

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2010

A. John Voelker
Acting 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. 2010AP1263-CR

Cir. Ct. No. 2009CM4160

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KACEY G. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Kacey G. Johnson appeals from an order denying his motion for resentencing. Johnson was charged with ten counts of bail jumping, contrary to WIS. STAT. § 946.49(1)(a) (2007-08),² and was sentenced to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

fifty-six months in the House of Correction. Johnson argues that his sentence is invalid because it was not imposed by the judge who took his pleas and heard the evidence of guilt. We affirm.

BACKGROUND

¶2 Johnson was charged with one count of misdemeanor battery and one count of misdemeanor criminal damage to property in Milwaukee County Circuit Court case number 2009CM1567 on March 24, 2009. The victim on both counts was Johnson's girlfriend, Kris Hawley. On April 27, 2009, Johnson was again charged with one count of misdemeanor battery and also with one count of misdemeanor intimidation of a victim in Milwaukee County Circuit Court case number 2009CM2102. The victim on both counts was again Kris Hawley. Johnson was placed on bond for each case with a condition not to have contact with Hawley.

¶3 On August 22, 2009, Johnson was charged with ten counts of misdemeanor bail jumping for violating the condition of his bond by repeatedly calling Hawley.³ See *State v. Johnson*, No. 2009CM4160, (Wis. Cir. Ct. Milwaukee County). All three criminal cases were scheduled for jury trials before the Honorable Mary Kuhnmuensch on September 29, 2009; however, case numbers 2009CM1567 and 2009CM2102 were dismissed after Hawley, an essential witness for the State, did not appear in court. The State was therefore unable to proceed. Following the dismissal of the first two cases against him, Johnson entered guilty pleas to all ten counts of bail jumping. Judge Kuhnmuensch

³ Upon his release, Johnson was placed in custody in Winnebago County for unrelated offenses. Johnson's phone calls to Hawley were made from the Winnebago County Jail.

accepted Johnson's pleas as knowing, voluntary and intelligent and found him guilty of all ten counts. A sentencing hearing was scheduled for October 14, 2009.

¶4 On October 14, 2009, the case was assigned to the Honorable Judge Jeffrey A. Wagner due to a conflict in Judge Kuhnmuensch's calendar that day. Neither party objected to the reassignment. After hearing arguments from both sides and considering letters from Hawley requesting leniency, Judge Wagner sentenced Johnson to seven months in the House of Correction on counts one through eight, consecutive to each other, and seven months each on counts nine and ten, concurrent to the rest, totaling fifty-six months.

¶5 Johnson filed a motion for resentencing on the grounds that his sentence was unduly harsh, that Judge Kuhnmuensch should have issued his sentence because she heard the evidence of Johnson's guilt, and that no justification was given by the trial court for the substitution of judge. Judge Wagner denied the motion, stating in his written order that it is standard procedure in Milwaukee County for judges to accept cases from other judges to accommodate calendars and that it was not improper for him to issue Johnson's sentence. The written decision also stated that if the parties do not consent to the reassignment, a new hearing date in front of the original judge will be given. Johnson contends on appeal that he was unaware of the option not to consent, and therefore, the sentence imposed by Judge Wagner was invalid.⁴

⁴ Johnson states in his brief that he is not pursuing relief based on the grounds that his sentence was unduly harsh. The only issue on before us is whether Johnson had a right to be sentenced by the same judge that took his plea.

STANDARD OF REVIEW

¶6 “Whether a motion states a request ... for resentencing because the original sentence is invalid, is a legal determination.” *State v. Wood*, 2007 WI App 190, ¶4, 305 Wis. 2d 133, 738 N.W. 2d 81. We review a trial court’s conclusion of law *de novo*. *Baierl v. McTaggart*, 2001 WI 107, ¶14, 245 Wis. 2d 632, 629 N.W.2d 277.

DISCUSSION

¶7 At issue in this appeal is whether Johnson had a right to be sentenced by the judge who took his plea and heard evidence of his guilt. Johnson argues that he only became aware of his option to object to sentencing before Judge Wagner after Judge Wagner issued the decision denying Johnson’s motion for resentencing. The decision stated in a footnote:

The defendant states that there is no reason or explanation in the court record for the substitution of judge. There was no substitution of judge. The case was spun to this court for sentencing purposes because Judge Kuhnmuensch was in the middle of a motion hearing and could not accommodate the parties. Spinning cases is standard procedure in Milwaukee County where one court cannot accommodate its calendar and another judge agrees to assist with the consent of the parties. If the parties do not consent, a new date is given.

¶8 Johnson argues that the procedure of “spinning” cases violated his expectation of fairness because no explanation was provided at the hearing, either by his trial attorney or the judge himself, as to why sentencing was before Judge Wagner, nor was Johnson given an option to object. Johnson contends that because he did not freely, knowingly, willingly and intelligently consent to a sentencing hearing before a different judge, the sentence imposed by Judge Wagner is invalid and he is entitled to a new sentencing hearing. He further

argues, contrary to the State's contention, that his expectation of a fair trial overrides any claim that he forfeited his right to raise a claim of error on appeal by not objecting at the hearing, and that the sentencing by Judge Wagner violated his expectation of fundamental fairness in criminal court. We conclude that Johnson did forfeit his right to raise a claim of error on appeal and that his expectation of fundamental fairness was not violated. We affirm.

I. Johnson's forfeited his right to raise a claim of error on appeal.

¶9 Johnson's failure to object to Judge Wagner presiding over his hearing constitutes a forfeiture of his right to raise a claim of error on appeal. "[F]orfeiture is the failure to make the timely assertion of a right." *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted). Although the record does not indicate that Judge Wagner expressly alerted Johnson of the option to object to the reassignment of the sentencing hearing, it does not follow that the hearing was conducted without Johnson's consent. Johnson and his counsel were clearly aware that Judge Wagner was not the judge who took Johnson's plea. Rather than question or object to the circumstances of the hearing, Johnson's counsel argued her sentencing recommendations. Johnson voiced no objection to the proceeding. Because no objection was made to Judge Wagner presiding over the sentencing hearing, Johnson forfeited his right to claim error on appeal. "Failure to object constitutes a forfeiture of the right on appellate review." *Id.*, ¶30.

II. Fundamental fairness was not violated.

¶10 Johnson also contends that his right to forgo sentencing by Judge Wagner and return to Judge Kuhnmuensch was so important to his expectation of a fair trial that the right could only be lost if he knowingly relinquished it. Johnson

argues that case law’s recognition that “[n]ormally, the judge who hears the evidence of guilt should also do the sentencing,” along with WIS. STAT. § 971.20, stand for the proposition that the notion of fundamental fairness allows a criminal defendant the ability to have some control over who presides at his trial and provides some expectations about how his case will be resolved. *See generally State v. Garner*, 54 Wis. 2d 100, 103, 194 N.W. 2d 649 (1972). Neither *Garner*, nor WIS. STAT. § 971.20 provide criminal defendants with an absolute right to be sentenced by the judge who adjudicated guilt. *See Garner*, 54 Wis. 2d 100; WIS. STAT. § 971.20.⁵

¶11 Fundamental fairness is a general due process concept. *Oliveto v. Circuit Court for Crawford Cnty.*, 194 Wis. 2d 418, 434, 533 N.W. 2d 819 (1995) (citation omitted). A defendant has three due process rights at sentencing: “(1) To be present at the hearing and to be afforded the right of allocution, (2) to be represented by counsel, and (3) to be sentenced on the basis of true and correct information.” *Bruneau v. State*, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977) (footnotes omitted). That Johnson was sentenced by Judge Wagner, rather than Judge Kuhnmuensch, does not offend fundamental fairness concerns in this matter. Johnson was present at the hearing with counsel, communicated directly with Judge Wagner, and does not argue that he was sentenced based upon inaccurate information. The record is clear that Judge Wagner was familiar with Johnson’s

⁵ WISCONSIN STAT. § 971.20 controls judicial substitution in criminal proceedings before and at trial. Johnson argues that the statute reflects “the legislature’s intent to give criminal defendants some control over their own judicial destiny,” and that an “element of predictability [is] grounded in fundamental fairness.” The portion of the statute dealing with a defendant’s right to substitute a newly assigned judge at trial (WIS. STAT. § 971.20(5)) does not extend that right to sentencing hearings. *See generally State v. Wisth*, 2009 WI App 53, 317 Wis. 2d 719, 766 N.W. 2d 781. Further, represented defendants are presumably aware, prior to sentencing, of the statutes which establish their potential punishments. The “element of predictability” was not lost because Johnson was sentenced before a different judge.

case and considered the appropriate sentencing factors, including the gravity of Johnson's offenses, Johnson's character, and the need to protect both the public and the victim. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Judge Wagner reviewed the transcripts of phone conversations that took place between Johnson and Hawley. He also considered letters written by Hawley requesting leniency, Johnson's attitude of "bravado," as well as Johnson's apology at the hearing. That the appropriate sentencing factors were considered by Judge Wagner, rather than Kuhnmuensch, was not a violation of the fundamental fairness principles underlying due process.

By the Court.—Order affirmed.

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

