COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-2608-CR
94-2609-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CRAIG A. SOMMER,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

SCHUDSON, J. Craig Sommer appeals from the judgments of conviction for four crimes: child enticement and two counts of first-degree sexual assault of a child (these three counts subject to the habitual criminality penalty enhancer); and an additional count of first-degree sexual assault of a child. He also appeals from the trial court order denying his motion for sentence modification. We affirm.

On October 27, 1993, the State charged Sommer with child enticement and two counts of first-degree sexual assault of a child, subject to the habitual criminality penalty enhancer. On March 11, 1994, the State charged Sommer with an additional count of first-degree sexual assault of a child. Sommer pled guilty to all charges and was sentenced to a total of sixty-eight years incarceration, followed by twenty years probation with an imposed and stayed sentence of twenty years.

A few months after Sommer was sentenced, the Wisconsin legislature enacted Chapter 980, STATS., the so-called "sexual predator law." Sommer moved for sentence modification arguing that the new law constitutes a new factor. On appeal, Sommer also argues that in denying his motion for sentence modification, the trial court's decision revealed its reliance on an inaccurate understanding of the chronology of his crimes. Thus, he asks this court to remand his case for re-sentencing.

A. NEW FACTOR

To gain sentence modification, a defendant must establish: (1) that a new factor exists; and (2) that the new factor justifies sentence modification. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). Whether a fact or set of facts constitutes a new factor presents a legal issue which we decide *de novo*. ***Id.*** Whether a new factor justifies sentence modification, however, presents an issue for the trial court's discretionary determination, subject to our review under the erroneous exercise of discretion standard. ***Id.***

A new factor is a "fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Further, a new factor is "an event or development which frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). A defendant bears the burden of proving the existence of a new factor by clear and convincing evidence. ***Franklin***, 148 Wis.2d at 8-9, 434 N.W.2d at 611.

Clearly, because Chapter 980, STATS., had not been enacted by the time of Sommer's sentencing, it was a new development. Because the new law relates to the potential additional length of confinement for some persons convicted of sexual assaults who have completed their terms of incarceration, its relevance to sexual assault sentencing is apparent. Whether it is "highly relevant to the imposition of sentence," however, or whether it "frustrates the purpose of the original sentence" may depend on the facts of each case.

In this case, denying Sommer's postconviction motion, the trial court concluded:

> This court finds that although the new law with regard to sexually violent persons was not in existence at the time of the defendant's sentencing, its codification does not frustrate the purpose of the

> original sentencing. In determining the appropriate sentence for the defendant, this court considered the seriousness of the offense and the need in the community for protection from this type of activity, as well as the rehabilitative needs of the defendant. The gravity of the offense weighed heavily in this case, and societal protection became an important factor. The presentence investigation report recommended the maximum sentence. While awaiting sentencing, the defendant sexually assaulted another child. There was, and remains, a compelling reason for the particular sentence imposed in this case.

Sommer has not persuaded us that the trial court erroneously exercised discretion in determining that the new law did not frustrate the purpose of the original sentencing.

The record of the sentencing establishes that the trial court carefully considered all the required criteria. *See* ***State v. Echols***, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640-641, *cert. denied*, 114 S. Ct. 246 (1993). Unquestionably, the trial court placed particular emphasis on the seriousness of the offenses, their impact on the young victims, Sommer's history of sex offenses, the failed attempts to rehabilitate him and deter him from assaulting children, and the need for community protection.

Sommer points to the trial court's comments that "the risk factor" was "the primary concern" and that "the institution must have sufficient amount of time in order to provide that treatment and to provide that assurance to the community that this defendant will not offend again." Although Sommer notes the apparent link between such concerns and the potential impact of the sex predator law on a trial court's determination of the appropriate length of a sentence, he has offered nothing to establish that the trial court, *in his case*, erroneously exercised its discretion in concluding that the new law did not frustrate the purpose of original sentencing. A defendant seeking sentence modification must show "some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence

selected by the trial court." ***Michels***, 150 Wis.2d at 99, 441 N.W.2d at 280. Sommer has failed to do so. *See also* ***State v. Hegwood***, 113 Wis.2d 544, 335 N.W.2d 399 (1983) (reduction of statutory maximum sentence subsequent to sentencing not a "new factor").

B. INACCURATE INFORMATION

Sommer also argues that resentencing is required because, in the written decision denying his postconviction motion, the trial court stated, "While awaiting sentencing, the defendant sexually assaulted another child." In fact, although the fourth count was charged one and one-half months after the first three, the fourth offense occurred at approximately the same time as the first three.

"A defendant has a due process right to be sentenced based upon accurate and valid information." ***State v. Coolidge***, 173 Wis.2d 783, 788, 496 N.W.2d 701, 705 (Ct. App. 1993). To establish a due process violation, a defendant must show, by clear and convincing evidence, that information on which a sentencing court relied was both inaccurate and prejudicial. ***Id.*** at 789, 496 N.W.2d at 705. Whether a defendant has established that a trial court violated due process by basing a sentence on inaccurate information presents a legal issue subject to our *de novo* review. *See* ***State v. Littrup***, 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991).

We conclude that Sommer has failed to establish that the trial court relied on inaccurate information at sentencing. Although the trial court misstated Sommer's history in its postconviction decision, the record reveals that, at the sentencing, the trial court received and relied on accurate information about Sommer's actual offense history. The trial court repeatedly referred to documents including the complaints, the presentence report, and the presentence addendum on the most recently-charged count, all of which accurately reflected that all four crimes occurred between July and late October, 1993. Sommer has failed to establish that the trial court relied on inaccurate information at sentencing.

By the Court. – Judgments and order affirmed.

Not recommended for publication in the official reports.

SULLIVAN, J. (*concurring*). I wholeheartedly agree with the conclusion reached by the majority—the legislature's passage of Chapter 908, STATS., is not a "new factor" justifying resentencing. I write separately only because the majority's analysis appears somewhat inconsistent with the analysis employed by the same panel in another unpublished case issued recently dealing with the very same issue we face in this case.

In ***State v. Beasley***, No. 95-0038-CR, slip op. at 8, (Wis. Ct. App. Aug. 8, 1995) (unpublished *per curiam*), we held that:

> [T]he enactment of Chapter 980 does not rise to the level of a "new factor" because Chapter 980 does not frustrate the purpose of the trial court's sentence. Chapter 980 was not passed in order to benefit convicted felons with the imposition of shorter sentences because of its protection. Chapter 980 was passed to keep sexually violent criminals off the streets of our community *even after they have completed the sentence imposed*.

(Emphasis in original.) Because we reached this holding *as a matter of law*, I do not believe it is necessary to evaluate this issue on a case-by-case basis. *See* majority slip op. at 4. Although ***Beasley***'s holding does not have precedential effect, I would employ ***Beasley***'s analysis in this case. For this reason, I respectfully concur.