

**COURT OF APPEALS
DECISION
DATED AND FILED**

JULY 15, 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. 97-2940-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER MACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Christopher Mack appeals from a judgment convicting him of robbery by use of force and burglary,¹ both as party to the crime, and from a postconviction order denying his sentence modification motion.

¹ Sections 943.32(1)(a) and 943.10(1), STATS.

On appeal, Mack argues that the trial court considered improper factors in sentencing him. We disagree and affirm.

The facts of the underlying incident are relevant to the appellate issue.² On the morning of December 24, 1995, Mack entered the bedroom of his roommate, Jack Heabler, and inquired whether Heabler knew who had stolen marijuana from Mack. Heabler denied any knowledge of the incident. In the early evening hours, Heabler's girlfriend came to the apartment and Mack told her to bring Heabler home that night because Mack wanted to "f—k him up." Doug Schroeder and two other individuals (Struble and Huba) went to Mack's apartment where they joined Mack and his brother. Another individual, Lambert, also arrived at the apartment.

Heabler and his girlfriend returned to the apartment in the early morning hours of December 25. Heabler denied stealing \$80 worth of marijuana when confronted by Mack. Mack, Struble and Lambert all demanded that Heabler pay Mack \$80 for the stolen marijuana. All three punched Heabler several times. Heabler then paid Mack \$80 and Mack went to his own bedroom.

Struble then demanded \$20 from Heabler but Heabler refused. Heabler heard someone yelling about swords and remembered that Mack had three swords in his room. Heabler then grabbed his own sword and closed his bedroom door. Heabler's door was kicked several times and then a sword was shoved through the door. When the door was kicked open again, Lambert and Schroeder were standing in the doorway and Struble was in the center with a sword in his

² The facts are taken from the preliminary examination, which Mack agreed would be the factual basis for his guilty and no contest pleas.

hand. Mack also brought swords out of his room and walked toward Heabler's bedroom.

Schroeder sprayed Heabler with pepper spray. Heabler covered his eyes to avoid being sprayed again, and when he saw legs coming at him, he thrust his sword in their direction. Lambert was stabbed and staggered out of the bedroom. Struble and Schroeder retreated. Heabler came out of his bedroom with a compound bow and arrow, ordered everyone out of the apartment and called 911. Emergency workers found Lambert outside on the sidewalk. Lambert, who had been stabbed by Heabler, died.

Mack was charged with robbery by use of force, burglary and felony murder. Plea negotiations resulted in dismissal of the robbery while armed and felony murder charges. Mack pled guilty to robbery by use of force and no contest to burglary. He alleges that the trial court erroneously considered Lambert's death and Lambert's mother's victim impact statement in sentencing him because he was neither charged nor convicted of a crime involving Lambert's death.

In sentencing Mack, the trial court considered Mack's character, his extensive record as a juvenile and his incarceration and treatment for mental health, drug and anger issues. The court also considered the nature and gravity of the offenses, noting that Mack instigated the confrontation with Heabler and involved others, including Lambert, in his dispute with Heabler. The court viewed Mack as the motivating force behind the series of events which resulted in Lambert's death. The court noted that even though Struble continued to assault Heabler verbally and physically after Heabler paid Mack the \$80, Mack returned with a sword from his bedroom and was "ready, willing and able to assist" the others. Finally, the court addressed the need to protect the public from crimes

involving drugs, drug dealing and weapons. The court then imposed a ten-year sentence for robbery and a consecutive seven-year sentence for burglary.

Mack argues that the trial court should not have considered Lambert's death because Mack was not convicted of a crime relating to Lambert's death. Mack also questions the trial court's consideration of a victim impact statement submitted by Lambert's mother. Mack essentially contends that his pleas to robbery and burglary insulated him from Lambert's death for purposes of sentencing. We disagree.

There is a strong public policy against interfering with a trial court's sentencing discretion. See *State v. Mosley*, 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). The record must show that the trial court exercised its discretion and stated its reasons for the sentence it imposed. See *id.* Trial courts typically consider three primary factors in sentencing: the gravity of the offense, the defendant's character and the need to protect the public. See *State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). "[T]he weight to be accorded to particular factors in sentencing is for the sentencing court, not the appellate court, to determine." *State v. Spears*, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988).

At the postconviction motion hearing on sentence reduction, the trial court noted that the victim impact statement tied into its consideration that Lambert was killed during the events for which Mack was convicted of robbery and burglary. The court affirmed that it was not sentencing Mack for Lambert's death. Nevertheless, Lambert's death was relevant to the three primary sentencing factors. See *State v. Bobbitt*, 178 Wis.2d 11, 18, 503 N.W.2d 11, 15 (Ct. App. 1993).

We conclude that the trial court was entitled to consider the consequences of Mack's plan to obtain money from Heabler, even if Mack was not convicted of those consequences. In addition to the primary sentencing factors mentioned above, the trial court properly considered the vicious or aggravated nature of the crime and the degree of Mack's culpability. *See State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The trial court's discussion of Lambert's death was related to its assessment of Mack's culpability. Mack did not withdraw after he obtained the money from Heabler; rather, he armed himself and returned to Heabler's bedroom and continued to be involved in the confrontation. Furthermore, it was Mack's plan to confront Heabler and all of the persons in the apartment other than Heabler were present at Mack's behest and in furtherance of his plan to obtain money from Heabler.

Because we conclude that the trial court did not err in considering Lambert's death in sentencing Mack, the trial court did not err in considering Lambert's mother's victim impact statement. We reject Mack's complaint that he did not have an opportunity to review the statement until the sentencing hearing. The record reflects that the trial court afforded Mack and his counsel an opportunity to review the statement prior to proceeding with sentencing and waited until Mack was ready to proceed. We see no prejudice in the manner in which the statement was handled at sentencing.

By the Court.—Judgment and order affirmed.

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

