COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1697-CR **Cir. Ct. No. 01 CF 215**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVERY SHANOWAT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Devery Shanowat appeals from a judgment entered after he pled guilty to one count of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (1999-2000).[1] He also appeals from an order denying

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

his postconviction motion, which sought to withdraw his plea and asked for sentence modification. Shanowat claims: (1) the trial court erred in denying his motion seeking plea withdrawal; and (2) the trial court erroneously exercised its discretion in denying his request for sentence modification. Because Shanowat waived the first claim and because the trial court did not erroneously exercise its sentencing discretion, we affirm.

I. BACKGROUND

¶2 In January 2001, Shanowat was charged with two crimes: first-degree sexual assault of a child and second-degree sexual assault by use of threat of force or violence. The basis for the first count was that Shanowat inserted his finger into the vagina of five-year-old Shannon T., who was the daughter of his live-in girlfriend. The basis for the second count was that Shanowat forced seventeen-year-old Denise K. to have penis-to-vagina intercourse with him at a different residence.

¶3 Shanowat reached a plea agreement with the State, and agreed to plead guilty to count one, and count two would be dismissed but treated as a read-in offense for sentencing. The trial court accepted the agreement and sentenced Shanowat to eighteen years of confinement followed by twelve years of extended supervision. Judgment was entered.

¶4 In January 2002, Shanowat filed a postconviction motion seeking plea withdrawal or, in the alternative, resentencing. The trial court denied the motion ruling that Shanowat failed to prove a manifest injustice to justify a plea withdrawal and resentencing was not warranted because he failed to file the request in a timely manner. Shanowat now appeals.

II. DISCUSSION

A. Plea Withdrawal.

¶5 Shanowat claims the trial court should have granted his motion seeking withdrawal of his plea. He argues that he entered into the plea agreement because he was advised that the State had DNA evidence on the victim's underwear which connected him to the sexual assault. He states that, postconviction, he discovered there were two pairs of underwear submitted for testing; one pair was submitted the day after the assault and the second pair was submitted two or three days later. Only one pair contained a DNA match to him. He argues that the several-day delay of the second pair raises suspicions of evidence tampering, and that if he had known these facts, he would have gone to trial. The State points out that the record does not reflect whether the DNA was found on the first or second pair of underpants, but that Shanowat presumes it was the second pair.

¶6 The trial court denied the motion for plea withdrawal. The record reflects that Shanowat's postconviction motion seeking plea withdrawal alleged only that Shannon T.'s "panties were not turned over to the police for at least two or three days after the alleged [assault,]" thus presenting "a chain of custody issue." The trial court declined to allow plea withdrawal on this basis because the allegations failed to demonstrate a manifest injustice. The trial court reasoned:

> That [Shanowat] did not know [that] a potential chain of custody issue is not a basis for withdrawing his plea in the absence of credible evidence that an actual chain of custody problem existed. In other words, simply because the panties were not turned over immediately does not render the DNA test invalid. The defendant must show by clear and convincing evidence that a manifest injustice has occurred. Did something intervene to render the DNA testing suspect due to the two to three day delay? Is there

> any other explanation why the panties revealed a DNA match? The defendant's motion is wholly conclusory and without any of the factual support necessary to sustain a motion to withdraw ….

¶7 Three months later, Shanowat moved for postconviction discovery, and alleged for the first time that Shannon's mother "planted" the semen in a pair of Shannon's underwear because the mother was a "vindictive ex-girlfriend" and had access to Shanowat's DNA. After discovery issues were resolved, Shanowat did not file any additional postconviction motions in the trial court. Rather, he filed this appeal and, for the first time, requested that this court conclude that a manifest injustice exists based on his allegations that Shannon's mother "planted" his semen in Shannon's underwear.

¶8 This court, however, generally will not review issues, which were not presented to the trial court. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Accordingly, because this issue was presented for the first time in the court of appeals, we decline to address it. *See* ***id.*** By waiting until his appeal to seek review on the "semen planting" claim, Shanowat undermined "fairness and notice[] and judicial economy." ***Id.*** at 605. He failed to satisfy his burden of establishing that the issue was raised at the trial court level. *See* ***id.*** at 604. He failed to give the trial court an opportunity to address the issue. Therefore, we deem this issue waived and decline to address it.

B. Sentencing.

¶9 Shanowat also contends that the trial court erroneously exercised its discretion when it imposed his sentence. He claims that the sentence was unduly harsh and exceeded the "minimal amount of custody" warranted under the circumstances. We disagree.

¶10 In reviewing a sentencing challenge, we will affirm the trial court's decision if it properly exercised its discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). To do so, a sentencing court must consider three primary factors: "(1) the gravity and nature of the offense, including the effect on the victim, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public." ***Id.*** at 507. Shanowat does not contend that the trial court failed to consider these factors. He was wise not to make that argument because the record clearly reflects a proper consideration of the pertinent factors.

¶11 Shanowat contends, however, that the sentence imposed was unduly harsh and excessive and that a ten-year period of confinement would have been sufficient. As the State points out, regardless of whether Shanowat's claim of excessive sentence is a constitutional or a nonconstitutional challenge, he must show that the sentence imposed is "so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Pratt***, 36 Wis. 2d 312, 322, 153 N.W.2d 18 (1967) (citations omitted); ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶12 The trial court sentenced Shanowat to eighteen years of confinement. Shanowat argues ten years would have been sufficient. Here, the sentence imposed is clearly not shocking to public sentiment. Rather, Shanowat's conduct, which formed the basis of the charge, was shocking. His victim was *five* years old. He admitted assaulting her. Shannon indicated that after her mother left, Shanowat woke Shannon up and inserted his finger into her vagina. Shanowat draped a leg over Shannon, made her play with his penis and ejaculated on her before wiping her off. Shannon indicated that Shanowat had done this on other occasions. He also told Shannon not to tell anyone or she would never be

allowed to play outside again. The trial court reasoned that a lengthy period of confinement would give Shannon "peace of mind" and allow Shanowat to get the treatment he needed.

¶13 Further, Shanowat had a history of similar assaultive behavior against children and an extensive criminal record. Shanowat faced a potential maximum period of confinement of forty years. He received less than half of the maximum potential sentence. The sentence imposed was not unduly harsh or excessive either under a constitutional or a nonconstitutional argument.

By the Court.—Judgment and order affirmed.

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