COURT OF APPEALS
DECISION
DATED AND RELEASED

August 8, 1995

No. 95-0038-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELVIN BEASLEY,

Defendant-Appellant.

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

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

PER CURIAM. Melvin Beasley appeals from a judgment of conviction for one count of first-degree sexual assault of a child, contrary to § 948.02(1), STATS. He also appeals from an order denying his postconviction motion, which sought sentence modification. He raises two issues for our consideration: (1) whether the trial court violated his due process rights by relying on inaccurate information in imposing sentence; and (2) whether the

enactment of Chapter 980, STATS., i.e., "the sexual predator law"[1] constitutes a new factor, justifying sentence modification. Because the trial court did not rely on inaccurate information in imposing sentencing, and because Chapter 980 does not constitute a new factor, we affirm.

I. BACKGROUND

Beasley was charged with one count of first-degree sexual assault of a child. The case was tried to a jury in February 1994. During the trial, the victim, Jeannetta R., an eight-year-old, testified that Beasley only assaulted her on one occasion. However, other testimony at trial presented evidence of multiple assaults. Police Officer Vicki Crowell, who had interviewed the victim on two occasions, testified that the victim had told her about multiple assaults committed by Beasley. In addition, a school psychologist testified that Jeannetta R. had described frequent assaults by Beasley. Further, medical evidence indicated that Jeannetta R. had been assaulted on more than one occasion.

The jury convicted Beasley and the trial court sentenced him to the maximum term—twenty years. During sentencing, the trial court relied on the evidence supporting multiple assaults in imposing sentence. Beasley filed a motion seeking sentence modification on the basis that the trial court relied on inaccurate information and that the enactment of Chapter 980 constituted a new factor. The trial court denied the motion. Beasley now appeals.

II. DISCUSSION

A. Inaccurate Information in Sentencing?

Beasley claims that he is entitled to a modification of his sentence because the trial court violated his due process rights by relying on inaccurate information when it imposed the twenty-year-sentence. Specifically, Beasley contends the trial court relied heavily on its belief that Beasley committed

[1] *See* 1993 WIS. ACT 479.

multiple assaults of the victim over a period of time. Beasley argues this information was inaccurate and points to the victim's trial testimony, which indicated that only one sexual assault occurred. The trial court rejected Beasley's argument, with the following rationale:

> A review of the transcripts reveals that the victim -- an eight-year old child--was an extremely difficult witness to question. Frequently, she looked down and would not answer the questions posed. She stated she was afraid of the defendant because he had said he would kill her, and that she was especially afraid to talk about what he did in front of the defendant seated in the courtroom.... Although she only testified to one instance during 105 pages of testimony, throughout much of which the child had to be coaxed to respond, she substantiated all of the highly sensitive recitation of events she previously gave to Officer Vicki Crowell in the State's redirect examination, indicating that all she had told Officer Crowell was truthful and not a lie....
>
> The testimony provided by Officer Crowell at the trial consisted of statements made by the child on two separate occasions concerning more than one sexual contact between the victim and the defendant.... Even though the victim did not testify in court to the other incidents, Officer Crowell testified to the information given her by the child. Crowell's testimony in conjunction with the child's statement provided the court with a basis for its statement at sentencing with regard to more than one sexual contact initiated by the defendant.

Whether the defendant has proved by clear and convincing evidence that the trial court violated his due process rights by imposing a sentence based on inaccurate information is a question of law that we review *de novo*. *See* ***State v. Littrup***, 164 Wis.2d 120, 126, 132, 473 N.W.2d 164, 166, 168 (Ct. App. 1991). We conclude that Beasley has not satisfied his burden.

If the record on this point consisted solely of the victim's testimony, we would accept Beasley's argument. The record, however, also contains testimony from additional witnesses that contradicts the victim's isolated account. A police officer, a school psychologist and a medical witness all testified regarding Beasley's repeated assaults on the victim. Further, as amply noted by the trial court, the victim may have limited her testimony because of her fear of the defendant. In any event, the record contains inconsistencies: some testimony shows that the assault was isolated and some testimony shows the assaults were multiple.

Beasley has failed to show by clear and convincing evidence that the additional testimony and evidence referenced above was inaccurate. He has shown only the inconsistency between the victim's testimony and the other witnesses' testimony. Accordingly, the trial court was free to rely on the other witnesses' testimony in imposing sentence and the trial court's reliance on this testimony does not render the sentence one based on inaccurate information.

B. New Factor.

Beasley also claims that his sentence should be modified because of a new factor. He contends that this "new factor" was the enactment of Chapter 980, STATS., after he was sentenced. The trial court rejected this argument, concluding that the new law does not frustrate the purpose of the original lengthy sentence. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989) (to be a new factor, event or development must frustrate the purpose of the original sentence).

To obtain sentence modification, Beasley must show: (1) that there is a new factor; and (2) that the new factor justifies sentence modification. *See* ***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 is a question of law which may be decided without deference to the lower court's determinations; however, whether the new factor justifies modification of the sentence is committed to the circuit court's discretion and will be reviewed under an erroneous exercise of discretion standard. ***Id.***

A new factor, as defined in ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975), 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 [the] 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." This court has further developed the definition of a "new factor" as "an event or development which frustrates the purpose of the original sentence." ***Michels***, 150 Wis.2d at 99, 441 N.W.2d at 280.

We must examine whether the enactment of Chapter 980, STATS., satisfies the "new factor" definition. It is undisputed that Chapter 980 was not known to the trial judge at the time of the original sentencing because it had not yet been enacted. Therefore, our determination turns on whether Chapter 980 is "highly relevant to the imposition of sentence," and whether its enactment after Beasley was sentenced frustrates the purpose of the original sentence.

The essence of Beasley's contention is that the trial court would not have had to impose the maximum sentence of twenty years if Chapter 980 had been enacted at the time he was sentenced. Beasley reasons that Chapter 980, which applies retroactively to him, provides a procedure by which a sexual predator remains in custody beyond the sentence imposed if the sexual predator is still sexually violent. *See* § 980.06, STATS. As a result, Beasley continues, he will remain in custody until it is determined that he is no longer sexually violent. Beasley contends that the purpose of the lengthy sentence, in light of the protections afforded by Chapter 980, no longer exists.

We reject Beasley's argument. The purpose of the maximum sentence arose out of a variety of factors, as noted by the trial court during sentencing and in its written order denying Beasley's postconviction motion. Beasley's repeated past criminal activity and his failure to reform himself demonstrated the need for a lengthy period of incarceration. The aggravated nature of the crime committed here—that is, sexual intercourse with a young child, and multiple sexual assaults committed by Beasley over a period of time, demonstrated the need for a lengthy sentence. The length of the sentence was also intended to protect the public. Beasley's argument is similar to arguments that our supreme court rejected in ***State v. Hegwood***, 113 Wis.2d 544, 335 N.W.2d 399 (1983) (holding that reduction of the statutory maximum after sentence was imposed is not a "new factor"); and ***State v. Macemon***, 113 Wis.2d

662, 335 N.W.2d 402 (1983) (holding that adoption of felony sentencing guidelines is not a "new factor").

We, in turn, hold that the 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*. *See* § 980.06, STATS. Further, there is no evidence in the current record to demonstrate that Chapter 980 will even be applied to Beasley.

By the Court.—Judgment and order affirmed.

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