

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2002

Cornelia G. Clark
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. 01-1072-CR

Cir. Ct. No. 93-CF-209

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS GODSCHALX,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Thomas Godschalx appeals from an August 2000 amended judgment of conviction following resentencing and from an April 2001 order denying his postconviction motion. On appeal, Godschalx challenges the sufficiency of the evidence to convict him of first-degree sexual assault of a child and the resentencing on all counts for which he was convicted. He also alleges a

due process claim relating to an increase in his sentence on resentencing. We reject all of these challenges and affirm.

¶2 This case has a somewhat lengthy history. In December 1993, a jury convicted Godschalx of two counts of child enticement (one while armed), one count of exposing genitals to a child while armed and one count of first-degree sexual assault of a child while armed. At the sentencing in January 1994, the circuit court did not have the benefit of a presentence investigation report (PSI). On direct appeal in April 1995, Godschalx argued that the State did not prove the “while armed” weapon enhancer portion of these offenses. We agreed, and we reversed and remanded for entry of a modified judgment of conviction deleting the weapon enhancers and resentencing on the underlying crimes. *State v. Godschalx*, No. 94-2078-CR, unpublished slip op. at 3 (Wis. Ct. App. Apr. 12, 1995).

¶3 As required by our decision, Godschalx was resentenced in December 1995 after the circuit court received a PSI. Godschalx did not appeal this resentencing. Because the first PSI contained inaccurate information, the circuit court ordered a second PSI and held a second resentencing in August 2000. Thereafter, Godschalx filed a postconviction motion alleging insufficient evidence of first-degree sexual assault of a child and a double jeopardy and due process violation arising from the August 2000 resentencing.

¶4 In disposing of Godschalx’s postconviction motion, the circuit court held that Godschalx waived his sufficiency of the evidence claim when he failed to raise the issue in two previous postconviction motions and on direct appeal. The court observed that even if the issue were not waived, there was sufficient evidence of sexual contact to warrant a conviction for first-degree sexual assault.

¶5 As to the double jeopardy and due process challenges to the August 2000 resentencing, the circuit court noted that at that sentencing, it had the benefit of information which the original sentencing judge did not have and which justified a longer sentence .

¶6 The circuit court also rejected Godschalx's claim that it lacked authority to resentence him on count five, child enticement without a weapon. First, the court concluded that the instructions on remand from this court required resentencing on all crimes. Second, at resentencing, Godschalx received a five-year sentence for count five, the same sentence imposed by the original sentencing judge. Therefore, Godschalx was not harmed on resentencing.

¶7 On appeal, Godschalx argues that there was insufficient evidence that he committed first-degree sexual assault of a child by sexual contact. Godschalx claims that the only evidence of sexual assault came from the testimony of the victim. Godschalx acknowledges that he raised this issue for the first time in his March 2001 postconviction motion, well into the postconviction and appeal process. However, Godschalx argues that his prior postconviction counsel was ineffective.

¶8 We conclude that Godschalx did not allege insufficiency of the evidence with any specificity in his March 2001 motion. The motion alleges that prior postconviction and appellate counsel were ineffective in several respects and that the circuit court erroneously sustained the State's objection to trial counsel's question whether something other than Godschalx's penis could have touched the victim's back (the factual basis for the first-degree sexual assault charge). The motion does not argue insufficiency of the evidence with the requisite specificity.

¶9 Furthermore, the circuit court held that even if the sufficiency of the evidence claim were not waived, there was sufficient evidence in the testimony of the victim. Finally, the circuit court held in the June 1999 postconviction proceedings that all prior counsel rendered effective assistance. Godschalx did not appeal this determination. Therefore, he cannot now challenge counsel's effectiveness.

¶10 We turn to Godschalx's challenge to the August 2000 resentencing. Godschalx argues that because our remand for resentencing related to the lack of proof of a weapon, the circuit court should not have resenteded Godschalx on count five, child enticement without a weapon.

¶11 We disagree with Godschalx's interpretation of our directions on remand. We stated:

In light of these comments by the [sentencing] court, we cannot say with any confidence that Godschalx's sentence was free of influence of the erroneous convictions. Accordingly, we reverse the postconviction order and the weapon enhanced portions of the judgment of conviction, and we remand the cause to the circuit court for the entry of a judgment on the underlying *crimes* only and for resentencing.

Id. (emphasis added).

¶12 Our directions on remand specifically contemplated resentencing on all of the underlying crimes because of our concern that Godschalx's sentence should be free of the influence of the erroneous convictions involving the use of a weapon. We held that "the weapon enhancer components did factor into the court's sentencing." *Id.* at 2. Sentencing integrates all of the convictions before the court and, as is clear from the record of the original sentencing, it is not possible to carve out the count five sentence from the other sentences.

¶13 Finally, we note that at the second resentencing in August 2000, the circuit court imposed a five-year term on count five, the same term imposed at the original sentencing. Therefore, we fail to see the harm to Godschalx arising from resentencing on count five.

¶14 We turn to Godschalx's last issue: an alleged double jeopardy/due process violation relating to his increased sentence after remand from this court. The circuit court's August 2000 sentence amounted to a ten-year increase for Godschalx's crimes, even though the weapon enhancer was no longer a factor. Godschalx contends that the resentencing court did not have any new information which justified an increased sentence.

¶15 On resentencing, a court may impose a more severe sentence only if that sentence can be justified by new objective factors. *State v. Stubbendick*, 110 Wis. 2d 693, 698, 329 N.W.2d 399 (1983). This requirement is satisfied by "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." *Id.* (citation omitted). At resentencing, the court should "consider all information relevant about a defendant, including information about events and circumstances either that the sentencing court was unaware of at the initial sentencing or that occurred after the initial sentencing." *State v. Carter*, 208 Wis. 2d 142, 146, 560 N.W.2d 256 (1997).

¶16 Godschalx's challenges are based on due process concerns, not double jeopardy concerns. Double jeopardy is not implicated by his resentencing. *See State v. Pierce*, 117 Wis. 2d 83, 88, 342 N.W.2d 776 (Ct. App. 1983). Due process is implicated if a court increases a sentence without new information or newly known information. *Carter*, 208 Wis. 2d at 156. We review whether the

circuit court stated a sufficient basis for imposing a lengthier sentence in August 2000.

¶17 The circuit court, in resentencing Godschalx, expressly stated that it had before it more negative information about Godschalx than did the original sentencing court. The record bears this out.

¶18 At the original sentencing, the sentencing court did not have the benefit of a PSI. At the first resentencing, the sentencing court had the benefit of an extensive PSI. The resentencing court noted new information regarding Godschalx's previous criminal conduct. Godschalx had denied any prior criminal conduct at the original sentencing, which the court considered in fashioning its sentence. The PSI noted other offenses, including indecent exposure and sexual fantasies involving children. None of this information was before the original sentencing court. In resentencing Godschalx on the first occasion, the court noted Godschalx's history of criminal conduct, the gravity of the offenses and the need to protect the public.

¶19 At the second resentencing, the circuit court considered the original PSI and a new, corrected PSI.¹ The court considered the same factors as before, particularly Godschalx's previous offenses. The circuit court imposed a sentence which was longer than the original sentence but less than the first resentence. The court noted that the original sentencing court did not have the impressions of the two PSI authors before it. Both authors had negative impressions of Godschalx and recommended lengthy periods of incarceration.

¹ The second resentencing was necessitated by errors in the first PSI relating to the details of one of Godschalx's indecent exposure convictions.

¶20 Because the record reveals a sufficient basis for imposing a lengthier sentence, we conclude that the August 2000 resentencing did not violate due process.

By the Court.—Judgment and order affirmed.

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

