

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 11, 2018**

Sheila T. Reiff  
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. 2016AP2222-CR**

**Cir. Ct. No. 2013CF431**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DARSHAWN E. FRISON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Darshawn Frison appeals from a judgment convicting him of two counts of first-degree intentional homicide as party to the crime and with dangerous weapon enhancements and from a circuit court order denying his postconviction motion challenging his sentence. We affirm.

¶2 Frison pled guilty to two counts of first-degree intentional homicide as party to the crime and with dangerous weapon enhancements.<sup>1</sup> Frison was seventeen years old when he committed the 2013 crimes<sup>2</sup> and nineteen years old at sentencing. Pursuant to the plea agreement, the State recommended extended supervision eligibility after fifty years.

¶3 For first-degree intentional homicide, a Class A felony, the sentence is life imprisonment. WIS. STAT. § 940.01(1)(a) (2013-14);<sup>3</sup> WIS. STAT. § 939.50(3)(a). When imposing a life sentence, the circuit court has the opportunity to determine an extended supervision eligibility date anytime after the defendant has served twenty years. WIS. STAT. § 973.014(1g)(a). In Frison's case, the circuit court imposed two concurrent life sentences with extended supervision eligibility in fifty years or 2063 (the year Frison reaches age sixty-seven).

¶4 Postconviction, Frison challenged his sentence on two grounds: (1) his sentence violated the Eighth Amendment because the sentence amounts to

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<sup>1</sup> Charges of felon in possession of a firearm and conspiracy to commit armed robbery were dismissed as part of the plea agreement.

<sup>2</sup> Frison became eighteen years old approximately six months after he committed the crimes.

<sup>3</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

either an actual or *de facto* life sentence without parole; and (2) the circuit court misused its discretion because it did not impose an individualized sentence in light of Frison’s youth and other relevant factors. The circuit court denied relief on several grounds: (1) as part of the plea agreement, Frison agreed that the State could argue for extended supervision eligibility after fifty years; (2) the circuit court properly exercised its discretion when it determined which sentencing factors to weigh most heavily and placed the most weight on the need to protect the public from a defendant who chose to murder two people; (3) the court considered the seriousness of Frison’s crimes, his history of criminal and violent offenses, and his character; (4) the court considered Frison’s age, personal history and mitigating factors; and (5) the predictions regarding Frison’s life expectancy did not compel a different approach to setting Frison’s extended supervision eligibility date.

¶5 On appeal, Frison relies on *Miller v. Alabama*, 567 U.S. 460 (2012), to argue that his life sentence with fifty-year extended supervision eligibility was an Eighth Amendment violation because he was a juvenile when he committed his crimes. In *Miller*, the Supreme Court held that it was an Eighth Amendment violation to sentence a juvenile to life in prison without the possibility of parole. *Id.* at 479.

¶6 In *State v. Barbeau*, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, we recognized the following principle from *Miller*: “the Eighth Amendment requires that before a sentence of life imprisonment without the possibility of parole may be imposed, a sentence ‘akin to the death penalty,’ a judge must be able to make an ‘individualized’ sentencing determination, allowing for the consideration of the juvenile’s age.” *Barbeau*, 370 Wis. 2d 736, ¶41 (citations omitted). As the *Barbeau* court recognized, this principle is not at stake where a

juvenile is not sentenced to life in prison without the possibility of future release, and where the circuit court has discretion to determine the date of possible future release. *Id.*

¶7 Barbeau was convicted as a juvenile of being party to the crime of the first-degree intentional homicide; he faced the same sentence structure as Frison. The *Barbeau* court noted that the circuit court had discretion to determine Barbeau’s punishment, “taking into account Barbeau’s youth, in deciding when, if ever, he should be eligible for supervised release.” *Id.* In contrast, the sentencing court in *Miller* had no discretion in relation to the imposition of a life sentence. *Barbeau*, 370 Wis. 2d 736, ¶41.

¶8 Frison received concurrent life sentences with the possibility of release to extended supervision after fifty years.<sup>4</sup> Frison’s Eighth Amendment claim lacks factual and legal support. *Id.*

¶9 Having rejected Frison’s Eighth Amendment claim, we turn to the circuit court’s exercise of sentencing discretion. We conclude that the circuit court made an individualized sentencing determination and took into account Frison’s youth as required by *Barbeau*.

¶10 With regard to the sentence, the record reveals that the sentencing court’s discretionary decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to setting a fifty-year extended

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<sup>4</sup> For this reason, *Tatum v. Arizona*, 137 S. Ct. 11 (2016), also does not apply. In *Tatum*, the juvenile defendants received sentences of life without parole. *Id.* at 12. As discussed, Frison is eligible for extended supervision after fifty years.

supervision eligibility date. In fashioning the sentence, the court credited Frison for entering guilty pleas after only one day of trial, which spared the victims' families an entire trial. The court considered the impact on the victim's families and that Frison entered a plea agreement in which the State agreed to recommend fifty-year extended supervision eligibility. The court also considered Frison's youth, personal history and development challenges, including being born with cocaine in his system and experiencing childhood neglect, and receiving social services during his lifetime.<sup>5</sup> The court also considered other mitigating circumstances, and his history of prior offenses.

¶11 In addressing the sentencing factors, the circuit court considered Frison's youth but stated that its primary focus was on the need to protect the public from a person who was indifferent to human life and who believed that murdering two people was an acceptable course of action. The court found that Frison's character was such that he was persuaded to assist in a robbery, and he then shot the two victims multiple times. The circuit court drew inferences about Frison's decision-making and character from the circumstances of the crimes, inferences which the court was not prepared to attribute to Frison's youth, noting that Frison was six months shy of his eighteenth birthday at the time he committed the murders. The court found that Frison's youth did not outweigh the need to protect the community. The weight of the sentencing factors was within the circuit court's discretion. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d

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<sup>5</sup> During his sentencing argument, defense counsel drew the circuit court's attention to the deficits Frison experienced as a result of his in utero exposure to drugs, including limited intellectual functioning and developmental delays. The circuit court also had before it a private presentence investigation report and a neuropsychological assessment, and defense counsel brought these materials to the court's attention. Defense counsel also made specific arguments about the significance of Frison's youth on his decision-making abilities.

224, 688 N.W.2d 20. All of the circuit court's sentencing considerations were part of an appropriate exercise of discretion. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court found the fifty-year extended supervision eligibility date appropriate.

¶12 Frison argues that eligibility for extended supervision after fifty years amounts to an actual or *de facto* life sentence because his life expectancy in either society or in prison does not approach age sixty-seven. The circuit court acknowledged the life expectancy information Frison provided during the postconviction motion hearing, but the court did not find this information persuasive because circumstances can change. The court reiterated that Frison agreed to a plea agreement that included a fifty-year extended supervision eligibility recommendation.

¶13 We conclude that under the circumstances of this case, Frison's Eighth Amendment claim does not prevail. We further conclude that the circuit court properly exercised its discretion when it required Frison to serve fifty years before being eligible for release to extended supervision.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2015-16).

