

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 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. 01-1231-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 95-CF-274**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,  
  
PLAINTIFF-RESPONDENT,  
  
V.  
  
MICHAEL W. SLINKER,  
  
DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Washington County:  
ANNETTE K. ZIEGLER, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 BROWN, J. Michael W. Slinker was sentenced in Washington County to a twenty-five year prison term to be served concurrently to a twenty-year term imposed in Sheboygan County. Subsequently, Slinker successfully appealed the Sheboygan County case; it was dismissed, new charges were filed and he was sentenced to a twenty-year term to be served consecutively to the

Washington County sentence. Because the net result of the Sheboygan proceedings was to increase his cumulative prison time from twenty-five years to forty-five years, Slinker argues that Sheboygan County's subsequent sentence is a new factor warranting modification of the Washington County sentence. He also claims the prosecutor for Washington County breached the plea agreement by opposing his motion for sentence modification. We disagree with Slinker on both issues and affirm.

¶2 On February 28, 1996, Slinker was convicted by a Sheboygan County jury of two counts of first-degree sexual assault in incidents involving his daughter. He was sentenced to twenty years' imprisonment on the first count and was placed on probation for a consecutive ten-year term on the second count. On May 13, 1996, Slinker pled guilty in Washington County to charges of first-degree sexual assault and incest in an incident involving another daughter. Slinker was sentenced pursuant to a plea agreement to a twenty-five year prison sentence (twenty years on the sexual assault charge and five years consecutive on the incest charge) to run concurrent with the twenty-year sentence previously imposed in the Sheboygan County case.

¶3 In 1998, the conviction and sentence in the Sheboygan County case were vacated on the grounds that Slinker had received ineffective assistance of counsel. That case was dismissed and the prosecutor re-filed sexual assault charges against Slinker in Sheboygan County, charging seven counts, and pursuant to a plea agreement, he pled guilty to two counts. Slinker was again sentenced to a twenty-year term on the first count; however, the sentence was to be served consecutively to the twenty-five year term he was already serving in Washington County. The court also imposed and stayed a twenty-five year sentence on the

second count, and placed him on probation for twenty years consecutive to the first count.

¶4 Slinker then filed a motion for sentence modification in Washington County, arguing that the subsequent sentence in Sheboygan County was a new factor justifying modification because it frustrated the purpose of the Washington County sentence by “effectively increasing [it] from 5 to 25 years.” The trial court denied the motion and Slinker appeals.

¶5 To obtain sentence modification based on a new factor, a defendant must show the existence of a new factor by clear and convincing evidence. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). If the defendant demonstrates the existence of a new factor, the trial court must determine whether that factor justifies sentence modification. *Id.* Not every factor which the sentencing court could have considered, but did not, is a new factor warranting sentence modification. Rather, “[a] new factor is a fact that is highly relevant to the imposition of sentence but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it.” *Id.* “There must also be a nexus between the new factor and the sentence; the new factor must operate to frustrate the sentencing court’s original intent when imposing sentence.” *Id.* Whether a new factor exists presents a question of law we review de novo. *State v. Scaccio*, 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449.

¶6 Slinker contends that when the original Sheboygan County twenty-year judgment and sentence were vacated and Slinker was subsequently recharged and resentenced to a twenty-year consecutive sentence, that subsequent Sheboygan County sentence frustrated the sentencing intent of the court in Washington

County. According to Slinker, the intent of the Washington County court in sentencing him to twenty-five years concurrent to the original twenty-year Sheboygan County sentence was really to impose a five-year “net” sentence in Washington County—a five-year add-on sentence to the twenty-year Sheboygan County sentence—because the Washington County court believed that a total of twenty-five years was an appropriate sentence for Slinker’s conduct in both Washington and Sheboygan Counties. The record of the sentencing hearing in Washington County belies Slinker’s claim.

¶7 In imposing the twenty-five year sentence, the Washington County court listed the reasons that a lengthy sentence was warranted for Slinker’s conduct. These included Slinker’s long history of substance abuse, failure to accept responsibility for the assaults, the seriousness of the offense, and the effect on the victim. The court never evinced any intent that Slinker’s conduct in Washington County warranted anything less than twenty-five years.

¶8 Slinker claims that the concurrent nature of the twenty-five year Washington County sentence indicates that the court had intended its sentence to operate as just a five-year add-on to the antecedent Sheboygan County sentence. We find no logic in his reasoning. Denominating a sentence as consecutive or concurrent, without more, merely identifies the starting date of the sentence when a defendant happens to have had another sentence imposed previously. Here, Slinker began his twenty-five year Washington County sentence when the court specified, i.e. immediately, and having done so, Slinker has received all of the benefit that concurrent sentencing confers.

¶9 Furthermore, if, as Slinker contends, the Washington County court had only intended its sentence to be a “net” term to the Sheboygan County case, it

would have sentenced Slinker to a five-year consecutive prison term, not a twenty-five year concurrent prison term. Indeed, the fact that the antecedent sentence was reversed was a risk known to the Washington County court at sentencing. This is because a court in a subsequent sentencing proceeding always faces the prospect that an antecedent sentence might get overturned. In this instance, the Washington County court must have known that if the antecedent case got overturned or modified, the twenty-five year sentence would not disappear—Slinker would still face twenty-five years on the Washington County charges.

¶10 We are also persuaded by the reasoning of the Washington County court that heard Slinker’s motion for sentence modification. The court held that it could not modify its sentence based upon the subsequent sentencing in Sheboygan County because to do so would frustrate the intent of the Sheboygan County court, which had imposed a consecutive sentence in the exercise of its discretion. The Washington County court explained that to allow Slinker to prevail in these circumstances would constitute a kind of post-sentencing forum shopping:

When [Slinker] chose to appeal his Sheboygan County sentence and ask for a new trial, he also ran the risk that he would receive a new sentence on that case if convicted. That is exactly what happened and now he seeks relief from the Washington County court in an effort to thwart the sentence imposed by the Sheboygan County Judge.... If this court were to grant the relief sought by [Slinker], then wouldn’t the same logic apply to allow the Sheboygan County case to be re-opened and a new sentence imposed? There would be no sensible stopping point.

¶11 As an alternative argument, Slinker contends that the Washington County prosecutor breached the plea agreement by opposing his motion for sentence modification. Slinker concedes that the prosecutor fully complied with the plea agreement at the time of his sentencing in Washington County, but argues the prosecutor was obligated to stand by that agreement when the subsequent

Sheboygan County sentencing frustrated the purpose and intent of the Washington County plea agreement and rendered the plea agreement and sentencing unjust.

¶12 Contrary to Slinker's contention, the prosecutor did not breach the plea agreement in this case. The parties' agreement was only that the State would recommend a twenty-five year concurrent sentence at sentencing, and that is exactly what the prosecutor did. Slinker has not demonstrated that the parties' plea agreement was intended to extend beyond the original sentencing hearing. *See State v. Windom*, 169 Wis. 2d 341, 350, 485 N.W.2d 832 (Ct. App. 1992). Nothing in the plea agreement prohibited the prosecutor from later responding to Slinker's sentence modification motion in the manner that she did.<sup>1</sup> Therefore, we conclude there has been no material and substantial breach of the plea agreement. *State v. Bangert*, 131 Wis. 2d 246, 288, 389 N.W.2d 12 (1986).

¶13 In sum, Slinker has failed to show by clear and convincing evidence that the subsequent Sheboygan County twenty-year consecutive sentence is a new factor warranting sentence modification. The fact that as a result of re-sentencing in Sheboygan County he now faces increased prison time was a risk he undertook when he chose to appeal his original Sheboygan conviction. Because the prosecutor was in no way responsible for the changed circumstances, no breach of the plea agreement has occurred.

*By the Court.*—Order affirmed.

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<sup>1</sup> In her written response to Slinker's sentence modification motion, the prosecutor emphasized that her intent was not to breach the plea agreement she had reached with Slinker. The prosecutor expressed her belief that his motion should have been raised in Sheboygan County and that the subsequent Sheboygan County sentence was not a new factor warranting sentence modification in Washington County.

Not recommended for publication in the official reports.

