COURT OF APPEALS
DECISION
DATED AND RELEASED

July 11, 1996

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

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No. 95-0207-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN C. SETAGORD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed*.

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

VERGERONT, J. John Setagord appeals from a judgment of conviction for taking a hostage, party to a crime, in violation of §§ 940.305 and 939.05, STATS.; conspiracy to escape, as a repeater, in violation of §§ 946.42(3)(a), 939.62 and 939.31, STATS.; and battery to a police officer, party to a crime and as a repeater, in violation of §§ 940.20(2), 939.62 and 939.05, STATS. The crimes were committed when Setagord and two other inmates attempted to escape

from the Dane County Jail. A person who takes a hostage contrary to § 940.305 is guilty of a Class A felony. The penalty for a Class A felony is life imprisonment. Section 939.50(3)(a), STATS. The trial court initially sentenced Setagord to life without parole on the hostage-taking charge, concurrent with the sentence he was already serving. The trial court imposed an eleven-year sentence on the battery to a police officer charge, consecutive to the sentence he was already serving, and an eleven-year sentence on the conspiracy to escape charge, consecutive to the battery sentence.

Setagord appealed the sentence on the hostage-taking charge only. In ***State v. Setagord***, 187 Wis.2d 340, 523 N.W.2d 124 (Ct. App. 1994), we reversed that sentence. We held that § 973.014(2), STATS., 1991-92,[1] does not authorize a court to impose the sentence of life imprisonment without parole, but instead requires the court to either set a parole eligibility date or allow parole eligibility to be determined by the Wisconsin Parole Commission. We reversed the judgment and remanded to the trial court for resentencing.

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[1] Section 973.014, STATS., 1991-92, provided:

> When a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (1) The person is eligible for parole under s. 304.06(1).
>
> (2) The person is eligible for parole on a date set by the court. Under this subsection, the court may set any later date than that provided in s. 304.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06(1).

Section 973.014(2), STATS., 1991-92, was renumbered § 973.014(1)(b) by 1993 Wis. Act 289, § 11. 1993 Wis. Act 289, § 12 added this subsection to § 973.014:

> (2) When a court sentences a person to life imprisonment under s. 939.62(2m), the court shall provide that the sentence is without the possibility of parole.

We will refer in this opinion to § 973.014(1)(b), STATS., rather than § 973.014(2), 1991-92.

On remand, the trial court imposed a mandatory life sentence on the hostage-taking charge with a parole eligibility date of October 21, 2091, one hundred years from the date of the crimes Setagord committed. We hold: (1) § 973.014(1)(b), STATS., permits a trial court to set a parole eligibility date beyond a person's expected lifetime; and (2) the trial court did not erroneously exercise its discretion in setting Setagord's parole eligibility date. We therefore affirm.

SECTION 973.014(1)(b), STATS.

We first decide whether § 973.014(1)(b), STATS., permits a trial court to set a parole eligibility date beyond a person's expected lifetime. We declined to address this issue in ***State v. Setagord***, 187 Wis.2d 340, 523 N.W.2d 124 (Ct. App. 1994), because the issue was not before us.

The interpretation of a statute presents a question of law, which we decide de novo. *See* ***State v. Eichman***, 155 Wis.2d 552, 560, 456 N.W.2d 143, 146 (1990). ***Id.*** The purpose of statutory construction is to discern the intent of the legislature. In determining the legislature's intent, we first consider the language of the statute. ***Id.*** If the language of the statute is ambiguous, we examine the scope, history, context, subject matter and object of the statute in order to ascertain the intent of the legislature. ***Ball v. District No. 4, Area Bd.***, 117 Wis.2d 529, 538, 345 N.W.2d 389, 394 (1984). A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses. ***State v. Martin***, 162 Wis.2d 883, 894, 470 N.W.2d 900, 904 (1991).

The State contends that the language of § 973.014(1)(b), STATS., is capable of only one reasonable interpretation. The State focuses on the word "any" in the phrase "any later date" and contends that this authorizes a court to indirectly deny the possibility of parole by setting the date so far in the future that it is certain the defendant will not be alive on that date. This is a reasonable interpretation, but we conclude it is not the only reasonable interpretation.

The State acknowledges that its interpretation is an indirect way of authorizing a court to deny the possibility of parole. In § 973.014(2), STATS.,

1993-94, the legislature uses the direct language "the court shall provide that the sentence is without the possibility of parole" with reference to one group of persons sentenced to life imprisonment--those sentenced under § 939.62(2m), STATS.[2] The absence of this direct language in § 973.014(1)(b) and the use instead of the language that the court may choose the option that "[t]he person is eligible for parole on a date set by the court," leads us to conclude that "a date set by the court" under § 973.014(1)(b) may reasonably be interpreted as a date that allows for the possibility of parole.

Since the statute is ambiguous, we look to its legislative history to aid us in discerning legislative intent. Section 973.014, STATS., was originally enacted by 1987 Wis. Act 412, § 5. Prior to its enactment, all persons convicted of crimes, including those convicted of a crime punishable by life imprisonment, were eligible for parole on a date set by statute. Under §§ 53.11 and 57.06(1)(b), STATS., 1987-88, the minimum period of time that a person sentenced to life imprisonment could serve before becoming eligible for parole release was approximately thirteen years and four months. ***State v. Borrell***, 167 Wis.2d 749, 765 n.6, 482 N.W.2d 883, 889 (1992).

1987 Wis. Act 412 was originally introduced as 1987 A.B. 8. This bill provided that if a person is convicted of a crime that is punishable by life imprisonment, "the court shall sentence the person to life imprisonment without parole eligibility unless it finds that mitigating circumstances justify life imprisonment with parole eligibility," in which case the parole eligibility was determined by statute. 1987 A.B. 8, § 11. The Senate then adopted Senate Substitute Amendment 1, which provided that if a person commits first-degree murder while attempting to commit certain violent felonies, "the court may set a date of parole eligibility later than that provided in [s. 304.06(1)]."

The measure moved back to the Assembly, which adopted the following amendment to Senate Substitute Amendment 1:

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[2] Section 939.62(2m)(b), STATS., provides for life imprisonment for certain felony convictions where the defendant is a persistent repeater as defined in § 939.62(2m)(a) and (b).

> 973.014 SENTENCE OF LIFE IMPRISONMENT; PAROLE ELIGIBILITY DETERMINATION. When a court sentences a person to life imprisonment for a crime committed on or after the effective date of this section .... [revisor inserts date], the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (1) The person is not eligible for parole.
>
> (2) The person is eligible for parole under s. 57.06(1).
>
> (3) The person is eligible for parole on a date set by the court. The court may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 57.06(1).

Assembly Amendment 1 to Senate Substitute Amendment 1.

After a vote in which the Senate did not concur in the Assembly's amendment, a Committee of Conference (committee) on 1987 A.B. 8 was formed. The report of the committee agreed to Assembly Amendment 1 with these amendments: deletion of subsec. (1); renumbering of subsecs. (2) and (3) to subsecs. (1) and (2); and replacing the second sentence of renumbered subsec. (2) with "Under this subsection, the court may set any later date than that provided in s. 57.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 57.06(1)." Assembly Amendment 1 as amended by the committee report became § 973.014, STATS., 1987-88.

Were this the only legislative history available, Setagord would have a strong argument that the deletion of the option of "[t]he person is not eligible for parole" from Assembly Amendment 1 indicates a legislative intent not to authorize a court to deny the possibility of parole under § 973.014(1)(b), STATS. However, the Legislative Reference Bureau (LRB) file on 1987 Wis. Act 412 also contains a memo from Bruce Feustel, Legislative Attorney,[3] to "File" on

[3] The drafts of 1987 A.B. 8, and the Senate and Assembly amendments contain the

the subject of "Differences between the Senate and Assembly positions on Assembly Bill 8 (Life sentence without parole)." The memo is dated May 23, 1988, four days after the Senate nonconcurred in Assembly Amendment 1 and the day before the committee issued its report. The memo contains the following comparison of the Senate and Assembly amendments:

SENATE	ASSEMBLY
(as shown by Senate Substitute Amendment 1 to Assembly Bill 8)	(as shown by Assembly Amendment 1 to Senate Substitute Amendment 1 to Assembly Bill 8)
1. Parole Eligibility restrictions; persons covered: Any person who commits first-degree murder while committing or attempting to commit a violent felony (kidnapping, abduction, taking hostages, robbery, arson, sabotage, mayhem, criminal damage to property of a witness or aggravated sexual assault).	1. Parole eligibility restrictions; persons covered: Any person who commits any crime punishable by life imprisonment (first-degree murder, treason, or, under certain circumstances, kidnapping, taking hostages or tampering with household products).
2. Court's options regarding parole: Provide that the person: -- is subject to ordinary parole eligibility -- is subject to delayed parole eligibility on a date fixed by the court (no limit, could be a date 100 years in the future)	2. Court's options regarding parole: Provide that the person: -- is subject to ordinary parole eligibility -- is subject to delayed parole eligibility on a date fixed by the court (no limit, could be a date 100 years in the future) -- is not eligible for parole
3. Miscellaneous: No additional items.	3. Miscellaneous: Sentencing commission is prohibited from issuing guidelines on court/parole eligibility determination and the current prohibition on probation for first-degree murder is extended to all crimes punishable by life imprisonment.

The State argues that from the memo's nature and date, it can confidently be concluded that it was prepared for the committee. In the State's view, the committee decided to strike the option of ineligibility for parole because it was not necessary, since the same result could be achieved by setting the parole eligibility date beyond the defendant's expected lifetime. Setagord responds with three arguments: (1) there is no indication that the committee

(..continued)
initials "B.F." We presume those initials refer to Bruce Feustel and that he drafted these measures.

saw this memo or accepted Feustel's interpretation of the two amendments; (2) the Assembly would not, in the first instance, have adopted an amendment containing an option that was surplusage; and (3) the Senate would not have agreed to language that implicitly authorized a court to choose parole ineligibility when the Senate had just rejected such a provision.

Our own review of the complete LRB file persuades us that the committee had Feustel's memo before it and accepted his interpretation that, if the court opted to set a parole eligibility date, it could set a date 100 years in the future.

The LRB file contains a "Drafting Request" stapled to a copy of the Feustel memo. The request is from Representative Louise Tesmer, stating that she represents the "Conference," and the subject is Assembly Amendment 1 to Senate Substitute Amendment 1 to Assembly Bill 8. The request was received by "BF" on May 24. The instructions read as follows:

A position on 1 and 3
Senate position on 2
modification on language.

Stapled behind the Feustel memo is a form containing the handwritten wording the committee agreed upon as a Conference Amendment to Assembly Amendment 1.

The only reasonable inference is that the instructions in the Drafting Request refer to Feustel's memo. The committee agreed to points 1 and 3 in the Assembly column of his memo and to point 2 in the Senate column. Because point 2 in the Senate column states that the court's option of fixing a parole eligibility date has "no limit, could be a date 100 years in the future," the committee must have accepted this interpretation of the court's authority.

This disposes of Setagord's first argument concerning the significance of the memo. Setagord's second and third arguments are not persuasive on the issue of the committee's intent. It may be that when the Assembly adopted Assembly Amendment 1, it was not aware of an interpretation of subsec. (3) that would make the option of denying parole

eligibility surplusage. But that does not mean the committee could not have come to a different conclusion after reading Feustel's memo. And although the Senate had rejected the Assembly's express language authorizing the court to determine a person ineligible for parole, any number of factors could cause the Senate members on the committee, and the Senate as a whole, to come to a different conclusion as a result of the conference.

Our construction of § 973.014(1)(b), STATS., is not inconsistent with § 973.014(2), even though § 973.014(2) uses more direct language. Whereas § 973.014(1)(b) permits a court to make parole for a person sentenced to life imprisonment impossible by setting a parole eligibility date beyond the person's expected lifetime, subsec. (2) requires that, for the particular subcategory of persistent repeaters, a court *must* provide that the sentence is without the possibility of parole.

Setagord also points to the amendment to § 973.014(1), STATS., enacted by 1995 Wis. Act 48. This Act, effective August 31, 1995, created § 973.014(1)(c), which provides a third option for the court: "The person is not eligible for parole." This is the same third option contained in Assembly Amendment 1 that was removed as a result of the agreement of the committee. We may accord subsequent amendments some weight in determining the intent of legislation enacted earlier. *See* ***McGarrity v. Welch Plumbing Co.***, 104 Wis.2d 414, 427, 312 N.W.2d 37, 43-44 (1981). However, we conclude that this later amendment does not assist us in interpreting subsec. (1)(b).

The language of the 1995 amendment is consistent with both Setagord's and the State's interpretation of § 973.014(1)(b), STATS. The legislature could have decided to clarify subsec. (1)(b) by making explicit that which was already implicit in the court's authority under subsec. (1)(b). On the other hand, the legislature could have decided to authorize the court to do something that it had earlier not intended to authorize. The parties have pointed to no legislative history of 1995 Wis. Act 48 that would shed light on the intent of 1987 Wis. Act 412. The enactment of 1995 Wis. Act 48, in itself, is insufficient to counter the persuasive indication of legislative intent expressed by the Drafting Request and the Feustel memo.

SENTENCING DISCRETION

Having concluded that the trial court had the authority under § 973.014(1)(b), STATS., to set a parole eligibility date beyond Setagord's expected lifetime, we now consider whether it erroneously exercised its discretion in doing so.

We first address the State's contention that Setagord may not raise this issue on appeal because he did not first bring a motion for sentence modification in the trial court. We conclude that under the circumstances of this case, it was not necessary for Setagord to bring that motion before the trial court.

Ordinarily, to obtain review of a sentence as of right, the defendant must move for sentence modification in the trial court either under RULE 809.30 or § 973.19, STATS. ***State v. Hayes***, 167 Wis.2d 423, 425-26, 481 N.W.2d 699, 700 (Ct. App. 1992). This rule is part of the broader rule that postconviction motions must be made in order for issues to be considered as a matter of right on appeal, except in challenges to the sufficiency of the evidence and except as to issues previously raised. Section 974.02(2), STATS.; ***Hayes***, 167 Wis.2d at 426, 481 N.W.2d at 700. The State argues that neither exception applies. The first clearly does not. As for the second, the State contends that at the hearing before the trial court after remand, Setagord was not arguing that the trial court had abused its sentencing discretion, as he is arguing on appeal, but was simply arguing what the proper sentence should be.

The State's analysis overlooks the context of the hearing after remand. The trial court had already sentenced Setagord to life without parole. The State argued, in the context of Setagord's appeal of that sentence, that the trial court had the authority to accomplish the same result by setting a parole eligibility date "so far in the future that the defendant cannot possibly live to enjoy parole." ***Setagord***, 187 Wis.2d at 344, 523 N.W.2d at 125. We did not decide the validity of that claim because the trial court had not attempted that approach.

At the hearing after remand, the State argued that the same factors that had justified the court's first sentence of life without parole justified a sentence tantamount to life without parole, that is, a parole eligibility date so far

in the future that Setagord would not live to see the date. The State requested that date be set at one hundred years from the date of the hostage taking--October 21, 1991. Setagord's counsel's arguments were directed to persuading the court that a sentence tantamount to life without parole was not reasonable and that the parole eligibility date should be left to the parole board so that there was, at least, the possibility that Setagord might live some years outside prison. In effect, the State was urging the court to follow the same reasoning and come to essentially the same result as it had earlier, while Setagord was urging the court to reconsider its earlier reasoning and come to a significantly different result.

In reaching its decision on resentencing, the court reviewed its reasons for imposing the first sentence and stated that it was still in agreement with those reasons and the conclusion it reached then--that Setagord needed to spend his entire life in prison.

The purpose of requiring a postconviction motion before raising an issue on appeal is to provide the trial court with the opportunity to first address the issue. The trial court here had that opportunity because of the hearing held after remand. It explained why it was not changing its conclusions. Under these circumstances, no purpose is served by requiring Setagord to again argue to the trial court that it is unreasonable to set a parole eligibility date so that he will spend his entire life in prison.

Setagord argues that the trial court erroneously exercised its discretion because the sentence fails to consider his rehabilitative needs; exceeds that which is necessary to protect the public; is grossly disproportionate with the parole eligibility dates for others sentenced to life imprisonment; and places excessive weight on the desire to "send a message" to prisoners. Setagord also contends the trial court erroneously exercised its discretion in demonstrating a "forsworn inflexibility." Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been a "clear" abuse of that discretion. ***McCleary v. State***, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). Our limited review in this area reflects the strong public policy against interference with sentencing discretion; we presume that the trial court acted reasonably, and we assign to the defendant the burden of "show[ing] some unreasonable or unjustified basis in the record for the sentence complained of." ***State v. Harris***, 119 Wis.2d 612, 622-23, 350 N.W.2d 633, 638-39 (1984). We do not substitute our preference for a particular sentence simply

because we would have decided the matter differently. ***McCleary***, 49 Wis.2d at 281, 182 N.W.2d at 521.

The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender, and the need for public protection. ***Harris***, 119 Wis.2d at 623, 350 N.W.2d at 639. The court may also consider, among other things, the defendant's criminal record; history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the defendant's degree of culpability; his demeanor at trial; the age, educational background and employment record of the defendant; his remorse, repentance and cooperativeness; the need for close rehabilitative control; the rights of the public; and the length of pretrial detention. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178, *cert. denied*, 115 S. Ct. 641 (1994).

Although all relevant factors must be considered, the sentence may be based upon any one or more of the three primary factors. ***Anderson v. State***, 76 Wis.2d 361, 368, 251 N.W.2d 768, 772 (1977). The weight to be given to each of the factors that influence the trial court's decision is particularly within the discretion of the trial court. ***State v. Larsen***, 141 Wis.2d 412, 428, 415 N.W.2d 535, 542 (Ct. App. 1987).

Before imposing the initial sentence, the trial court read the lengthy presentence report, the report of Julie McReynolds, who was held hostage by Setagord and two inmates for thirteen hours, and the statement of the husband of Julie McReynolds. The court had heard the trial testimony of Deputy McReynolds and Deputy Leonard Harris who were performing a "head count" when McReynolds was overpowered by Setagord. It also viewed a video tape of Deputy McReynolds in the cell with Setagord. While McReynolds was bound, gagged and blindfolded, Setagord struck her. Setagord also made a statement.

The court commented on the horrible experiences of Deputy McReynolds, Deputy Harris, the law enforcement personnel who worked to resolve the incident and the community, which was waiting in suspense throughout.

The trial court noted that it had a firm idea of who Setagord was from everything it had heard and read. It referred to Setagord's lengthy criminal record. It described Setagord as unable to control himself and dangerous, taking out his rage and anger on others. The court considered Setagord to be intelligent and clever enough to execute a plan, utilizing someone less intelligent to carry it out. It described Setagord as the leader of the attempted escape, desperate and willing to lose everything in order to get out of the jail.

The court stated that, based on the presentence report, there was no opportunity for rehabilitation, nothing available in the community or anywhere else to change Setagord. There had been a lack of response in past attempts to deal with problems. The court considered Setagord's expressions of remorse, stressing that it did not know if he was sincere and that the agent who prepared the report felt he was not sincere.

While noting that punishment was a factor in its sentencing considerations, the court made clear that the determining factor in this case was deterrence. The court stated that the overcrowding in the Dane County Jail placed the law enforcement personnel in the jail at risk. According to the presentence report, Setagord had received recognition in prison because of what he had done. In the court's view, that increased the risk to law enforcement personnel and the community. The court decided it was necessary to send a message to all inmates by way of a severe sentence for Setagord.

At the hearing after remand, the court heard arguments from the State and Setagord's counsel, and statements from Dane County Sheriff Richard Raemsich and Setagord. It did not repeat all of its reasons for imposing the initial sentence, but it adopted them by reference. It did reiterate its concern that the jail was overcrowded, and was therefore dangerous for inmates, law enforcement personnel and posed a high risk for the community. The court emphasized that it still considered it essential to convey a message that taking hostages in the jail would result in a harsh sentence. The court noted Setagord's statement that he was remorseful and wanted some chance to show in the future that he had changed. But the court stated that it also remembered him as portrayed in the video, and still considered him dangerous and capable of doing the same thing again. The court said Setagord needed to be kept from the public for the rest of his life.

Setagord argues that the trial court erroneously exercised its discretion by wholly failing to consider his rehabilitative needs. As evidence for his potential for rehabilitation, Setagord points to his troubled background, which included child abuse, psychiatric problems, substance abuse and juvenile delinquency. He also points to his statement at the resentencing, in which he expressed remorse and his attempts in prison to understand what he did and his problems and to take responsibility for them.

We conclude that there is evidence in the record to support the court's conclusion that there was no potential for rehabilitation. In the seven years preceding this crime, Setagord had been convicted in various jurisdictions of numerous crimes, including indecent exposure, resisting arrest, criminal damage to property, carrying a concealed weapon and second-degree sexual assault. He admitted to other sexual assaults of daughters of a girlfriend. When placed on probation, there were numerous probation violations and he spent most of probation either in jail or a halfway house. When transferred to a halfway house, he received twenty-three incident reports and apparently assaulted at least one staff member. He was terminated from the halfway house for reasons including "his not providing sufficient effort in the treatment goals; total disrespect for staff, program and others; mismanagement of his financial affairs; along with an uncooperative attitude." The presentence investigator did not detect any real expressions of remorse or sympathy toward the victims of the hostage-taking incident. The investigator also noted that there had been a great deal of time, money and energy already spent on rehabilitation for Setagord, which Setagord had spurned.

The evidence Setagord points to does not show that the court's conclusion was unreasonable. The court specifically referred to Setagord's troubled background, but found that did not excuse his actions. Setagord does not explain how his troubled background demonstrates that he has the potential for rehabilitation. The trial court was not required to accept Setagord's expressions of remorse as evidence that he had the potential for rehabilitation. The court could reasonably conclude that his past actions were more probative of his rehabilitative potential. To the extent Setagord is arguing that the court should have relied on progress he had made in prison since the initial sentencing, such evidence is not properly considered in resentencing. "[W]hen resentencing a defendant the trial court must consider only the circumstances existing when defendant was first sentenced." ***State v. Solles***, 169 Wis.2d 566, 569, 485 N.W.2d 457, 458 (Ct. App. 1992).

Setagord next argues that the gravity of the offense does not warrant the parole eligibility date set by the court. This argument focuses in large part on what Setagord perceives as the disparity between his parole eligibility date and the parole eligibility dates set in other cases under § 973.014(1)(b), STATS.

However, Setagord provides no authority for the proposition that a sentence, which, in itself, is not an erroneous exercise of discretion, becomes unreasonable in comparison to other sentences. In the context of an equal protection analysis to sentencing disparities, more than a showing of a disparity is required; the disparity must be arbitrary or based on considerations not pertinent to proper sentencing discretion. ***Ocanas v. State***, 70 Wis.2d 179, 187, 233 N.W.2d 457, 462 (1975). We see no reason to require a lesser showing here simply because Setagord does not couch his disparity argument as an equal protection challenge. "By its very nature, the exercise of discretion dictates that different judges will have different opinions as to what should be the proper sentence in a particular case. As a result, a judge imposing a sentence in one case cannot be bound by the determination made by a judge in another case." ***Ocanas***, 70 Wis.2d at 187-88, 233 N.W.2d at 462 (citation omitted).

Setagord emphasizes that he did not take a life and that the crime of hostage taking does not compare to the crime of first-degree intentional homicide. However, the legislature has decided that they are comparable because it has made each a Class A felony with a penalty of life imprisonment. Sections 940.01, 940.305(1)[4] and 939.50(3)(a), STATS. The legislature has also given the court the discretion to set a parole eligibility date for both crimes under § 973.014(1), STATS. The fact that under § 973.014(2) the court is required to sentence certain defendants to imprisonment without the possibility of parole does not limit the court's discretion in setting a parole eligibility date for defendants whose crimes fall under § 973.014(1). Setagord concedes as much when he states that he is not contending that § 973.014(2) provides the only set of circumstances in which a court may impose a sentence that is, in effect, life imprisonment without the possibility of parole.[5]

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[4] Section 940.305(2), STATS., provides that if each person taken hostage is released without bodily harm before the actor's arrest, the crime is a Class B felony. That is not applicable here because Setagord inflicted bodily harm on Deputy McReynolds.

[5] We understand that Setagord makes this concession based on the assumption that

The proper focus concerning the gravity of the offense factor is whether the trial court's evaluation of that factor is unreasonable in light of the facts of record. We conclude it is not. The court did not, as Setagord suggests, rule as a categorical matter that all hostage takers should be sentenced to life without the possibility of parole. The court considered the facts involved in this particular hostage taking: it occurred in an overcrowded county jail; was committed by inmates; the hostage was a sheriff's deputy; and the incident was thus a direct assault on the criminal justice system. The court also considered Setagord's treatment of the hostage, including the threats to kill her.

Setagord also argues that the need to protect the public does not warrant the parole eligibility date set by the court. Setagord refers only to the danger he himself presents. Given the court's finding that Setagord has no potential for rehabilitation, which we have decided is not unreasonable, there is a reasonable basis for the court's conclusion that Setagord needs to be permanently imprisoned for the protection of the public.

However, the need to protect the public is not measured only by the need to deter Setagord. It also is measured by the need to deter others from committing the same sort of crime. This need for general deterrence brings us to Setagord's claim that the court placed excessive weight on the need to deter others. A court erroneously exercises its discretion when it gives too much weight to one sentencing factor in light of contravening factors. ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). The court clearly stated that the determining factor was the need to deter other inmates from committing the same type of crime. However, Setagord does not point out what the contravening factors were that the court ignored. Given the lack of potential for rehabilitation and the gravity of the offense, these two factors are certainly not contravening factors.

We conclude the record supports the court's conclusion that the need to deter others in order to protect the community, law enforcement personnel and other inmates is the critical factor. The sentencing report related that Setagord described the respect and congratulations he had received from other prison inmates as a result of his crime. The report also described the effect

(..continued)
§ 973.014(1)(b), STATS., permits a trial court to set a parole eligibility date beyond a person's expected lifetime.

on other inmates who were in the jail at the time of the incident: other cell blocks became unmanageable, making threats to other deputies and chanting, "Kill the bitch." As a result of the incident, some deputies will no longer work in the jail.

Setagord argues that a parole eligibility date set for when he is in his fifties or sixties would be sufficient deterrence. But the issue before us is not whether another parole eligibility date would have been within the proper exercise of the court's discretion. The issue is whether the court properly exercised its discretion in setting the date it did set. The court imposed the most severe sentence possible when it set parole eligibility for a date which will require Setagord to spend his life in prison. But we cannot say that the court erroneously exercised its discretion in concluding that such a parole eligibility date was necessary in order to deter others.

Setagord's final argument is that the trial court demonstrated a "forsworn inflexibility" because, at the resentencing, the court was intent on achieving the same effect as the life without parole sentence which had been reversed. The cases Setagord cites in support of this argument are not resentencing cases, but rather cases in which the trial court has indicated that it has a preconceived sentencing policy with respect to certain types of cases, which it follows from defendant to defendant. *See, e.g.*, ***State v. Martin***, 100 Wis.2d 326, 302 N.W.2d 58 (Ct. App. 1981); ***State v. Varnell***, 153 Wis.2d 334, 450 N.W.2d 524 (Ct. App. 1989). These cases are not applicable.

Setagord's first appeal challenged the court's statutory authority to impose a sentence of life without parole, rather than setting a parole eligibility date itself or leaving the determination to the parole commission. We agreed and remanded to the court for resentencing. ***Setagord***, 187 Wis.2d at 343-45, 523 N.W.2d at 125-26. Nothing in our opinion precluded the trial court from relying on its earlier reasoning and conclusions in deciding whether it should set a parole eligibility date or leave it to the parole commission and, if it chose the former, in deciding what the parole eligibility date would be. The trial court permitted additional argument and statements at the resentencing. The record shows that the court reviewed the record from the initial sentencing and was still persuaded that Setagord must spend his life in prison, in spite of the additional argument and statements of Setagord and his counsel and in spite of its further reflection. Nothing in our earlier decision precluded this result.

The trial court applied the pertinent sentencing factors to the record and explained its reasoning for the parole eligibility date it set. While we may not have reached the same decision ourselves, given the deference we accord the sentencing court, we are not persuaded that the sentence was unreasonable.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

GARTZKE, P.J. (*concurring*). Setagord is guilty of taking a hostage, party to a crime, contrary to §§ 939.05 and 940.305, STATS., a Class A felony, the penalty for which is life imprisonment. Section 939.50(3)(a), STATS. The penalty is not imprisonment for life with no possibility of parole. We established that in Setagord's first appeal. ***State v. Setagord***, 187 Wis.2d 340, 523 N.W.2d 124 (Ct. App. 1994).

Section 973.014(1), STATS., requires a court when sentencing a person to life imprisonment to determine the person's parole eligibility by choosing one of two options. The first option is to make the person eligible for parole under § 304.06(1), STATS. That option leaves parole to the discretion of the parole commission, subject to statutory restrictions. The second option is to set a date for the person's parole eligibility, provided that the date does not occur before the earliest possible eligibility date calculated under § 304.06(1).

The trial court deprived the parole commission of its power to grant parole under § 304.06, STATS., but I am satisfied that this is within the trial court's discretion and that the trial court did not erroneously exercise that discretion. For that reason, we must affirm.

However, when we affirm a trial court's discretionary decision, that does not mean we agree with or would have made the same decision. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). As then Chief Justice Heffernan said in ***State v. McConnohie***, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983):

The concept of discretion is a review-constraining concept. In that sense:

> "[T]o be invested with discretion means that the trial judge has what might be termed a limited right to be wrong in the view of the appellate court, without incurring reversal." M. Rosenberg, *Appellate Review of Trial Court Discretion*, 79 FRD 173, 176 (1979).

In my view, the wiser course would have been to set a parole date within Setagord's life expectancy if that is possible in view of his earliest

possible eligibility date calculated under the statute. Such a disposition should satisfy the need to protect society and deter others.

Setagord is a thirty-four-year-old male. He is odious, dangerous and evil. But dangerous and evil men can change. Surely some thirty-four-year-old males will change and become fit for rehabilitation, notwithstanding dim present prospects for that happening. The aging process alone may so debilitate a prisoner as to make him rehabilitable. And circumstances change. Penology may advance so that prisoners once thought to be unredeemable can nevertheless be safely released to society. However unlikely Setagord's present potential for rehabilitation, the court ought not completely deprive the commission of its power to grant parole. No court is prescient. No court can predict the future with certainty.

It now costs about $25,000 a year to keep a man in prison. If years from now the parole commission decides that Setagord has been rehabilitated or is no longer dangerous, the trial court's decision will nevertheless preclude the commission from saving the state an unnecessary expense.