

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2026

Samuel A. Christensen
Clerk of Court of Appeals

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.

**Appeal No. 2024AP2551-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2016CF119

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTWON CORDERREL POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN P. ZAKOWSKI, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

¶1 GILL, J. Antwon Powell appeals from a judgment of conviction, entered upon a jury's verdicts, for first-degree intentional homicide with the use of a dangerous weapon and felon in possession of a firearm, each as a repeater. He also appeals from the circuit court's order denying his motion for resentencing.

¶2 On appeal, Powell argues that the circuit court erroneously exercised its discretion by “rigidly” applying the homicide victim’s life expectancy¹ when setting Powell’s extended supervision eligibility date. We conclude that a homicide victim’s life expectancy, and his or her family’s lost companionship, are appropriate factors for a sentencing court to consider. Here, the circuit court did not place undue weight on any single factor in determining Powell’s extended supervision eligibility date because the court tied the victim’s life expectancy to its overall sentencing objective of imposing a sentence that recognized the gravity of the offense and the harm done to the victim and his family. We affirm.

BACKGROUND

¶3 The State charged Powell with one count each of first-degree intentional homicide with the use of a dangerous weapon; first-degree recklessly endangering safety with the use of a dangerous weapon; and possession of a firearm by a felon, with all counts as a repeater. According to the complaint, Powell shot and killed Michael² and shot and injured another victim during the same December 2015 incident.

¶4 At trial, the State presented evidence that Powell shot Michael and the other individual because Powell believed that they had stolen approximately

¹ Throughout this decision, when we refer to the homicide victim’s “life expectancy,” we are referring to his estimated remaining life expectancy.

² Pursuant to the policy underlying WIS. STAT. RULE 809.86 (2023-24), we refer to the homicide victim in this case by a pseudonym. Although homicide victims are excluded from the confidentiality rule set forth in RULE 809.86(4) (2023-24), we nonetheless apply the rule here to protect the privacy of the victim’s family. See RULE 809.86(3), (5) (2023-24); WIS. STAT. § 950.02(4)(a)4.a. (2023-24).

All references to the Wisconsin Statutes are to the 2023-24 version.

\$500 and less than a pound of marijuana from him. The trial evidence demonstrated that Powell confronted Michael on the phone about the theft, went to his residence, rang the doorbell, and hid. When Michael came to the door and stepped out of the residence carrying a shotgun, Powell shot and killed him. The jury found Powell guilty of first-degree intentional homicide with the use of a dangerous weapon and felon in possession of a firearm, but it acquitted him of first-degree recklessly endangering safety.

¶5 The matter proceeded to sentencing, and the circuit court heard from Michael’s father, mother, and girlfriend (the mother of Michael’s son), all of whom asked for the court to impose “the maximum” sentence. The State delivered its arguments and asked the court to make Powell, who was 34 years old at the time sentencing, eligible for release to extended supervision in December 2060, 45 years after the shooting. Arguing that Powell’s prior criminal history was not lengthy and he was “not a huge risk to re-offend,” defense counsel asked the court to set Powell’s eligibility date for release to extended supervision “closer to ... the minimum” of 20 years. Powell exercised his right of allocution and apologized to Michael’s family.

¶6 The circuit court then delivered the sentence. The court stated that, with respect to the first-degree intentional homicide count, “[t]he only decision the Court has to make is to set [an extended supervision] eligibility date. The minimum is 20 years.” The court further asserted that it had “to look at the” *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, “factors and one of those factors is seriousness of the offense, and of course, nothing gets more

serious than a homicide case.”³ The court noted that it had “the benefit” of presiding over the trial and was therefore familiar with “the aggravated nature of the facts,” which the court found relevant to “setting [an extended supervision] eligibility date.” The court considered the homicide “really aggravated” because “[t]here was a lot more premeditation here than in most” cases and because Powell essentially ambushed Michael.

¶7 The circuit court also considered the homicide’s impact on Michael’s family. As to Michael’s father, the court stated, “I can’t imagine losing my only child under these circumstances and I have no reason to doubt the impact that, Mr. Powell, your actions had on [Michael’s father]. I mean, he’s really sentenced to a life sentence of grief.” The court further stated that Michael’s mother is “really in the same boat,” and it referenced her statements made in court and those she made to the PSI author about the effect the homicide had on Michael’s children. The court explained that Michael’s youngest son was only 2 months old at the time of his father’s death, that his father “was shot for 500 lousy dollars,” and that the youngest son “suffers a life penalty [of] never having his dad.”

³ The circuit court also stated that it had reviewed the two presentence investigation reports (PSI). Prior to the trial, Powell had entered an *Alford* plea to first-degree reckless homicide, and the circuit court ordered that a PSI be completed. See *North Carolina v. Alford*, 400 U.S. 25 (1970). However, prior to the originally scheduled sentencing, but after the first PSI had been submitted to the court, Powell successfully moved to withdraw his plea. After the trial, a second PSI was completed pursuant to the court’s order.

The author of the second PSI, in recommending a sentence on the first-degree intentional homicide conviction, stated that “[a]ny decision regarding [extended supervision] eligibility is respectfully left up to the Court.”

¶8 The circuit court also referenced Michael’s girlfriend’s statement that Powell “gave us a life sentence without [Michael].” The court agreed with her statement, commenting that Powell would “still have a life in prison” where he “can get cards, letters, [and] watch television,” while Michael’s family will not be able to “share those types of things with [Michael].” It further cited statements made to the PSI author by the mother of Michael’s daughter, in which she discussed “how devastating” Michael’s death was to both her daughter and herself. For example, the mother and daughter “now struggle with father/daughter dances that [Michael] can’t attend when he did so in the past.” The court stated that Powell “took that away and nobody thinks about that. It’s an emptiness.”

¶9 In addition, the circuit court considered Powell’s character, including the circumstances surrounding his upbringing. As to his prior criminal record, the court noted that Powell had prior convictions for armed robbery and manufacturing/delivering cocaine but that the court had “seen worse.” The court pointed out that Powell has “a learning disability” but commented that Powell is “an intelligent young man.” The court also stated that Powell used marijuana daily prior to his arrest, which “helped lead to th[is] mess,” but it agreed with the defense that Powell was “not a high risk to re-offend.” The court determined that while there was “some good” in Powell, it is “just outweighed by the gravity of the offense, the impact on all of these other people who are innocent.”

¶10 The circuit court also articulated that there was a “need to protect the public. There was this shooting outside because we’re trying to settle a score but then the public’s at risk, everybody is at risk. Stray bullets. We have to protect the public. We have to deter people.” Moreover, the court noted that it needed to consider punishment in its sentence. The court acknowledged that the family members had asked the court to sentence Powell to life without the possibility of

release, but it declined to do so, stating, “We’re not about an eye for an eye but we are about what is fair under the circumstances.”

¶11 The circuit court observed that “there’s no rule book” or “guide” for setting an eligibility date for release to extended supervision on a life sentence and that it had to “look at those *Gallion* factors.” The court stated that it “looked at life expectancy. [Michael] was born in [1983], and he was shot when he was 32, ... and back in 2015, the life expectancy was about 75 years.... He should have lived for another 43 years.” After noting that approximately five years had passed since the homicide, the court stated:

[W]hat the Court’s going to do is issue a life sentence with [an extended supervision] eligibility date of 38 years.... I’m trying to justify a number.... Today [Michael] would be living for 38 more years if you use the Life Expectancy Table and maybe the life expectancy numbers have gone up. I don’t know if it makes much difference [if it’s] 30, 35, 40. It isn’t a case where as much as I know the victims would like for the reasons stated I don’t think it’s a life without [extended supervision] but I think 38 years is appropriate

On the felon in possession of a firearm conviction, the court sentenced Powell to nine months’ jail, to run concurrently to the first-degree intentional homicide sentence.

¶12 Powell filed a motion for postconviction relief, arguing that he was entitled to resentencing because the circuit court erroneously exercised its discretion by improperly relying on Michael’s life expectancy when setting Powell’s extended supervision eligibility date. At a subsequent hearing, Powell argued that Michael’s life expectancy amounted to “an improper [sentencing] factor” and that the court had given “undue weight to” this factor. In response, the

State contended that the court properly exercised its discretion by applying the **Gallion** factors to the facts of the homicide.

¶13 The circuit court denied Powell’s postconviction motion in an oral ruling. The court reasoned that it had applied the **Gallion** factors when setting Powell’s extended supervision eligibility date, having had “the benefit” of presiding over the trial and knowing all of the facts. The court further stated that it “talked about life expectancy to try to come up and explain the number that it was going to use” for Powell’s extended supervision eligibility date. The court did not view its reliance on Michael’s life expectancy as improper because it had “indicated that it used the **Gallion** factors” to reach its decision. According to the court, “there has to be internally some basis that any judge uses to arrive at a number” for a defendant’s extended supervision eligibility date. The court later entered a written order encompassing its oral ruling.

¶14 Powell now appeals.

DISCUSSION

¶15 On appeal, Powell concedes that “[a] sentencing court might note that the victim had a long life ahead which was cut short, and that his survivors were also deprived of the victim’s support and companionship.” According to Powell, “[s]uch considerations are unobjectionable, as long as they are not given ‘too much weight.’” However, Powell continues, “[t]hat is not what happened [here]. Instead, the sentencing court, using life expectancy tables, determined exactly how long the victim might have expected to live, and converted that into how long Mr. Powell must wait to seek release to supervision.” According to Powell, “[r]igid application of life expectancy tables to determine the victim’s life expectancy and to then ... use that exact number to calculate release eligibility [is]

an erroneous use of discretion.” Stated differently, Powell argues that the issue with the court’s sentencing decision setting Powell’s extended supervision eligibility date is that the court used Michael’s life expectancy, not as a “sentencing *factor*,” but as a “sentencing *determinant*.”⁴

¶16 Like the State, we interpret Powell’s argument to be that the circuit court placed undue emphasis on Michael’s life expectancy, to the exclusion of the required ***Gallion*** factors, when setting Powell’s extended supervision eligibility date. See ***Gallion***, 270 Wis. 2d 535, ¶63. We review a circuit court’s sentencing decision for an erroneous exercise of discretion. ***State v. Whitaker***, 2022 WI 54, ¶11, 402 Wis. 2d 735, 976 N.W.2d 304.

¶17 First-degree intentional homicide, a Class A felony, carries a mandatory sentence of life imprisonment. See WIS. STAT. §§ 940.01, 939.50. Pertinent to this case, when a court sentences a person to life imprisonment, the court shall make an extended supervision eligibility date determination and choose one of the following three options: (1) the person is eligible for release to extended supervision after serving 20 years; (2) the person is eligible for extended supervision on a date after 20 years; or (3) the person is not eligible for release to extended supervision. WIS. STAT. § 973.014(1g)(a).

¶18 A circuit court’s determination of a defendant’s supervision eligibility date “is governed by the same factors that govern a sentencing decision: ‘the gravity of the offense, the character of the offender, and the need for

⁴ The State does not disagree with Powell that the circuit court relied upon Michael’s life expectancy when setting Powell’s extended supervision eligibility date.

protection of the public.”⁵ *State v. Barbeau*, 2016 WI App 51, ¶18, 370 Wis. 2d 736, 883 N.W.2d 520 (citation omitted). Additional related factors that a court may consider include:

- (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant’s personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant’s culpability; (7) defendant’s demeanor at trial; (8) defendant’s age, educational background and employment record; (9) defendant’s remorse, repentance and cooperativeness; (10) defendant’s need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

State v. Harris, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409 (citation omitted). A circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision, *Gallion*, 270 Wis. 2d 535, ¶68, and the weight to be given to each factor, *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

¶19 As Powell appears to concede, a homicide victim’s life expectancy, and his or her family’s lost companionship, are appropriate factors for a sentencing court to consider.⁶ While a victim’s life expectancy is not among the primary sentencing factors listed in *Gallion*, or the secondary factors listed in *Harris*, our supreme court has indicated that *Harris*’s list of additional factors, introduced by the word “includes,” is “non-exclusive.” See *State v. Arberry*, 2018

⁵ We note that the factors listed under WIS. STAT. § 973.017(2) do not apply to felonies punishable by life imprisonment. See § 973.017(1); WIS. STAT. § 973.01(3).

⁶ To the extent Powell does not make this concession, we conclude that a victim’s life expectancy is not an improper sentencing factor, for the reasons discussed in this opinion.

WI 7, ¶16 n.8, 379 Wis. 2d 254, 905 N.W.2d 832. In fact, appellate courts of this state have recognized that other factors not included in the twelve **Harris** factors are proper and relevant sentencing factors. A court may consider, for example, the life expectancy of a defendant. See **Stenzel**, 276 Wis. 2d 224, ¶20.

¶20 Significantly, statements from victims concerning how crimes affected their lives are “relevant to one of the considerations that a judge must take into account at sentencing—the gravity of the crime.” See **Gallion**, 270 Wis. 2d 535, ¶65 (citation omitted). And WIS. STAT. § 950.04(1v)(pm) gives crime victims⁷ the right to “have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim and have the information considered by the court.” See also WIS. CONST. art. I, § 9m(2)(j) (providing that crime victims have the right to give “economic, physical, and psychological” impact information to any “authority” over a case and “to have that information considered by that authority”); **State v. Naydihor**, 2004 WI 43, ¶78, 270 Wis. 2d 585, 678 N.W.2d 220 (discussing crime victims’ right to have certain information considered by a court at sentencing). Given the foregoing, the estimated remaining life expectancy of a homicide victim had the defendant not taken the victim’s life is a relevant and appropriate consideration in determining the defendant’s eligibility date for release to extended supervision.

¶21 Turning to the facts of this case, the circuit court properly exercised its sentencing discretion when setting Powell’s extended supervision eligibility date because the court’s decision to link this date to Michael’s life expectancy was

⁷ A “[v]ictim” includes “[a] family member of” a person against whom a crime has been committed if that person is deceased. WIS. STAT. § 950.02(4)(a)4.a.

grounded in its application of the **Gallion** factors, which focused on the gravity of the offense, particularly its impact on the victims, and the needlessness of the homicide. In delivering its sentencing remarks, the court repeatedly emphasized the gravity of the offense, including the homicide’s impact on Michael’s family. After discussing the victims’ statements concerning how the homicide affected their lives, the court stated that the “good” in Powell is “just outweighed by the gravity of the offense, the impact on all of these other people who are innocent.” The court agreed with Michael’s girlfriend that Powell gave Michael’s family “a life sentence without [Michael],” stating that Michael was “was shot for 500 lousy dollars.”

¶22 We agree with the State that, when read in context, the circuit court’s use of Michael’s life expectancy to determine Powell’s extended supervision eligibility date carried out the court’s objective of imposing a sentence that recognized the gravity of the offense and the harm done to Michael and his family. The court did not, as Powell contends, “rigidly appl[y]” Michael’s life expectancy without consideration of the **Gallion** factors or an explanation as to why Michael’s life expectancy was an appropriate date for setting Powell’s extended supervision eligibility. Nor did the court, after estimating Michael’s life expectancy, disregard all other sentencing factors. Rather, the court reasonably determined that Powell would not be eligible for release to supervision until the date when Michael’s family members’ “life sentence” might be said to expire—i.e., the date until which Michael probably would have lived had Powell not killed him.

¶23 Stated differently, the circuit court did not place undue weight on any single factor in determining Powell’s extended supervision eligibility date because Michael’s life expectancy was linked to, and an expression of, a required

Gallion factor—the gravity of the offense. Michael’s life expectancy was but one factor, and it was determinative only in that it fit within the court’s narrative concerning the homicide’s impact on the victims. Given the court’s heavy, yet reasonable, reliance on the gravity of the offense and the impact of the homicide on the victims, the court’s decision to link Powell’s extended supervision eligibility date to the date until which Michael’s family could have reasonably expected Michael to live was not improper.

¶24 Powell’s arguments to the contrary are unavailing. Powell contends that **Washington v. Elza**, 941 P.2d 728 (Wash. Ct. App. 1997), is the “one ... case in the country” addressing “a situation where the sentencing court used the victim’s life expectancy to calculate the sentence.” In **Elza**, a jury acquitted the defendant of felony murder, but it convicted him of the lesser-included offense of first-degree robbery. **Id.** at 730. Despite the acquittal, the sentencing court imposed an “exceptional sentence” of 252 months on the robbery conviction, which was “roughly equivalent to” the victim’s life expectancy and “within the standard range for a felony murder sentence.” **Id.** at 732.

¶25 On appeal, the Washington Court of Appeals concluded that the sentencing court should not have considered the victim’s death in imposing its sentence because his death “was not a valid aggravating factor” in light of the defendant’s acquittal of felony murder. **Id.** The court further concluded: “Because we are not persuaded that the court would have imposed the same sentence absent this factor, we vacate the sentence and remand for resentencing without consideration of this factor.” **Id.** **Elza** offers no assistance in this appeal because the court there did not address whether a victim’s life expectancy is a proper sentencing factor when the defendant is convicted of killing the victim.

¶26 Powell also argues that applying the circuit court’s “methodology generally to determine release eligibility dates would lead to unreasonable results.” Powell proposes that the “[d]eath of a 20-year-old with a life expectancy of perhaps another 60 years is quite different from [the] death of a 60-year-old who might have lived only another 20 years.” However, as the State aptly notes, sentencing courts retain *discretion* as to what factors are relevant to their sentencing decisions and the weight to be given to each factor. See **Gallion**, 270 Wis. 2d 535, ¶68; **Stenzel**, 276 Wis. 2d 224, ¶9. In other words, sentencing courts are not required to consider a victim’s life expectancy in a homicide case. Here, the court chose to do so because Michael’s life expectancy was relevant to the court’s ultimate sentencing objective under **Gallion** of imposing a sentence that recognized the gravity of the offense and the harm done to Michael and his family.

¶27 Lastly, citing **State v. Loomis**, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749, Powell compares a court’s reliance on a victim’s life expectancy at sentencing to a court’s reliance on a COMPAS⁸ risk assessment at sentencing.⁹ In **Loomis**, our supreme court held that while a COMPAS risk assessment may be a helpful tool to a sentencing court, the risk scores therein “may not be used as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community.” **Id.**, ¶98. “Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support

⁸ “COMPAS” stands for “Correctional Offender Management Profiling for Alternative Sanctions.” **State v. Loomis**, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

⁹ Powell raised this argument for the first time in his reply brief on appeal, and, as such, the State did not have an opportunity to respond to it. While this court need not address arguments that are raised for the first time in a reply brief, we exercise our discretion to address Powell’s argument in this instance. See **State v. Reese**, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396.

the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.” *Id.*, ¶99.

¶28 Despite the sentencing court in *Loomis* mentioning a COMPAS risk assessment in delivering its sentencing remarks, the supreme court declined to grant the defendant a resentencing because the record reflected that “the sentencing court considered the appropriate factors and was aware of the limitations associated with the use of the COMPAS risk assessment.” *Id.*, ¶109. Further, the COMPAS risk assessment “was not determinative in deciding whether [the defendant] should be incarcerated, the severity of the sentence or whether he could be supervised safely and effectively in the community.” *Id.*

¶29 Powell contends that like a COMPAS risk assessment, a victim’s life expectancy “may be relevant” and “may be a consideration to be balanced with other appropriate sentencing factors,” but it cannot be used “as a basis to mathematically calculate [a defendant’s] release eligibility date.” Again, however, the circuit court here discussed and considered each of the *Gallion* factors and then tied those factors to the facts of this case and, ultimately, to Michael’s life expectancy. The court clearly believed that Powell should be given the opportunity for release but that the homicide necessitated a period of incarceration beyond the minimum 20 years. As the sentencing transcript demonstrates, the court’s reliance on Michael’s life expectancy in determining Powell’s extended supervision eligibility date was grounded in the court’s broader reliance on the gravity of the offense and its impact on the victims.

¶30 In summary, a sentencing court’s use of a victim’s life expectancy when setting a defendant’s extended supervision eligibility date in a homicide case is not improper, per se. Here, the circuit court reasonably relied on Michael’s life

expectancy in determining Powell’s extended supervision eligibility date after relating Michael’s life expectancy to the court’s broader reliance, pursuant to ***Gallion***, on the gravity of the offense and its impact on the victims.¹⁰ We therefore affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¹⁰ We briefly note that Powell makes repeated references in his briefing to the fact that the circuit court did not share with the parties, or enter into the record, the life expectancy table that it used to calculate Michael’s life expectancy. At one point in his brief-in-chief, Powell states that the “use of such tables is objectionable” for that reason. We agree with the State that if Powell means to challenge the court’s sentence on this basis, he has not made a developed argument in support of such a claim. See ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Notably, Powell does not dispute that Michael’s life expectancy in 2015, the year of his murder, was 75 years.

