

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 1998

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. 96-1681-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CARL R. LIPPSTOCK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Carl R. Lippstock appeals from an order of the circuit court for Grant County, denying his motion for postconviction relief. We affirm because we conclude that Lippstock failed to comply with the requirement that his attorney appear at a hearing on ineffective assistance of counsel, and

because we conclude that the circuit court did not err in imposing a sentence outside the sentencing guidelines.

BACKGROUND

Lippstock was convicted of first-degree sexual assault of a child in 1995, and sentenced to fifteen years' imprisonment. Lippstock brought pro se¹ postconviction motions before the circuit court in early 1996, alleging ineffective assistance of counsel and erroneous exercise of sentencing discretion. The court denied the motions.

INEFFECTIVE ASSISTANCE

Lippstock brought a motion alleging ineffective assistance of trial counsel, which the court properly dismissed. When challenging effective assistance of counsel, a defendant must notify trial counsel in order to obtain counsel's presence at a hearing challenging counsel's conduct. *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979). Counsel's presence is a prerequisite to an appeal on ineffective assistance grounds. *Id.* However, Lippstock failed to obtain trial counsel's presence, and so forfeits the issue on appeal.

SENTENCING DISCRETION

Lippstock argues that the circuit court erred in failing to follow the sentencing guidelines in effect at the time of his sentencing. Former § 973.012,

¹ Lippstock dismissed his appointed appellate counsel before counsel could file a no merit brief. Lippstock then obtained an order permitting him to file these pro se postconviction motions.

STATS., in effect at the time Lippstock was sentenced,² required a court to state on the record why it was deviating from the guidelines. The guidelines for Lippstock's crime recommended five to seven years' imprisonment.

Sentencing lies within the trial court's discretion, and our review is limited to whether the trial court erred in exercising that discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors which the trial court must consider are the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 426-27, 415 N.W.2d at 541. The weight to be given to each of these factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). The court may also consider among other things, the defendant's criminal record; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the vicious or aggravated nature of the crime; degree of culpability; the defendant's remorse, repentance and cooperativeness; the need for close rehabilitative control; and the rights of the public. *State v. Iglesias*, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178, *cert. denied*, 115 S.Ct. 641 (1994).

Here, the court specifically noted aggravating circumstances, including a prior sexual assault conviction, Lippstock's lack of remorse, his failure to apologize, his prior failures at rehabilitation, and a diagnosis as a "criminal sexual psychopath." These were proper factors for the court's consideration, and they comply with the requirement of former § 973.012, STATS., that the court explain its deviation from the guidelines on the record.

² This section was repealed effective July 29, 1995, after Lippstock's February 1995 sentencing.

By the Court.—Order affirmed.

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

