COURT OF APPEALS
DECISION
DATED AND RELEASED

May 30, 1996

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.

NOTICE

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

Nos. 95-1748
95-1749

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL J. KNAPP,

Defendant-Appellant.

APPEALS from an order of the circuit court for Lafayette County: JAMES WELKER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Carl J. Knapp appeals from an order denying his motion for sentence modification. We affirm in part and reverse in part.

Knapp was convicted in 1991 of two counts of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. He was sentenced to two consecutive seven-year prison terms, out of a maximum possible total of twenty years. Knapp did not appeal from the convictions. In June 1995, Knapp filed a motion to modify his sentence.

Knapp argues that several new factors justify sentence modification. The alleged new factors are: a change in the health of his mother; enactment of ch. 980, STATS.; and new parole commission rules. A defendant seeking sentence modification must show the existence of a new factor. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A new factor is a fact highly relevant to the imposition of sentence, but not known to the trial court at the time of original sentencing, either because it was not then in existence or was unknowingly overlooked by the parties. ***Id.*** A new factor must be one which frustrates the purpose of the original sentence, something which strikes at the very purpose selected by the trial court. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989).

We agree with the trial court's conclusion that none of Knapp's arguments are new factors. While each may have some impact on the future of Knapp or his family, none of them are highly relevant to sentencing or frustrate the purpose of the original sentence.

Knapp argues that the court erred in sentencing him by placing undue weight on an "unsubstantiated" charge of contributing to the delinquency of a minor. Knapp asserts that the presentence report erroneously claimed he admitted to such a conviction, although the conviction was not supported by any official record. However, Knapp did not object to the alleged error in the report, and therefore he has waived this issue. *See* ***State v. Johnson***, 158 Wis.2d 458, 470, 463 N.W.2d 352, 358 (Ct. App. 1990). Knapp also argues that certain other statements in the report were erroneous or improper, but these issues have also been waived because he did not object.

Knapp argues the court erroneously considered his lying during trial when sentencing him. However, this is a factor the trial court may constitutionally consider. *See* ***United States v. Grayson***, 438 U.S. 41 (1978).

Knapp argues the court erroneously exercised its discretion by giving him an unduly harsh sentence. The record shows that the court considered appropriate factors. The sentence is not "so excessive and unusual and 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." *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992) (quoting ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975)). Therefore, we reject this argument.

Knapp argues that his trial counsel was ineffective in several ways. However, these arguments are not relevant to a motion to modify sentence. They must be presented by a motion under § 974.06, STATS.

Knapp argues that the trial court erred by setting restitution at $2,000. The record shows the court set this amount if Knapp failed to return certain personal property to the victim. Knapp's counsel argued at sentencing that the restitution order was inappropriate because his possession of the property had no relationship to the crime for which he was being convicted, as required by statute. We agree. The sentencing court may make a variety of restitution orders under § 973.20(2)-(5), STATS. However, all the provisions of that statute require a connection between the crime and the restitution order.[1] The record does not show any connection between Knapp's crime of second-degree sexual assault of a child and his retention of the victim's property. Therefore, on remand the circuit court shall amend the judgment to remove the restitution provision.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

[1] For example, § 973.20(2), STATS., allows the court to make orders concerning property "[i]f the crime *resulted in* damage to or loss or destruction of property." (Emphasis added.)