

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 5, 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.

No. 95-2972-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN P. COLE,

Defendant-Appellant.

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

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

PER CURIAM. Jonathan P. Cole appeals from a judgment of conviction for armed robbery. See § 943.32(1)(b) & (2), STATS. The judgment was entered on his guilty plea. Cole also appeals from an order denying his postconviction motion seeking sentence modification. Cole argues that defects in the initial appearance deprived the trial court of personal jurisdiction and

violated due process. Cole also argues that a new factor warrants sentence modification. We affirm.

Cole, on parole for armed robbery, committed four armed robberies. The case was plea bargained and Cole pled guilty to one of the crimes. The remaining armed robberies were not charged, but were to be read-in at sentencing. Cole was sentenced to 40 years in prison. Cole subsequently filed a postconviction motion seeking sentence modification, claiming that a new factor existed that justified reducing his sentence. The trial court denied Cole's motion.

Cole argues that at his initial appearance he did not receive a copy of the complaint, that the complaint was not read to him, and that the penalties for imprisonment were misstated by the court commissioner, all in violation of § 970.02(1)(a), STATS.¹ Cole, however, did not raise these matters in the trial court prior to his guilty plea. “[O]bjections based on defects in the institution of proceedings must be raised before trial by motion or be deemed waived.” *Lampkins v. State*, 51 Wis.2d 564, 570, 187 N.W.2d 164, 167 (1971). Cole has waived the alleged defects in the initial appearance. Further, Cole does not contend that there were errors at his plea hearing as a result of the commissioner's alleged failure to comply with § 970.02(1)(a) or otherwise. Thus,

¹ A court commissioner is authorized to perform the same duties of a judge at an initial appearance. *See* § 757.69(1)(b), STATS.

Section 970.02(1)(a), STATS., provides:

Duty of a judge at the initial appearance. (1) At the initial appearance the judge shall inform the defendant:

- (a) Of the charge against the defendant and shall furnish the defendant with a copy of the complaint which shall contain the possible penalties for the offenses set forth therein. In the case of a felony, the judge shall also inform the defendant of the penalties for the felony with which the defendant is charged.

we reject Cole's request that we address the alleged failure to comply with § 970.02(1)(a) "in the best interest of justice" despite the waiver.²

Cole also argues that he was denied his due-process right to notice of the charge against him by the alleged failure to comply with § 970.02(1)(a), STATS., at the initial hearing. Once a defendant has pled guilty, he or she may not raise claims of constitutional violations that occurred prior to the plea. *Mack v. State*, 93 Wis.2d 287, 293, 286 N.W.2d 563, 566 (1980). Since Cole entered a plea of guilty to the charge of armed robbery despite the alleged due-process violation, he has waived any such claim.

Finally, Cole argues that a new factor justified sentence modification. He states that, during sentencing, the sentencing court was under the mistaken impression that the presentence writer had recommended that Cole receive a 40-year sentence when, in fact, the presentence writer meant to recommend a 20-year sentence.

"A trial court may, in its discretion, modify a criminal sentence upon a showing of a new factor." *State v. Michels*, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). "[T]he phrase 'new factor' refers to 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." *Id.* (citation omitted). "[A] 'new factor' must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." *Id.*, 150 Wis.2d at 99, 441 N.W.2d at 280. Whether a set of facts is a "new factor" is a question of law that we review without deference to the trial court. *State v. Hegwood*, 113 Wis.2d 544, 546-547, 335 N.W.2d 399, 401 (1983).

² In arguing that we should consider the alleged defects in the initial appearance, Cole represents to us that he is not relying on our authority under § 752.35, STATS.

The “new factor” Cole sets forth in his argument is not a “new factor” within the meaning of *Michels* because it did not frustrate the purpose of the original sentencing. Any confusion created by the presentence writer was immaterial because the sentencing court indicated that it did not rely on the recommendation contained in the report although the recommendation was mentioned during the sentencing hearing. In its ruling on Cole's motion to modify his sentence, the trial court explained that it used the presentence report to learn about Cole's history and character, including his prior criminal and juvenile records. The trial court applied the appropriate sentencing criteria. Any error in the presentence writer's sentencing recommendation, therefore, did not frustrate the purpose of the original sentence; it does not constitute a new factor requiring sentencing modification.

By the Court. – Judgment and order affirmed.

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