

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 7, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2184-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY J. LIBKE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Gregory Libke appeals from a judgment convicting him of armed robbery. Libke pleaded guilty to the charge, and only challenges his sentence on appeal. He contends that the trial court improperly considered his testimony from another proceeding that was protected by use immunity. He also contends that the trial court failed to properly consider the

Wisconsin sentencing guidelines then in effect. We conclude that Libke waived the first issue, and that the second is not reviewable. We therefore affirm.

Libke made inculpatory statements, with use immunity, at an accomplice's preliminary hearing. At his sentencing hearing, the prosecutor described those statements to the trial court, which considered them when it imposed sentence. However, Libke failed to object to the description and consideration of his protected testimony. We therefore deem the issue waived. *See State v. Skamfer*, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993). It is true that we may excuse a waiver and review an issue where the interest of justice require it and where there are no factual issues which require resolution. *See id.* That is not the case here because a factual dispute remains whether the prosecutor had other sources for Libke's inculpatory statements. Only if the prosecutor had no other source for the inculpatory information would resentencing be necessary. *State v. J.H.S.*, 90 Wis.2d 613, 617, 280 N.W.2d 356, 358-59 (Ct. App. 1979).

We do not review whether the trial court properly considered the sentencing guidelines, as was formerly required by § 973.012, STATS. The trial court's failure to comply with that statute is not an appealable issue. *State v. Elam*, 195 Wis.2d 683, 685, 538 N.W.2d 249, 250 (1995).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.