COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1471-CR **Cir. Ct. No. 99-CF-581**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER W. KARNSTEIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

¶1 BROWN, J.[1] Walter W. Karnstein pled no contest to appearing as a respondent to a harassment action and orally making two false statements while under oath. He also pled to disorderly conduct in sending e-mails to his former girlfriend which included nude photos of her and a companion. The trial court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

sentenced Karnstein to thirty-six months of probation on the first false swearing, nine months in jail on the second and an additional ninety days in jail, consecutive, on the disorderly conduct. Karnstein's postconviction motion requested that the plea be withdrawn based on newly discovered evidence showing that he was not the source of internet postings of his former girlfriend in the nude and that trial counsel was ineffective for various reasons. In the alternative, Karnstein asked that his sentence be modified on the same grounds. The motion was denied. Now he comes to this court claiming that the sentencing court arbitrarily denied his new factor allegation. But he also claims that the sentencing court failed to adequately explain why a consecutive sentence was necessary and sentenced solely upon the court's "policy" of incarcerating any individual convicted of false swearing. Because the court had more than sufficient reason to deny the new factor argument and because the other arguments are raised for the first time on appeal, this court affirms.

¶2 We will address the latter two arguments first. In ***Spannuth v. State***, 70 Wis. 2d 362, 365, 234 N.W.2d 79 (1975), the supreme court repeated the "frequently stated requirement that when sentences are challenged as excessive under the facts or as being the result of an abuse of discretion, no consideration can be given by this court unless a motion *raising such error* is made to the trial court; compelling circumstances being an exception to the requirement." (Emphasis added.) ***State v. Lynch***, 105 Wis. 2d 164, 167, 312 N.W.2d 871 (Ct. App. 1981), held that the adoption of the rules of appellate procedure did not invalidate the admonition of ***Spannuth***. ***State v. Monje***, 109 Wis. 2d 138, 153-54, 325 N.W.2d 695 (1982) (on reconsideration) teaches that an erroneous exercise of discretion in sentencing must be based on an issue "previously raised" in order to bypass having to raise it by postconviction motion.

¶3 Karnstein's postconviction motion never so much as asserted that the trial court's sentencing remarks failed to explain why a consecutive sentence was mandated. Nor did the motion accuse the trial court of having sentenced him based on some policy of always incarcerating persons convicted of lying in court while under oath. There is a good reason why an appellant is generally limited to raising only those arguments on appeal that were raised with sufficient clarity in the trial court. The trial court has a right to be informed if there is an objection to what it has done and the nature of the objection. For us to reverse based on something the trial court has never had the opportunity to respond to would be tantamount to "blind siding" the trial court based on theories which did not originate in the original forum. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827-29, 539 N.W.2d 897 (Ct. App. 1995).

¶4 Lest Karnstein think that we are using waiver as a means to avoid having to reverse, we think it necessary to disabuse him of that notion. The record does not show that the trial court has a policy of always incarcerating persons convicted of perjury or false swearing in court. Rather, the sentencing transcript shows that the court was commenting on how it thought perjury and false swearing are serious offenses. This the court not only may do, it has a responsibility to do under the law. One of the jobs in sentencing is to determine whether the crime is serious. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The trial court thought lying in court was serious because it is the kind of offense that "rip[s] the guts out of our system of justice …. [W]hen you are under oath, you basically tell the truth." To underscore how serious the offense of perjury was, the court noted that "I've sent people to prison usually on perjury convictions." Never did the court say it had a blanket policy to incarcerate each and every time for perjury, a felony. Nor did the court ever say that it had a

blanket policy of incarcerating every defendant convicted of misdemeanor false swearing.

¶5 Moreover, the record shows that the court conducted an individualized sentencing in this case. The court said that it had read the transcript of the hearing where Karnstein gave the false statements under oath. The court concluded that there was no way that Karnstein could have been confused when he gave the false testimony. The court commented that the false swearing ended up costing the taxpayers "a great deal of money…. Investigations do cost money." The court summed it up by saying that "you don't go to court and lie." So, the claim that there was some blanket policy applied rather than individualized sentencing lacks merit.

¶6 As to whether there was a reason for the consecutive sentence, the court took pains to differentiate the act of lying to the court and the act of sending the offensive e-mails to his ex-girlfriend. The court spoke about the lying in court independently of Karnstein's e-mail activity. It is obvious from the record that although the court considered both types of acts to be reprehensible, they were separate acts. The trial court's sentence of nine months for lying (far less than the maximum Karnstein could have received) and another ninety days for the disorderly conduct conviction (also far less than the maximum) reflected the court's independent consideration of these two crimes, unrelated as they were in time, space and content. There was no sentencing misuse here.

¶7 The remaining issue is not waived. In his postconviction motion and in the hearing, Karnstein claimed the existence of newly discovered evidence

which he believed justified either a withdrawal of his plea or a modification of sentence.[2] In his motion, he made the following claim:

> At his plea and sentencing hearing on May 21, 2001, Karnstein was charged and sentenced for making false statements about his denials of using the gatonegro screen name to send e-mails and nude photos of Ehlert and Rice, *but also for denying that he posted such photos, their identities and sexual invitations on internet news groups.* (Emphasis added.)

Karnstein's motion further contended that, at sentencing, the district attorney, Ehlert and Rice all made moving statements discussing the posting of the photos on the internet and the humiliation and embarrassment that resulted. Karnstein then proffered that he had an expert who could prove that the postings on the internet were not placed by him and concluded that this was newly discovered evidence which the court should consider in ruling on the motion. At the hearing, Karnstein reiterated the claims he made in his motion.

¶8 The trial court rejected the claim. It noted that the question of posting the photos on the internet was the subject of a separate action in Waukesha county. However, the charges that Karnstein pled to had nothing to do with the posting on the internet. Instead, the charges had to do with false swearing and the e-mails he sent to Ehlert containing nude photos of her and Rice, which she viewed at her residence. The trial court said that the internet postings were not a consideration in its sentencing and were therefore not relevant. From this ruling, Karnstein has appealed.

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[2] He alternatively claimed that his trial counsel was ineffective for giving him wrong information on whether he, as a naturalized citizen, could be denaturalized. He argued that this misinformation induced him to plead. Karnstein does not raise this issue on appeal. We deem it abandoned.

¶9 Just because the district attorney may have alluded to the internet postings at sentencing and Ehlert and Rice may also have discussed them does not mean that the court considered them. The trial court said it did not consider the postings because that was a Waukesha county matter. The sentencing transcript supports the trial court. The trial court uttered not one word that the postings were being considered in sentencing. The expert opinion proffer was therefore irrelevant since it did not go to the heart of the sentence. One of the factors in a newly discovered evidence analysis is whether the new evidence would probably have changed the sentence handed down by the trial court had the trial court been armed with that evidence beforehand. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Obviously, the trial court held that the result would not have changed. Judging from the transcript, the trial court's determination is hard to argue with. The newly discovered evidence claim must fail on this ground alone.

¶10 We need not address the other factors. But we note that there is no showing that Karnstein could not have obtained this expert opinion prior to his plea. Nor is there any discussion of why Karnstein was not negligent in obtaining this expert at such a late date. In our view, the newly discovered evidence argument utterly fails to convince.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.