

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 30, 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. 95-2343-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GABREON J. STONE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Gabreon J. Stone appeals from a judgment of conviction entered after he pled guilty to one count of first-degree reckless homicide, while armed, contrary to §§ 940.02(1) and 939.63, STATS. He claims: (1) the trial court erroneously exercised its sentencing discretion; and (2) the trial court erred in denying his motion to dismiss based on the delay between his arrest and initial appearance. Because the trial court did not erroneously

exercise its sentencing discretion, and because dismissal is not the proper remedy when the initial appearance is delayed, we affirm.

I. BACKGROUND

On July 29, 1994, Stone went with three other persons to collect money from Carlos Hayes. An argument ensued, Stone pulled out a gun and pointed it at Hayes's head. Hayes attempted to push the gun away, but Stone fired a single shot into Hayes's chest. Stone fired an additional shot in another direction. Hayes died as a result of the gunshot wound.

Stone fled to Memphis, Tennessee, where he was arrested without a warrant on August 2, 1994. On August 3, 1994, the trial court issued a Felony Warrant and Authorization for Extradition. In issuing the warrant, the trial court made a finding that probable cause exists that Stone committed first-degree reckless homicide. Stone was returned to Milwaukee, and arrested, pursuant to the warrant, on August 5, 1994. He was charged with one count of first-degree reckless homicide while armed. His initial appearance took place on August 12, 1994. At the initial appearance, Stone moved to dismiss the charge on the basis that there had been an unreasonable delay between his arrest and appearance, in violation of his constitutional rights. The trial court denied the motion.

In October 1994, Stone pled guilty to the charge. Subsequently, he was sentenced to a thirty-year term of imprisonment. He now appeals.

II. DISCUSSION

A. Sentencing.

Stone first claims the trial court erroneously exercised its sentencing discretion. Specifically, he contends that the trial court was biased toward favoring the presentence report prepared by the State, (over the report

prepared on behalf of the defense), and was predisposed to impose a lengthy sentence because of its belief that drugs were involved.

Appellate review of a trial court's sentencing decision is limited to determining whether the trial court erroneously exercised its discretion. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). When sentencing, the trial court must consider the following three factors: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). Our review of the sentencing transcript confirms that the trial court did consider the three primary factors. It imposed the thirty-year sentence because of the extreme injury to the victim, because of Stone's wanton conduct, because of the statements made by the victim's family, because Stone gunned down an unarmed victim, and because Stone involved himself in a dispute with drug overtones. This was a proper exercise of discretion.

We are not persuaded by Stone's "biased" and "predisposed" arguments. The sentencing transcript demonstrates that the trial court considered both the court-ordered presentence report and the presentence report prepared at the request of the defense. In addition, there was an ample factual basis for the trial court to conclude that the money Hayes owed was for drugs. Accordingly, the trial court's reference to the involvement of drugs in this case was not a misstatement and the trial court's comments regarding the negative effects of drugs on society do not establish trial court predisposition.

Moreover, this court will not find that the sentence imposed by the trial court was excessive unless "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." *State v. Dietzen*, 164 Wis.2d 205, 213, 474 N.W.2d 753, 756 (Ct. App. 1991). Stone faced a maximum sentence of forty-five years. The trial court imposed a thirty-year sentence. Based on the severity of the crime—a homicide, and the other factors the trial court appropriately considered, we cannot say that the thirty-year sentence was excessive.

B. Delay Between Arrest and Initial Appearance.

Stone also argues that the delay between his arrest and initial appearance violated § 970.01, STATS., and his constitutional rights. As a result, he claims the trial court should have dismissed the charge against him. Stone essentially makes two separate arguments: (1) that the delay between his warrantless arrest (on August 2, 1994) in Tennessee and his initial appearance violates the constitutional protection enunciated in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), (a probable cause determination must be made within forty-eight hours of a warrantless arrest); and (2) that the delay between his arrest pursuant to a warrant (on August 5, 1994), in Milwaukee and his initial appearance violates § 970.01's requirement that anyone who is arrested must "be taken within a reasonable time before a judge."

Our standard of review with respect to these issues is *de novo*. See *Manor v. Hanson*, 123 Wis.2d 524, 533, 368 N.W.2d 41, 45 (1985) (application of statute to undisputed facts presents question of law); *State v. Murdock*, 155 Wis.2d 217, 226, 455 N.W.2d 618, 621-22 (1990) (scope of constitutional protections reviewed *de novo*). We reject both of Stone's arguments.

Stone's first argument is meritless because a probable cause determination was made within the forty-eight hour *Riverside* rule. On August 3, 1994, the trial court signed a felony warrant for Stone's arrest. The trial court made a specific finding contained within the warrant that probable cause exists that Stone committed the crime charged. This finding was made within forty-eight hours of his August 2 warrantless arrest. Therefore, we reject this argument.

We also reject Stone's second argument that the charge should be dismissed because the delay between arrest and appearance violated § 970.01, STATS. Stone has not supplied this court with any controlling authority which requires dismissal as a result of an unreasonable delay between arrest and initial appearance. Stone cites only a concurring opinion, which suggests that under certain circumstances, dismissal should be considered. See *State v. Aniton*, 183 Wis.2d 125, 130-32, 515 N.W.2d 302, 304-05 (Ct. App. 1994) (Schudson, J., concurring). We are not bound by this authority. Moreover, controlling cases addressing the concern regarding delay between arrest and initial appearance do not hold that dismissal is the appropriate remedy. See *State v. Golden*, 185 Wis.2d 763, 769, 519 N.W.2d 659, 661 (Ct. App. 1994); *State v. Koch*, 175 Wis.2d 684, 699, 499 N.W.2d 152, 160, *cert. denied*, 114 S. Ct. 221

(1993); *Aniton*, 183 Wis.2d at 130, 515 N.W.2d at 304 (delay does not affect jurisdiction of trial court). Rather, the remedy available to Stone for any violation is suppressing any evidence that is gathered as a result of an unreasonable delay. *Golden*, 185 Wis.2d at 769, 519 N.W.2d at 661. Such did not occur here. There is no evidence that any additional evidence was gathered between Stone's arrest on August 5 and his initial appearance on August 12. Further, as indicated by the trial court, Stone was not prejudiced in any manner by the delay.

By the Court. – Judgment affirmed.

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