr., appeals a judgment convicting him of robbery with use of force and theft. He also appeals an order denying his postconviction motion in which he requested sentence modification based on a more lenient sentence given to his co-defendant, Aaron Algee. McKay argues the court improperly exercised its discretion and denied him his equal protection right

by refusing to consider Algee's sentence and establish a rational basis for the disparate treatment. We reject that argument and affirm the judgment and order.

¶2 McKay and Algee were charged with robbing money and a portable PlayStation from two individuals who had just used an ATM. During the robbery, McKay threatened to shoot one of the victims. The court imposed concurrent sentences totaling six years' initial confinement and five years' extended supervision. Six weeks later, a different court sentenced Algee for these crimes and an additional burglary charge, imposing concurrent terms totaling three years' initial confinement and three years' extended supervision. McKay then requested sentence modification based on the disparate sentences.

¶3 McKay acknowledges that individualized sentencing has been a cornerstone of Wisconsin's criminal justice jurisprudence because no two convicted felons stand before the sentencing court on identical footing and no two cases will present identical factors. *See State v. Gallion*, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. However, he argues that he has an equal protection right to have substantially the same sentence imposed for persons having substantially the same case histories. His postconviction motion compared the sentencing courts' statements at the sentencing hearings and contends that McKay's and Algee's age, corrections experiences, offenses and danger to the public are substantially the same, compelling comparable sentences. He argues that the court refused to consider Algee's sentence and failed to establish a rational basis for the disparate treatment.

¶4 McKay's argument that the court failed to consider Algee's sentence is based on the court's statement at the postconviction hearing: "The sentence that I imposed is the absolute minimum amount of time for this defendant, not

Mr. Algee, because I can't tell you what Mr. Algee's circumstances are at all, and I only know Mr. McKay" However, the court also stated:

I take into account what you've told the Court here today, Miss Hirsch [McKay's attorney], and that doesn't change the court's opinion of the role that Mr. McKay played in this case. I concluded when I made the sentence for Mr. McKay from all--and I emphasize the word 'all' of the evidence that this defendant, Edward McKay, is the person who approached Mr. Salish and asked him for his money and told him he would shoot him.

This statement shows that the court did consider McKay's motion and the arguments of his attorney, both of which set out the details regarding the similarities between McKay and Algee, and the court determined that McKay had greater culpability based on his threat to shoot Salish, which is a rational basis for the disparate treatment.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

