

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 00-0671-CR
00-0779-CR
00-0780-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT W. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
EMMANUEL VUVUNAS, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Robert W. Miller complains that the circuit court erroneously exercised its discretion when it refused to grant him Huber law

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

privileges. Because the granting of Huber law privileges is within the discretion of the court and Miller has demonstrated that he would likely not comply with the rules accompanying the granting of Huber law privileges, we affirm.

¶2 These three appeals were consolidated because they all have the same issue: did the circuit court misuse its discretion when it denied Miller Huber law privileges under WIS. STAT. § 303.08?² The criminal conduct that Miller was convicted of in the three underlying cases and in the original sentences is not relevant to this appeal. Suffice it to say that the charge of theft of movable property in the most recent case precipitated the revocation of probation in the two older cases. On October 26, 1999, Miller appeared for sentencing on all three cases. For the first two cases, the court imposed county jail terms of nine months, concurrent to each other. For the latest case, the court imposed a jail term of six months, consecutive to any other jail term. The circuit court denied Miller Huber law privileges under § 303.08. Miller began serving the sentence immediately, and on February 10, 2000, he filed a motion seeking Huber law privileges. The circuit court denied the motion during a brief hearing.

THE COURT: No. Forget about it. That's why I didn't give you Huber, because you've been convicted of bail jumping, and that's why I continue not to give you Huber. Good luck. You got revoked on the probation, right?

DEFENDANT: Right.

² WISCONSIN STAT. § 303.08 provides in part:

“Huber Law”; employment of county jail prisoners. (1) Any person sentenced to a county jail for crime ... may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:

....

(b) Working at employment[.]

THE COURT: No. Thanks. That's 3 strikes and you're out. That's even more than 3 strikes, Mr. Miller. Thanks. No Huber.

¶3 At the request of Miller's counsel, the hearing was continued for two days to permit counsel to file a motion for bail pending this appeal. While granting Miller release upon the posting of \$2000 bail, the court reiterated the reason it denied Miller Huber law privileges, "First of all, as to the Huber, I'm not giving him Huber. I think we addressed that yesterday. Here's a man who has been revoked on a bail jumping charge and was revoked on that bail jumping charge on probation."

¶4 On appeal, Miller asserts that the circuit court erroneously exercised its discretion in denying him Huber law privileges. In fact, he claims that in summarily dismissing his request for Huber law privileges, the court did not exercise any discretion because it did not give a rationale for its action.

¶5 Miller's appeal requires this court to review the sentencing decision of the trial court. "It is axiomatic that an appellate court will not usually interfere with a trial court's discretion in this area." *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). The reviewing court should "start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980) (citations omitted). In conducting our review, it is appropriate to look to the entire record and to the totality of the trial court's remarks. See *State v. Timmerman*, 198 Wis. 2d 309, 318, 542 N.W.2d 221 (Ct. App. 1995).

¶6 To be sustained, a discretionary determination "must demonstrably be made and based upon the facts appearing in the record and in reliance on the

appropriate and applicable law.” *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999) (citation omitted). As the Wisconsin Supreme Court has pointed out:

[T]here must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.... [T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) (citation omitted).

¶7 Huber law release is a privilege and not a right; it is within the discretionary control of the circuit court.

Unless such privilege is expressly granted by the court, the prisoner is sentenced to ordinary confinement. The prisoner may petition the court for such privilege at the time of sentence or thereafter, and in the discretion of the court may renew the prisoner’s petition. The court may withdraw the privilege at any time by order entered with or without notice.

WISCONSIN STAT. § 303.08(2).

¶8 Our review of the record in these three appeals convinces us that the circuit court properly exercised its discretion. Admittedly, the court did not expend a great deal of time explaining its decision; however, the exercise of discretion is not dependent upon the loquaciousness of the court. The court made it plain that it was denying Miller Huber law privileges because he had been convicted of bail jumping and his probation had been revoked. These succinct comments make manifest that Miller was denied Huber law privileges because the

court lacked faith in his ability and desire to follow the rules that go along with such privileges.³

¶9 We agree with the circuit court's assessment that Miller has repeatedly demonstrated that he will not obey the law, the orders of the court and the rules of probation. In fact, Miller's continual failure to comply with the law is more than enough justification for denying him Huber law privileges.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

³ The bail jumping conviction and the probation revocation are examples of Miller's history of undesirable behavior patterns. A defendant's undesirable behavior may be considered when a sentencing court considers the defendant's character and the need to protect the public, two of the three principal factors to be taken into account at sentencing. *See State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992).

