COURT OF APPEALS
DECISION
DATED AND RELEASED

September 25, 1997

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. 96-0648-CR
96-0649-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD R. GILBERTSON

Defendant-Appellant.

APPEALS from judgments and orders of the circuit court for Green County: WILLIAM D. JOHNSTON, Judge. *Affirmed in part; reversed in part and cause remanded with instructions.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Todd R. Gilbertson appeals from a judgment of conviction entered on March 7, 1995, resulting from his no contest plea to one

count of possessing child pornography, contrary to § 948.12, STATS., and four counts of child enticement (taking pictures), contrary to § 948.07(4), STATS., Specifically, Gilbertson appeals a circuit court order denying his motion to suppress the evidence against him on the grounds that the search warrant was improperly issued. Gilbertson also appeals a postconviction order denying his motion for resentencing on the grounds that he was sentenced on materially inaccurate information. Finally, Gilbertson argues that the sentence imposed on him is impossible. For the reasons set forth below, we reject Gilbertson's first two arguments. However, we agree that the sentence imposed is impossible for the technical reason that a sentence cannot be simultaneously concurrent and consecutive in the manner ordered here. We therefore affirm in part; reverse in part and remand to the circuit court to "clarify" the sentence.

BACKGROUND

By affidavit dated July 21, 1994, Monroe Police Officer Mark Samelstad requested a warrant to search Gilbertson's mobile home. Samelstad alleged that Gilbertson possessed various generic child pornographic items such as pictures and videos. The basis for Samelstad's knowledge was alleged to be "personal observations" as well as "information that Victim #1 provided your complainant ... believed to be truthful and reliable, as the information is provided by a victim/witness." The affidavit alleges further that victim #1 identified four other victims; that victim #1 had been paid cash to model in the nude, both alone and at least once with another of the victims; that Gilbertson had informed victim #1 that he, Gilbertson, had that previous Monday photographed two other victims in the nude; that Gilbertson lived in a mobile home at a certain address, affixed with a certain sign; that Gilbertson did business at a certain address under a certain name and other like allegations.

Based on Samelstad's affidavit, a search warrant was issued; a search was conducted; pornography was found; and Gilbertson was arrested. An amended and joint[1] information issued, charging Gilbertson with sixteen counts of child pornography. Gilbertson sought to suppress the evidence. The circuit court denied the motion and Gilbertson sought leave for interlocutory appeal. We denied his motion, and Gilbertson ultimately pled no contest, pursuant to a plea agreement to the five counts set forth above. As part of the agreement, Gilbertson specifically reserved the right to appeal the circuit court's denial of his suppression motion.

At sentencing, Gilbertson presented several witnesses. After hearing them, the circuit court stated as follows:

> So I am taking those factors [favorable to your rehabilitation] into account as well. I think you will be an early candidate for the [treatment] program and I think you will do very well in their program. I can't tell the prison system what to do. I know that their evaluation of you will probably earmark you quickly for the Winnebago program and I think your approach to that program as evidenced by your energy, your approach previously, is going to mean you will successfully handle that and I suspect that, as a result of that, under the system that now exists in the Wisconsin Prison Systems, you will be a very early out.

The court then sentenced Gilbertson as follows: On count one, the possession of pornography, to an indeterminate term of not more than two years; on count two, child enticement, to an indeterminate term of not more than ten years, which is to be concurrent with the sentence on the first count; on count nine, child enticement, to an indeterminate term of not more than ten years, which is to be concurrent with the sentence for count one and consecutive to count two; on count thirteen, child

[1] Charges centered on other victims were originally filed separately, but then the cases were consolidated.

enticement, sentence withheld and probation ordered for a period of ten years, consecutive to the sentences on counts one, two and nine; on count fourteen, child enticement, sentence withheld and probation ordered for a period of ten years, consecutive to the sentences for counts one, two, nine and thirteen. The court explained its reason for the consecutive probation was its anticipation that Gilbertson would be released relatively soon and therefore supervision must be dealt with for an extended period of time.

Gilbertson brought a postconviction motion, arguing that two terms of probation could not be consecutively imposed. The circuit court agreed and modified its order. Gilbertson also argued that the court mistakenly believed Gilbertson would be able to qualify immediately for treatment, and predicated its sentence on this incorrect understanding. Pointing to the court's "early out" language, Gilbertson brought an affidavit from an expert which tended to show that he would have to serve at least ten years before he would be released. Gilbertson therefore moved to have all sentences be concurrent instead of consecutive, so as to effectuate the court's prediction of early release.

The circuit court denied this motion. By written decision, the court stated:

> [The] defendant has not shown the existence of new factors which frustrate the purpose of the court's original sentencing. The court at sentencing was aware in sentencing defendant to 20 years in state prison that defendant's mandatory release date, treatment programs for which he would be eligible in prison, as well as defendant's shown willingness to embrace such programs would most likely lead to his being released early from that sentence. Make no mistake, under all of the factors before the court it felt a 20 year prison sentence was appropriate. The court also knew defendant would not serve that amount of time, that his actual served sentence would be much shorter. Defendant established [at the] February 8, 1996 [postconviction hearing] that his prison term will be only 10 years which is certainly much shorter than 20 years.

DISCUSSION

Warrant.

Gilbertson argues first that the search warrant executed against him was based on information which no reasonable person could conclude was accurate and reliable. Gilbertson contends that Officer Samelstad had no particular reason to believe that the first victim was telling the truth, and further, that the first victim's information was not corroborated before the search warrant issued.

The State agrees that although the warrant recites Officer Samelstad's "personal observations" as a source, nevertheless, "[m]ost of the information set forth in the complaint had been provided to Officer Samelstad by Victim 1." The State argues that veracity of a citizen victim witness may be assumed or presumed, *citing* ***State v. Paszek***, 50 Wis.2d 619, 631, 184 N.W.2d 836, 843 (1971); ***State v. Welsh***, 108 Wis.2d 319, 331, 321 N.W.2d 245, 251 (1982), vacated on other grounds *sub nom* ***Welsh v. Wisconsin,*** 466 U.S. 740 (1984); and the treatise by Professor LaFave, SEARCH AND SEIZURE § 3.4(a) at 204-05 (3d ed. 1996). Therefore, argues the State, corroboration was not required. Rather, the magistrate issuing the warrant needed only sufficient information from which a reasonable and prudent person would be justified in acting, applying the standards which cause them to act on everyday affairs.

We agree that the State has properly set forth the standard governing warrant issuance. As our supreme court has stated:

> On review, it must appear that the magistrate was apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the

> commission of a crime, and that the objects sought will be found in the place to be searched.

State v. Starke, 81 Wis.2d 399, 408, 260 N.W.2d 739, 744 (1978) (citations omitted).

We also agree with the State that the warrant here met that standard. Our supreme court has stated:

> In several recent cases, however, it becomes clear that if the citizen or victim informant is an eyewitness this will be enough to support probable cause even without specific corroboration of reliability.

Allison v. State, 62 Wis.2d 14, 23, 214 N.W.2d 437, 442 (1974). In so holding, the court rejected the argument Gilbertson makes here, that verification is required before a victim witness' statement may form the basis of a search warrant. The court pointed out that previous precedent, which seemed to so imply, merely stated that verification was a sufficient safeguard, but that verification was not "required." ***Id.*** at 22, 214 N.W.2d at 441. The court concluded that the victim witness' observation of the criminal act, plus reliance on the informant by the police, "are sufficient to support the issuance of a search warrant." ***Id.*** at 23, 214 N.W.2d at 442 (citation omitted).

The first victim alleged that he has been the victim of the crime of child pornography. He further alleged that he had personally observed at least one other victim being subjected to the same crime. Such an allegation by a victim witness is sufficient, without verification to "excite an honest belief in a reasonable mind" that objects existed on Gilbertson's premises which were "linked with the commission of a crime." ***Starke***, 81 Wis.2d at 408, 260 N.W.2d at 744. Accordingly, the warrant was properly issued, and we reject Gilbertson's argument to the contrary.

Sentencing.

Gilbertson also argues that the circuit court erred in sentencing him on materially incorrect information. According to Gilbertson, the court's comments regarding an "early" release show that the court was under a misapprehension at the time of sentencing. Specifically, the court miscalculated Gilbertson's eligibility for quickly enrolling in a sex offender's treatment program. To effectuate quick access to the sex offender's program as anticipated by the court, Gilbertson argues that he would have to be sentenced to a shorter aggregate term.

At the postconviction hearing, the circuit court clarified its remarks. Although regretting that it had not provided a more accurate quantification of the terms "short" and "early," the court noted that it intended to sentence Gilbertson to twenty years, and that Gilbertson himself had established that he would probably be released after ten years. The court found that this effective halving of the sentence met its definition of "early" release.

It is within a circuit court's discretion whether to hold a hearing on a sentence modification motion. ***Cresci v. State***, 89 Wis.2d 495, 506, 278 N.W.2d 850, 855 (1979). In order to prevail on a motion to modify sentence, defendant must demonstrate by "clear and convincing evidence" that a "new factor justifying a motion to modify a sentence" exists, unknown to any party at the time of sentencing. The defendant must then persuade the circuit court that the new factor warrants sentence modification. Sentence modifications are discretionary determinations. ***State v. Franklin***, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611-12, (1989). The new factor must not only be previously unknown, but must frustrate the very purpose for the sentence selected by the trial court. ***State v. Michels***, 150 Wis.2d 94, 99, 441

N.W.2d 278, 280 (Ct. App. 1989). Whether facts constitute a "new factor" is a question of law, which we review *de novo*. ***Michels***, 150 Wis.2d at 97, 441 N.W.2d at 279.

We conclude that the defendant has not shown that a "new factor" exists which was unknown at the time of sentencing. Rather, the defendant pins his argument on the hope that when it used the undefined term "early," the court must have meant less than ten years imprisonment on a twenty-year sentence.

We cannot conclude as a matter of law that the court's use of the undefined term "early" "strike[s] at the very purpose" for which the circuit court selected the sentence, especially in light of an acknowledged anticipated halving of the defendant's twenty-year sentence. Therefore, we reject Gilbertson's argument that the circuit court sentenced him on materially incorrect information.

Defendant last argues to this court[2] that the sentence imposed is impossible. He correctly points out that if the first two counts are to be served concurrently, the sentence on the ninth count cannot be both concurrent to the first and consecutive with the second. Although it is clear from the circuit court's remarks that the court intended to sentence defendant to twenty years, the sentence imposed did not achieve that objective. We therefore remand for the sole purpose of having the circuit court "clarify" its "obvious intent" by entering a corrected sentence. ***Krueger v. State***, 86 Wis.2d 435, 442-43, 272 N.W.2d 847, 850 (1979).

[2] Despite a postconviction hearing, it does not appear that Gilbertson raised this argument before the circuit court. Nevertheless, we conclude that the matter has not been waived, but must be remanded. Where an arguably ambiguous sentence is imposed, our supreme court has stated that if the intention of the circuit court is clear from the record—as it is here in light of the court's remarks of a twenty-year sentence—the correct procedure is for the sentencing court to "clarify the meaning" of its original sentence to conform to the "court's obvious intent." ***Krueger v. State***, 86 Wis.2d 435, 442-43, 272 N.W.2d 847, 850 (1979)

By the Court.—Judgments and orders affirmed in part; reversed in part and cause remanded with instructions.

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