COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1691-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HAROLD W. ZASTROW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] Harold W. Zastrow appeals a denial of sentence modification without an evidentiary hearing. Zastrow has a heart condition which he claims was unknown at the time of sentencing. He argues that this condition

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

strikes at the very purpose of his twenty-month prison sentence, imposed consecutively to a sentence in another case. He claims that the sentencing court's purpose in sending him to prison was to deter him from repeating his unlawful acts and contends that his heart condition will by itself provide that deterrence such that further confinement is unnecessary. We affirm for three reasons, which we will address seriatim.

¶2 Zastrow had been the subject of a criminal complaint charging him with violating a domestic abuse order, unlawful use of a telephone and misdemeanor bail jumping, all as a habitual criminal due to having been previously convicted of nineteen counts of violating a harassment injunction. Bail was conditioned upon posting a cash bond of $2500, that he have no contact, directly or indirectly, with Debra Lohr, his former wife, and that he not operate any motor vehicles within one city block of Lohr's address, which was listed on the bond form. Zastrow posted the required cash.

¶3 On July 6, 1999, the State accused Zastrow of violating the bond when he drove by Lohr's house, gave her what appeared to be "the finger," blew his horn several times, made a U-turn, squealed his tires, and then came back and repeated the procedure. The State alleged that Zastow's conduct amounted to an intentional failure to comply with the terms of his bond, contrary to WIS. STAT. § 946.49(1)(a), a Class A misdemeanor carrying a fine of not more than $10,000 or imprisonment not to exceed nine months, or both. The State also alleged that Zastrow was a habitual criminal whose incarceration could therefore be increased to not more than three years if convicted of violating the conditions of the bond. A jury trial was had and Zastrow was found guilty.

¶4 Sentencing was on October 11, 1999. At that time, the court was informed that Zastrow was already serving twenty-seven months on the predicate convictions of which he had served nine or ten months by the date of sentencing. Zastrow's counsel informed the court that Zastrow was soon scheduled to have surgery on his hip and recommended probation. Zastrow, for his part, admitted that he was guilty of violating the terms of his bond, but told the court that he was never violent toward his former wife.

¶5 The court told Zastrow that "[v]iolence can take some pretty subtle forms sometimes. Harassment is one of those forms. You can make people extremely uncomfortable, very afraid, and make their life miserable without actually doing anything." The court observed that Zastrow's past behavior exhibited a "pattern of absolute harassment" and that the goal was to make a person fearful.

¶6 Then, the court began speaking to what it called "another major issue." That issue was the agreement Zastrow entered into with the court when he was placed on bond. The court said: "It's critical that when we release people on bond, with conditions, that they are not to do certain things, that they don't do them. Otherwise, what's the point in having bonds?" The court reasoned that if a person is told to do something and does not do it, the courts "can't let people go out there back in the community if they are not respectful of the conditions." The court said that Zastrow was "thumbing [his] nose, not just at Miss Lohr and her feelings, but at society itself because society is the one who imposed the bond on you in the first place through the court." The court then stated:

> I think it appropriate … for you and for other folks who would be inclined to want to disregard bond conditions, to be aware that there are extra penalties for doing this. The extra penalties are over and above anything you got on any

> underlying case.… I think in your case, deterrence on a personal level is very necessary.

Based on this, the court sentenced Zastrow to a term not exceeding twenty months to run consecutively to the twenty-seven month term he was presently serving.

¶7 On May 15, 2000, the sentencing court heard a motion to modify the sentence. Zastrow's counsel complained that, unknown to Zastrow and also unknown to the court at sentencing, Zastrow now had a serious heart problem which resulted in his having coronary bypass surgery and two catheterizations. Zastrow's counsel considered this to be a new factor for the court to consider. His counsel told the court that he had two doctors "standing on board." Counsel noted that the original reason for the prison sentence was "personal deterrence" and submitted that Zastrow's deteriorating health "is going to act as a deterrence, whereas the prison sentence does not need to anymore." The court denied the motion without taking any evidence. The court stated its belief that postsentencing medical conditions are not new factors in sentencing. The court also mentioned that Zastrow's medical needs could be addressed very adequately in a prison environment. The court rejected Zastrow's contention that he is being "punished enough" by virtue of the heart disease and also commented that Zastrow had not shown how his heart condition would be better monitored "on the outside." From this denial, Zastrow appeals.

¶8 Zastrow's appeal picks up on the theme he first allocuted before the trial court. He notes that in ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989), this court limited the "new factor" standard to situations where the new factor frustrates the purpose of the original sentencing. The ***Michels*** court reasoned that 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***. at 99. Focusing on the comments made by the court at sentencing relating to the need for "deterrence on a personal level," Zastrow claims that his health now prevents him from doing the same kind of harassing acts that he did before. He appears to be contending that he is now incapable of the mobility that he had before and, therefore, the deteriorating health acts as its own deterrent. Thus, his health problem goes to the heart of the purpose of the original sentence and is a valid new factor.

¶9 The first problem with Zastrow's claim is that the sentencing court did not sentence him merely to keep him from continuing his harassment of Lohr. Of "major" (the sentencing court's word) concern was the need to punish for not honoring a promise to the court. Punishment is a valid consideration for a sentencing court. *See* ***Klimas v. State***, 75 Wis. 2d 244, 247, 249 N.W.2d 285 (1977). It is different in whole and in part from the idea of separating a person from the community so that the criminal conduct does not happen again soon.

¶10 Upon reading the sentencing court's decision in its proper context, it is apparent that the court's goal was to send Zastrow to prison as punishment, not simply to keep him in a place which would prevent him from repeating his behavior. And while the court did use the word "deter," the court was speaking to two things: the need to teach Zastrow a lesson so that he would not do it again and the need to use Zastrow as an example to others so that they would not flaunt the orders of the court. We note that the dictionary definition of the word "deterrence" is: "the restraint and discouragement of crime by fear (as by the exemplary punishment of convicted offenders)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 617 (1993, unabridged). Thus, we see that the sentencing court was not speaking to the need for keeping Zastrow out of Lohr's way at all. The court was speaking to the need to deter Zastrow's future conduct

and the future conduct of others who might find themselves in Zastrow's place by punishing Zastrow—by imposing the concept of fear into Zastrow and others.

¶11 This much is evident from the court's comments at the sentence modification hearing. The court asked rhetorically:

> [I]s he being punished by his heart disease that I could consider now that he doesn't need any additional punishment? I don't think so. There are a lot of people with heart disease, and I don't think they really look at it as punishment, as such. They may look at it as a life-changing event, but not so much as punishment.

From reading the sentencing transcript and the sentence modification transcript, this court is convinced that the sentencing court meant to punish Zastrow for "thumbing his nose" at the court. And the court meant to have Zastrow serve as an example to others. The court meant to instill the concept of fear into Zastrow so that he would understand that there are consequences for his unlawful behavior.

¶12 With the proper context in place, we now see that letting Zastrow out of prison because of a heart problem would frustrate the whole purpose for sending him to prison in the first place. Gone would be the harsh, cold reality of prison life as the punishment for flaunting his bond. Gone would be the example that Zastrow could serve to others. By letting Zastrow out of prison, he would avoid punishment. This court concludes that Zastrow's heart problem is not one which strikes at the heart of the court's original sentencing consideration.

¶13 Even assuming for the sake of argument that a major concern of the sentencing court was to deter a repetition of Zastrow's conduct toward Lohr, there remains a significant problem with this contention. That problem is found in his offer of proof or, more accurately, failure of an offer of proof. Zastrow told the sentencing court that he had two doctors ready to testify. But testify about what? If they were ready to testify about Zastrow's heart problems, Zastrow's exhibit #1,

detailing his recent medical history and admitted by the court into the record, was sufficient to do that. But what would they say about how his heart problem affects his ability to call his former wife on the telephone and harass her? Does the heart condition keep him from picking up the phone? Does the condition prevent him from driving to his former wife's residence? Does the condition prevent him from sounding the horn on his vehicle? Does it prevent him from "flipping the finger"? We do not know the answers to these questions, but they are central to his claim. He appears to argue that his disease incapacitates him such that the disease acts as its own deterrence. But he has provided no offer of proof.

¶14 Still another reason is identified by the oft-repeated quotation from ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), which said:

> [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.* (Emphasis added.)

¶15 When Zastrow appeared before a different branch of the Sheboygan county circuit court on the predicate charges on December 28, 1998, almost ten months before the sentencing hearing at issue, he complained to that judge, "You have to excuse me right now. I'm having a—severe chest pains, I'm sweating. I think I'm having a heart attack." The State suggests that Zastrow had notice of his problems back then and had a duty to let the sentencing court know about them if he wanted the court to consider them. Although we do not make this the cornerstone reason for affirming the court, we think it merits mention because it is obvious that Zastrow was aware he had some kind of heart problem. He had a duty, under ***Rosado***, to at least explain to the sentencing court at the modification

hearing how his knowledge was "unknowingly overlooked" by him. But Zastrow never brought it up.

¶16 Finally, Zastrow argues that we should disregard ***Michels*** and hold that a changing health condition is a new factor as a matter of law regardless of whether it goes to the heart of the original sentencing purpose. He notes that, under the new truth-in-sentencing law, parole is abolished. Therefore, the ***Michels*** court's rationale, that health matters are better taken up by the Department of Corrections and the Parole Board, is no longer true. We are not in a position to overrule a prior decision of this court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.