

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1244-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL R. ASKEW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

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

PER CURIAM. Paul Askew appeals from a judgment convicting him of theft from a person while armed. He also appeals from an order denying his motion to reduce the nine years in prison imposed after his probation was revoked. We affirm the circuit court's nine-year sentence, and the decision refusing modification of that sentence.

The State originally charged Askew with armed robbery that occurred when he hid in the victim's vehicle until she entered it and stole cash from her, using a knife. Pursuant to a plea bargain, the charge was reduced to theft from a person while armed, reducing Askew's potential prison time from forty years to nine years. Due to Askew's minimal record, the circuit court sentenced him to probation.

Two years after sentencing, the Department of Corrections revoked Askew's probation for numerous violations, including conduct that resulted in several unrelated felony charges.

At sentencing after revocation, the court noted that Askew had failed on probation; that he appeared to have a problem with drugs; and that the Department of Corrections and the district attorney recommended a maximum nine-year prison term. The court also considered the seriousness of Askew's offense, and the bad character demonstrated by his failure to comply with his probation terms and to rehabilitate himself. Based on those factors, the court concluded that the nine-year maximum term was appropriate, and sentenced Askew accordingly. The court made no mention of Askew's pending felony charges.

A jury subsequently acquitted Askew on the pending charges. Consequently, he brought a motion to reduce his sentence, asserting that his acquittal was a new factor warranting a modified sentence. At the hearing on his motion, the court stated unequivocally that it did not consider the pending charges when passing sentence. The court reiterated its comments about the seriousness of the conduct Askew engaged in, and noted that "[i]t is a rare armed robber that gets out of this court without a ten-year sentence, whether he has a record or not." The

court therefore concluded that the acquittal was not a new factor, and denied relief. On appeal Askew contends that acquittal was a new factor requiring a modified sentence notwithstanding the court's express statement to the contrary, and that the nine-year sentence resulted from an erroneous exercise of the circuit court's discretion.

If a defendant shows a new factor, the circuit court may modify his sentence. A new factor is one that is highly relevant to sentencing, but unknown to the circuit court at the time of sentencing because it did not then exist or was unknowingly overlooked. See *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). To obtain relief on that basis, a defendant must prove by clear and convincing evidence not only that the circuit court based the sentence on incorrect or incomplete information, but that it prejudicially affected the sentence. See *State v. Littrup*, 164 Wis.2d 120, 131-32, 473 N.W.2d 164, 168 (Ct. App. 1991). Whether a particular fact constitutes a new factor is a question of law. See *State v. Hegwood*, 113 Wis.2d 544, 547, 335 N.W.2d 399, 401 (1983).

Askew failed to meet his burden because there is no evidence in the record that the pending felony charges influenced the sentencing decision. At sentencing, the circuit court relied on the seriousness of the offense and Askew's failure to rehabilitate himself on probation. The circuit court never referred to the pending charges. At the postconviction hearing, the circuit court unequivocally stated that the pending charges had no effect on the sentence. Given that unequivocal statement, and the absence of any contrary indication in the record, we necessarily affirm. We do not go beyond the circuit court's statements on the record or speculate as to its state of mind. See *State v. Thompson*, 146 Wis.2d 554, 567, 431 N.W.2d 716, 721 (Ct. App. 1988).

The circuit court did not erroneously exercise its sentencing discretion. The primary factors the court must consider in sentencing are the gravity of the offense, the character of the offender, and the need to protect the public. *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight given the various factors is within the circuit court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). The circuit court is presumed to have properly exercised its discretion and the defendant has the burden to show an improper sentencing. *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). Here, in sentencing Askew, the court considered the undeniable seriousness of his offense, and the opportunity Askew had to rehabilitate himself and prove that he was not a danger to the public. These were proper factors for the court to consider and the court fully explained its reliance on them at the sentencing hearing. Additionally, the court properly considered the district attorney's and the Department of Corrections' recommendations for a maximum prison term.

Askew also contends that he received ineffective assistance of counsel in the revocation proceeding. This issue is not properly before this court on appeal from the judgment and order in the separate, criminal proceeding.

By the Court.—Judgment and order affirmed.

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

