

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 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. 97-0318-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS STREAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Douglas Stream appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1) and 939.05, STATS. He also appeals from an order denying his post-conviction motion to modify his parole eligibility date. Stream argues that: (1) the trial court erred in refusing to instruct

the jury on the coercion defense; (2) the trial court erred in denying his motion to suppress an uncounseled statement that he alleges he gave to the police after he had invoked his right to counsel; (3) the trial court erred in denying his motion to suppress the shotgun that he alleges was illegally seized from his home; and (4) the trial court erroneously exercised discretion in imposing a life sentence that requires Stream to serve fifty-five years before becoming eligible for parole. We affirm.

I. BACKGROUND

On February 18, 1996, at about 11:10 p.m., Theodore Agnello was shot to death as he entered the back door of his home. A few seconds later, someone ran out of the back door and down the street, carrying a shotgun. Shortly thereafter, Lucian Agnello, Theodore's foster son, came running out of the front of the house and asked the neighbors if they had seen anything. Lucian then ran down the street in the same direction as the person with the shotgun, but returned after running to the end of the block.

The police arrived at the Agnello home at about 11:20 p.m. They took Lucian to the police station to question him about the shooting. Lucian confessed that he had wanted to kill Theodore, and that Stream agreed to help him. Lucian said that he purchased a shotgun in order to kill Theodore. He said that on the night of the murder he met Stream at Stream's home. The two of them drove separately until a few blocks away from Theodore's home, where Stream parked his car. Lucian said they then went to Theodore's home in Lucian's car, and waited for Theodore to get home from work. When Theodore drove into the driveway, Lucian went into the basement. Stream stood on the stairs leading to the basement, and Stream shot Theodore twice as he entered the house. Lucian

said that Stream then ran to his car and went home. Lucian told the police that they could find the shotgun in the attic of Stream's home, where the two of them had planned to hide it.

The police then obtained a search warrant for Stream's home. They recovered a shotgun from the attic, and arrested Stream. At the police station, the police informed Stream that Lucian had implicated him in the shooting, and Stream gave a statement. Stream's statement substantially agreed with Lucian's statement. Stream said that Lucian had asked him to kill Theodore. Stream said that Lucian came to his home on the night of the shooting, and that the two of them drove to Theodore's house in separate cars. Stream parked his car a few blocks away from the house and rode with Lucian to the house. Lucian gave Stream the shotgun when they were in the house. Stream said that when Theodore arrived, Lucian went to the basement and Stream waited on the stairs to shoot Theodore as he entered. Stream said that he shot Theodore in the chest as Theodore entered the back door, and that he shot Theodore again as he stood over Theodore before running out the door. Stream then ran to his car, drove home, and hid the shotgun in his attic as planned.

Contrary to these statements, both Stream and Lucian testified at trial that Lucian was the one who shot Theodore, and that Stream merely waited in his car and then hid the shotgun in his attic after Lucian ran from Theodore's home and brought it to him. Stream testified that he participated in the crime because he feared that Lucian would harm his family if he refused. The jury found Stream guilty of first-degree homicide as charged.

II. DISCUSSION

Stream argues that the trial court erred in refusing to instruct the jury regarding the coercion defense because coercion is a defense available to one who aids and abets a crime. He argues that he was charged as a party to the crime of first-degree intentional homicide, that the trial court instructed the jury that Stream could be found guilty as a party to the crime if he was an aider and abettor, and that he presented sufficient evidence to raise a coercion defense, and therefore he was entitled to a coercion instruction.

The State responds that Stream was not entitled to a coercion instruction because he did not present sufficient evidence to raise the defense. We agree. A trial court need only give a requested instruction where the evidence reasonably requires the instruction. *State v. Dyleski*, 154 Wis.2d 306, 310, 452 N.W.2d 794, 796 (Ct. App. 1990). On review of the denial of a requested instruction, the evidence is to be viewed in the light most favorable to the defendant. *State v. Stoehr*, 134 Wis.2d 66, 87, 396 N.W.2d 177, 185 (1986). The coercion defense is defined as follows:

A threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the *only means* of preventing *imminent death or great bodily harm* to the actor or another and which causes him or her so to act is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.

Section 939.46(1), STATS. (emphasis added).

Stream presented evidence that he did not shoot Theodore, but that he knew Lucian planned to kill Theodore and assisted Lucian in carrying out this plan because he feared that Lucian would harm him or his family. Both Stream and Lucian testified that Lucian threatened to harm Stream's family, and that

Stream therefore participated in the crime by waiting in his car for about twenty to thirty minutes while Lucian waited for Theodore to arrive and then shot him. They testified that Lucian then brought the shotgun to Stream and that Stream drove home and hid it in his attic.

Although this testimony provides evidence that Lucian threatened to harm Stream's family, it does not provide any evidence that harm was imminent or that Stream had no means to avoid the harm other than participating in Theodore's murder. The evidence does not show that Lucian was at any time in a position to harm anyone in Stream's family. Further, the evidence discloses that Stream and Lucian drove separately to the crime scene, and that Stream had at least twenty minutes outside of Lucian's presence before the murder, during which he could have contacted the police and prevented the murder. Because Stream failed to present evidence that there was an imminent harm and that he had no means to avoid the harm other than participating in the murder, the evidence did not reasonably require the coercion instruction. The trial court properly refused Stream's coercion instruction.

Stream next argues that the trial court erred in denying his motion to suppress a statement he gave to the police without the advice of counsel. He argues that he had requested an attorney prior to giving the statement but the police continued to question him without the presence of an attorney.

In order to gain admission of a defendant's custodial statement, the State must show by a preponderance of the evidence that the defendant knowingly and intelligently waived his *Miranda* rights.¹ *State v. Santiago*, 206 Wis.2d 3, 12,

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

556 N.W.2d 687, 690 (1996). When a defendant who is in custody requests an attorney, interrogation of the defendant must cease until an attorney is present unless the defendant validly waives the request. *State v. Long*, 190 Wis.2d 386, 394, 526 N.W.2d 826, 829 (Ct. App. 1994).

Whether a defendant has validly waived his right to counsel is an issue of constitutional fact that we review *de novo*. *Santiago*, 206 Wis.2d at 18, 556 N.W.2d at 692. The historical factual determinations underlying the findings of constitutional fact will be affirmed unless clearly erroneous. *State v. Lee*, 175 Wis.2d 348, 354, 499 N.W.2d 250, 252 (Ct. App. 1993); *see also* § 805.17(2), STATS. (trial court's findings of fact shall not be set aside unless clearly erroneous).

At the suppression hearing, Stream testified that after he had been arrested at his home, and before he was taken to the police station, he told Detective Michael Lewandowski that he wanted to speak to an attorney. Stream's roommate and good friend, James Pfaff, testified that he heard Stream make this request for an attorney in the presence of Lieutenant David Clarke. Stream also testified that he made several requests for an attorney after he was taken to the police station and while he was being questioned by Detective Lewandowski and Detective Gary Temp. Contrary to this testimony, Detective Lewandowski testified that Stream never asked him for an attorney. Lieutenant Clarke also testified that Stream never asked for an attorney in his presence. Detective Lewandowski further testified that, before making a statement, Stream was informed of his right to an attorney, he said that he understood that right, and he indicated that he was willing to make a statement. Stream also wrote his initials on a form next to a sentence indicating that he was aware of his rights and willing

to make a statement, and he signed his name after a sentence indicating that he understood his rights.

The trial court found that Stream did not request an attorney. This finding is supported by the evidence and is not clearly erroneous. The credibility of witnesses is a determination for the trial court, and conflicts in the testimony at a suppression hearing are resolved in favor of the trial court's finding. *State v. Flynn*, 92 Wis.2d 427, 437, 285 N.W.2d 710, 714 (1979). The trial court did not err in denying Stream's motion to suppress his statement.

Stream next argues that the trial court erred in denying his motion to suppress the shotgun that was recovered from the attic of his home. He argues that the warrant was not sufficiently particular because it did not specify which unit of the multi-family dwelling where he lived was to be searched, and, therefore the search violated the Fourth Amendment and the evidence seized should have been suppressed.

The constitutional reasonableness of a search is a question of law that we review *de novo*. *State v. Nicholson*, 174 Wis.2d 542, 545, 497 N.W.2d 791, 793 (Ct. App. 1993). The Fourth Amendment requires a search warrant to particularly describe the place to be searched and the person or thing to be seized. *Id.*

Although the warrant indicated that Stream resided at 2341 South 10th Street rather than 2341B South 10th Street, this technical error does not require suppression of the evidence seized in the search. It is undisputed that the police sought a warrant for the building in which Stream lived, that they performed a search of the portion of the building in which Stream lived, and that they recovered the challenged evidence from the attic of Stream's living area.

Although the police were unaware at the time they sought the warrant that the building in which Stream lived was a multi-unit dwelling, the search was aimed at the attic of the home indicated in the warrant, and the only access to the attic of the multi-unit structure was within Stream's apartment; thus Stream's apartment was subject to the warrant. The fact that the warrant did not accurately reflect Stream's address does not render the search unreasonable. *See id.*, 174 Wis.2d at 548, 497 N.W.2d at 794 (upholding the validity of a search conducted at an address other than the address stated in the warrant because the police were searching the place for which the warrant was sought and to which the warrant was intended to apply); *see also* § 968.22, STATS. ("No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant."); § 971.26, STATS. ("No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant.").

Stream's final argument is that the trial court erroneously exercised discretion when it imposed a life sentence that requires him to serve fifty-five years before becoming eligible for parole. Stream claims that the trial court failed to consider the proper factors in imposing sentence, that the trial court placed too much emphasis on the gravity of the crime, and that the sentence is excessive.

Sentencing is left to the sound discretion of the trial court, and we are limited on review to determining whether the trial court committed an abuse of discretion. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). We presume that the trial court acted reasonably in imposing sentence, and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. *Id.*, 119 Wis.2d at 622–

623, 350 N.W.2d at 638–639. The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the defendant, and the protection of the public. *State v. Patino*, 177 Wis.2d 348, 385, 502 N.W.2d 601, 616 (Ct. App. 1993). The trial court may also consider the defendant’s criminal record; history of undesirable behavior patterns; personality and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. *See State v. Curbello-Rodriguez*, 119 Wis.2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984).

The record discloses that the trial court considered the proper factors in imposing Stream’s sentence. Before imposing sentence, the trial court explicitly stated that it had to consider the nature and gravity of the offense, Stream’s background and character, and the interest and needs of the community. The trial court then cited specific evidence that it had heard regarding each of those factors, and explained how it was taking each of those factors into account. Within this analysis, the trial court noted not only details of the crime, but also Stream’s lack of a criminal record, his family and educational background, his work ethic, and the support offered by Stream’s family and friends. We therefore reject Stream’s argument that the trial court failed to consider the proper factors in imposing sentence.

We also reject Stream’s argument that the trial court placed too much emphasis on the gravity of the crime. Stream cites *State v. Thompson*, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992), for the proposition that a trial court erroneously exercises its discretion when it gives too much weight to one factor in the face of other contravening considerations. As noted, the record

reflects that the trial court considered several factors that were favorable to Stream. Thus, even if the trial court placed more weight on the gravity of the crime than on other sentencing factors, the trial court properly exercised discretion because it properly considered other contravening factors. The weight afforded to each of the relevant factors is particularly within the wide discretion of the trial court. *Curbello-Rodriguez*, 119 Wis.2d at 434, 351 N.W.2d at 768.

Stream's contention that his sentence is excessive is also without merit. Stream argues that his sentence is excessive because he must serve fifty-five years before he is eligible for parole. A trial court exceeds its discretion when it imposes a sentence so excessive as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *Thompson*, 172 Wis.2d at 264, 493 N.W.2d at 732. A defendant bears a heavy burden in challenging a sentence as excessive. *State v. Glotz*, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). This court will not upset a particular sentence merely because we would have meted out a different sentence. *State v. Roubik*, 137 Wis.2d 301, 310–311, 404 N.W.2d 105, 108–109 (Ct. App. 1987). Considering the brutal and heinous nature of the crime and Stream's substantial role in the crime, Stream's sentence is not excessive. The evidence disclosed that the victim was shot twice, at close range, as he entered his own home. The force of the second shot was so great that it pulverized the victim's brain and blew his entire face off. This crime was premeditated, and a substantial amount of evidence indicated that Stream was the one who actually pulled the trigger. The trial court properly exercised discretion in imposing Stream's sentence.

By the Court.—Judgment and order affirmed.

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

