COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3110-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROGER L. KAUFMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Juneau County: JAMES EVENSON, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Roger Kaufman appeals from a trial court order denying his motion to modify his sentence. He was convicted by a jury on October 26, 1989, of first-degree intentional homicide while using a dangerous weapon contrary to §§ 940.01 and 939.63(1)(a)2, STATS., and theft while using a dangerous weapon contrary to §§ 943.20(1)(a) and 939.63(1)(a), STATS. The

court sentenced him to life imprisonment plus five years for the homicide and a consecutive year in the county jail for the theft, and set his parole eligibility date on the homicide charge at twenty-five years.[1] The trial court denied Kaufman's motion to modify the sentence, concluding that it was not an erroneous exercise of discretion.[2] We agree and therefore affirm.

We review a trial court's sentence for an erroneous exercise of discretion. ***McCleary v. State***, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519-20 (1971). Because of the trial court's advantageous position, we presume that the sentence is reasonable, and the burden is upon the defendant to show that there is some unreasonable or unjustifiable basis for the sentence. ***Elias v. State***, 93 Wis.2d 278, 281-82, 286 N.W.2d 559, 560 (1980). The rationale is that the trial court has the advantage in considering all relevant factors, including the opportunity to observe the defendant. ***Cheney v. State***, 44 Wis.2d 454, 469, 171 N.W.2d 339, 346 (1969).

The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender, and the need for public protection. ***McCleary***, 49 Wis.2d at 274-76, 182 N.W.2d at 518-19. The court may also consider, among other things, the defendant's criminal record; history of

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[1] Kaufman filed a direct appeal from the homicide conviction, which this court affirmed in an unpublished opinion issued on November 27, 1990. The petition for review by the Wisconsin Supreme Court was denied. The State points out that a request to modify the sentence on the ground of erroneous exercise of discretion was not included in the direct appeal, nor was it presented by motion to the trial court within ninety days of the sentencing. *See* § 973.19(1)(a), STATS. The State contends that we could summarily dismiss Kaufman's appeal for this reason, without considering the merits, even though the trial court did not address this issue. Because we choose to decide the appeal on the merits, we do not address this procedural issue.

[2] Kaufman also contended before the trial court that a new factor warranted a modification of the sentence. The trial court denied that motion as well, and Kaufman does not pursue it on appeal.

undesirable behavior patterns; personality, character and social traits; results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; rights of the public and length of pretrial detention. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994). Although all relevant factors must be considered, the trial court determines how much weight to give each factor. *See* ***Anderson v. State***, 76 Wis.2d 361, 366-67, 251 N.W.2d 768, 771 (1977).

Kaufman was convicted for the fatal shooting of his mother-in-law, which occurred when he went to her home to contact his wife, who was then staying with her mother. A restraining order had been issued preventing Kaufman from contact with his wife, and he had been arrested and jailed for battering her. He went to his in-laws' home in violation of the restraining order. His defense was that the shot was accidentally fired and he had not meant to kill his mother-in-law.[3]

At Kaufman's sentencing hearing, both the prosecutor and defense counsel argued extensively, defense counsel made some corrections to the presentence report, and Kaufman spoke. The mandatory penalty for the homicide offense was life imprisonment, the maximum for the weapon enhancement for that offense was five years,[4] and it was within the trial court's discretion to set parole eligibility date for the homicide offense. *See* § 973.014(2), STATS., 1989-90. The prosecutor argued that Kaufman should spend his entire life in prison, because the

[3] We take these facts from our opinion on the direct appeal.

[4] *See* § 939.63(1)(a)2, STATS.

presentence report showed that he lacked remorse and that he had intended to kill his wife and daughter and might still kill his wife if he had the chance. Defense counsel acknowledged Kaufman's lack of remorse and his need for treatment of his drug and alcohol problems and his anti-social disorder, which defense counsel attributed to the violence Kaufman witnessed and experienced growing up. However, defense counsel argued that the court should select the option under § 973.014(1), whereby parole eligibility would be determined by the parole commission under § 304.06(1)(b), STATS., rather than setting a later parole eligibility date. Under that option, defense counsel contended Kaufman would have a parole eligibility date in approximately fourteen years, and that would be a sufficient minimum period of imprisonment and would allow for more if necessary. The defense also argued that the sentence for use of the dangerous weapon should be concurrent to the sentence to the homicide.

In setting the sentence for the use of a weapon during the homicide at five-years imprisonment, consecutive, the court stated that it was considering Kaufman's social history as set forth in the presentence investigation, the information presented at trial and the social information, concerning his childhood and adult life. With respect to the parole eligibility date for the homicide, the court stated that it was considering the seriousness of the offense, his need for rehabilitation and correction, and the need for the protection of the public, particularly the protection of his former father-in-law and his former wife. The court considered that the presentence report and the testimony at trial clearly established that he was a danger to others and to the public in general and noted that he had committed the most serious offense under the law. The court stated that there was a very real likelihood of his reoffending, based both on Dr. Lorenz's testimony at trial concerning his mental disorder and on his own statements during

the presentence investigation. The court observed that Kaufman needed treatment and that the treatment must be provided in a correctional setting. The court also stated that it was taking into account his age, which was then twenty. Based upon all those factors, the court concluded, it was setting his parole eligibility date at twenty-five years.

Kaufman argues that his offense did not warrant a "deviation from the minimum parole eligibility date" because, while the offense of first-degree intentional homicide is the most serious, the circumstances of his particular offense were not "particularly gruesome"; he had never before been convicted of a felony; and the homicide was caused by the emotional feelings resulting from his relationship with his wife, and "losing his daughter and his personal property." In his view, Dr. Lorenz's testimony that he was "a crime waiting to happen" demonstrates that it was the circumstances that triggered the offense. He also argues that the trial court erred by not considering that the longer parole eligibility date would affect his eligibility for vocational programs, and that, given his young age at the time of the offense, it was likely that rehabilitation and correction would occur as he matured. Finally, he contends that there was no evidence that he would reoffend and therefore the extended parole eligibility date is not necessary to protect the public.[5]

We are not persuaded by Kaufman's arguments that the trial court erroneously exercised its discretion in requiring Kaufman to serve twenty-five years before being considered for parole, rather than permitting parole eligibility

[5] Kaufman also refers in his brief to the petition signed by persons stating that the parole eligibility date set by the court is too harsh, but he does not explain why it is proper for us to take this document into account in deciding whether the trial court erroneously exercised its discretion at sentencing, and we do not see that it has any relevance to the proper inquiry on this appeal.

to be determined under § 304.06, STATS. Kaufman does not contend that the trial court did not consider the proper factors, or that it considered improper factors. Rather, he is disputing the way the trial court viewed the evidence, and the weight the court gave to particular evidence and to particular factors. However, whether another decision on parole eligibility could have been made on this record is not the proper inquiry.

The presentence report contained information that would support a conclusion that Kaufman lacked remorse, had intended to kill his wife and daughter and was still a danger to them and to his father-in-law. Under this view of the record, three people rather than one might well have been killed by Kaufman. The court could reasonably consider that a later parole eligibility date was necessary to impress upon Kaufman the seriousness of his crime, to adequately treat his anti-social disorder and other problems, and to protect his family and the public. We conclude the trial court properly exercised its sentencing discretion.

By the Court.—Order affirmed.

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