

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 16, 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. 97-3110-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOUA YANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Toua Yang appeals his convictions for armed robbery and operating a vehicle without the owner's consent, both as a party to the crime, having pleaded guilty to both charges. Yang and three other gang members joined in a violent home invasion where they wielded a gun and clubbed the occupants with a baseball bat. The trial court sentenced Yang to concurrent

twenty-year and five-year prison terms on the armed robbery and motor vehicle charges. Yang argues that the trial court wrongly saw him as the ringleader, unlawfully relying on inaccurate information in his presentence investigative report and that of his co-perpetrators, in violation of due process. *See State v. Mosley*, 201 Wis.2d 36, 44, 547 N.W.2d 806, 809-10 (Ct. App. 1996). Yang's sentence was a discretionary decision dependent on the gravity of his offense, the nature of his overall character, the public's need for protection, and the interests of deterrence. *See State v. Sarabia*, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Because the record supported the trial court's exercise of discretion, we reject Yang's arguments and affirm his sentence.

First, we are satisfied that the trial court did not rely at sentencing on a presentence report for its gang leadership finding. For that finding, the trial court expressly cited an informant's statement in a police report which is a proper source of information. The trial court was also aware of the potential unfairness of relying on the presentence report and informed the parties of this concern. The trial court's decision enjoys a presumption of regularity. *See State ex rel. LaFollette v. Circuit Ct.*, 37 Wis.2d 329, 344, 155 N.W.2d 141, 149 (1967). Yang had the burden to show improper reliance. *See State v. Littrup*, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). In addition, the trial court confirmed the source of his information at the postconviction hearing when it clarified that it gained the leadership role information from the police report, along with a statement Yang made implying a leadership role to the presentence report's author. Moreover, the trial court at all times acknowledged the uncertainty over who did what in the crimes, and Yang disputed his leadership role at sentencing. This put the issue in proper perspective, and we are satisfied that the trial court fully understood the degree of dispute on this point at sentencing.

Second, the trial court could reasonably rule that Yang failed at the postconviction hearing to disprove a leadership role. The trial court there rejected the testimony of witnesses, including gang members, that Yang had not led the gang. The court found their testimony unsubstantial and unpersuasive. For example, one gang member did not know who the leader was but knew Yang was not the leader. Another witness, a friend of Yang, knew that Yang was not the leader but did not know who the gang members were. She was not present during the crime. Two other non-gang acquaintances thought Yang was not the leader. Another gang member assured the court of the same. Yang himself testified and denied a leadership role, but the trial court found his testimony unpersuasive. The trial court was the final arbiter of this evidence, and we will not overturn its judgment. See *Johnson v. Merta*, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980). In short, Yang did not carry his postconviction burden.

Third, Yang's leadership role was to a large extent immaterial to his sentence. In the eyes of the law, Yang was equally culpable with the others, regardless of the leadership issue. The gang members shared in a violent break-in in a material way, standing ready at the scene to assist or prevent interference in the crime if necessary. Here, the trial court explained at the postconviction hearing that the leadership issue played a minor role in its sentencing calculus. It then reviewed the more important factors, such as how the gang's unified acts made the crime work. The trial court emphasized how the gang members fed off each other and how their massed force was critical to the crime's success. It was the sum of the parts, not the parts themselves, that was decisive. The trial court had the sentencing discretion to give each gang member the same sentence on that basis. In short, the evidence showed that Yang had had a critical role in the crime,

regardless of any leadership role, and we see nothing excessive in the trial court's sentence.

By the Court.—Judgment and order affirmed.

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

