COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2955-CR **Cir. Ct. Nos. 2006CF2261**
2007CF1403

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. SILENO,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 LAROCQUE, J. Joseph P. Sileno appeals from a judgment entered following a trial to the court, wherein Sileno was found guilty of possession of a

machine gun in violation of WIS. STAT. § 941.26(1)(a) (2005-06).[1] He also appeals from an order denying his postconviction motion. Sileno asserts four claims for our review: (1) his trial counsel provided ineffective assistance by failing to notify the Attorney General's office when making the claim that § 941.26(1)(a) was unconstitutional; (2) the trial court should have granted the motion to dismiss on the ground that § 941.26(1)(a) was unconstitutional; (3) the trial court erred in denying the motion to suppress; and (4) the trial court erroneously exercised its discretion when it refused to modify the sentence based on new factors. Because Sileno failed to assert any prejudice as a result of trial counsel's failure to notify the Attorney General; because Sileno failed to establish that the statute involved was unconstitutional; because the trial court did not err in denying the suppression motion; and because there was no erroneous exercise of sentencing discretion or new factors, we affirm.

BACKGROUND

¶2 On April 22, 2006, Milwaukee Police Officers Robert Dickerson and Luke Chang were stopped in their patrol car in the area of North 20th and West Center Streets, when they observed Sileno's vehicle pulling into the parking lot where they were parked. The officers noticed that Sileno did not have any front license plates and approached him to ask about this issue. When the officer observed an object that may have been a knife in the vehicle, he asked Sileno if he had anything illegal in his vehicle. Sileno told the officers that he did not have anything illegal. The officers requested permission to search the vehicle. Officer

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Dickerson found a large knife and some counterfeit U.S. currency under the front floor mat. In the trunk, the officers found a rifle, which they believed was an automatic weapon. The weapon was confiscated, test-fired, and did prove to be an automatic weapon, which could fire more than one shot with a single pull of the trigger.

¶3 On May 3, 2006, Sileno was charged with one count of possession of a machine gun in violation of WIS. STAT. § 941.26(1)(a). He pled not guilty and the case was set for a court trial. During the pre-trial proceedings, Sileno filed two motions. The first was a motion seeking to dismiss on the basis that the statute with which he was charged was unconstitutional. He asserted that the statute was constitutionally deficient in that it did not contain a *mens rea* element requiring the State to prove that the offender knew the firearm was an automatic weapon. His claim throughout the case has been that he did not believe the weapon was fully automatic. The trial court denied the motion, ruling that the statute did not contain a *mens rea* element and such did not render the statute vague or unconstitutional.

¶4 The second was a motion to suppress alleging that the search of the car was illegal. The trial court conducted a suppression hearing and heard testimony from both the police officers and Sileno. The police testified that Sileno consented to the search of his vehicle. Sileno testified that he did not give the police consent to search. The trial court found the police testimony to be the more credible account and denied the motion to suppress.

¶5 Following the disposition of the two motions, Sileno was charged with one count of felony bail jumping for failing to appear for a required court

appearance. This bail-jumping charge was joined together with the firearms charge and the matter was scheduled for a court trial on June 4, 2007.

¶6 At trial, the court was presented with stipulated facts, which included the following. Sileno did possess or transport an Armalite M15A2 rifle, which he had legally purchased in 2003, in the trunk of his vehicle. Separately and subsequent to the rifle purchase, Sileno also purchased a "M16 trigger parts group + GI SEAR." He intentionally installed on his rifle all of the trigger parts with the exception of the GI SEAR. He then placed the rifle in the trunk of his car. Sileno asserted that he did not install the GI SEAR piece because it would make his rifle an illegal fully automatic machine gun. He did state that when he turned twenty-one, he intended to install the last piece to make the rifle fully automatic after he obtained a federal firearms license.[2]

¶7 As noted above, the rifle was located in Sileno's truck on April 22, 2006, and the police officers believed it to be fully automatic. It was sent to the State Crime Lab where it was test-fired and confirmed that the "firearm would shoot automatically, more than one shot, without manual reloading, by a single function of the trigger."

¶8 It was also stipulated that Sileno knew he had to attend court on September 14, 2006 to enter a guilty plea. Sileno failed to appear. A bench warrant was issued and stayed until September 28, 2006. Sileno intentionally failed to appear and this was the basis for the felony bail jumping charge.

[2] Sileno turned twenty-one on March 15, 2005. He never applied for the license because by the time he turned twenty-one, he had been put on probation for two misdemeanors.

¶9 At the conclusion of the court trial, Sileno was found guilty on both counts. He was sentenced to thirty-eight months in prison, consisting of fourteen months of initial confinement and twenty-four months of extended supervision on the firearm count. The trial court found Sileno eligible to participate in the Challenge Incarceration Program, but not the Earned Release Program. Sileno was sentenced to nine months in the House of Correction on the bail-jumping charge, to be served concurrent to the firearm sentence.

¶10 Sileno filed a postconviction motion alleging the same issues raised in this appeal. The trial court denied the motion by written order. Sileno now appeals from the judgment and order.

DISCUSSION

A. Ineffective Assistance.

¶11 Sileno's first claim is that his trial counsel provided ineffective assistance by failing to notify the Attorney General's office that he was challenging the constitutionality of a statute, as required by WIS. STAT. § 806.04(11) ("If a statute … is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard."). The trial court denied the motion on the basis that Sileno was not prejudiced by the failure to notify the Attorney General. We agree.

¶12 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's

performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her "counsel's errors were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶13 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶14 Here, it is undisputed that the trial court considered the merits of Sileno's challenge to the statute notwithstanding his failure to notify the Attorney General. The trial court found the statute to be constitutional. Moreover, in the postconviction order, the trial court stated:

> The court recognized at the March 15, 2007 proceedings that the Attorney General's Office had not been notified and that they had a right to be present…. Even if the Attorney General's Office had been notified, the court would have made the same ruling. Consequently, there is no prejudice to the defendant under Strickland v.

> Washington, 466 U.S. 668 (1984) for counsel's failure to notify the Attorney General's Office prior to the hearing on the motion to dismiss.

¶15 Sileno concedes in his appellate brief that he "is again raising the issue in order to avoid any claim of procedural default." Sileno does not, in his brief, assert any facts, which if proven true, would establish that trial counsel's failure to notify the Attorney General resulted in prejudice. Accordingly, we reject Sileno's claim that his trial counsel provided ineffective assistance in this regard.

B. Motion to Dismiss—Unconstitutional.

¶16 Sileno's next claim is that the trial court erred in denying his motion to dismiss. He asserts that WIS. STAT. § 941.26(1)(a) is unconstitutional because it does not contain a *mens rea* requirement, and as a result is vague for failing to give reasonable notice of the prohibited conduct. The trial court rejected this argument, noting that the statute does not require a *mens rea* element, is not unconstitutional and is not vague.

¶17 The constitutionality of a statute is a question of law, reviewed *de novo*. ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). Statutes are presumed constitutional, and courts will indulge every presumption favoring the validity of the law. ***Id.*** A challenger must prove the statute unconstitutional beyond a reasonable doubt. *See* ***State v. Hahn***, 2000 WI 118, ¶30, 238 Wis. 2d 889, 618 N.W.2d 528.

¶18 WISCONSIN STAT. § 941.26(1)(a) provides: "No person may sell, possess, use or transport any machine gun or other full automatic firearm." Sileno's argument is that without a *mens rea* requirement in the statute, it is

unconstitutional, vague, and prevents him from presenting the defense that he did not know his firearm was a fully automatic weapon. In support of his argument, he relies almost entirely on ***Staples v. United States***, 511 U.S. 600 (1994). In ***Staples***, the Supreme Court construed the federal statute, 26 U.S.C. § 5861(d) (which makes it a crime to possess an unregistered machine gun), to include a *mens rea* requirement. "[T]o obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his [rifle] that brought it within the scope of the Act." ***Id.*** at 619.

¶19 We are not convinced that ***Staples*** controls the issue here. As noted by the trial court when it rejected this claim:

> What they said in Staples was, as we look at the congressional intent, as we the court look at it and interpret everything we believe the U.S. Congress intended to require a mens rea element. That is what Staples said, at least to my reading and that is a significant difference from saying, substantively, there must be a mens rea element or there is a violation of due process and since they didn't say that, by implication it means that someone could create a statute that doesn't have a mens rea element in there and not be violative of someone's due process rights, which is exactly the situation that we have right here with Mr. Sileno.

We agree with the trial court's interpretation in this regard. Sileno's argument here is that the statute is unconstitutional because it does not contain the *mens rea* element and thus leaves him unable to present his claim that he did not know the rifle in his possession was a machine gun. Sileno's primary objection is the discrepancy between the Wisconsin statute and the federal counterpart. We must decide this case on the argument presented relative to the Wisconsin statute.

¶20 Here, the Wisconsin statute is clear on its face that *mens rea* was not an element of the offense created by our legislature. The language of the statute

clearly and simply states that the legislature intended the crime to be one of strict liability. Sileno does not present any legislative intent to establish that the Wisconsin legislature intended a *mens rea* element to be read into the statute, nor did he argue during the trial court proceedings that the Wisconsin statute should be construed to require the State to prove a *mens rea* element. Rather, he argued that a defendant charged under this statute should be allowed to present a *mens rea* defense, and the failure to include a *mens rea* element rendered the statute unconstitutional. Sileno fails to present any convincing authority which renders a statute unconstitutional solely because it does not require *mens rea* as an element. Based on these particular circumstances, the federal congressional intent relative to 26 U.S.C. § 5861(d), and ***Staples***' interpretation thereof, does not apply to the instant case.

¶21 Sileno also asserts that WIS. STAT. § 941.26(1)(a) is void for vagueness. In support of this argument, he cites the following sentence from our supreme court's opinion in ***State v. Jadowski***, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810: "It is a fundamental principle of law that an actor should not be convicted of a crime if he had no reason to believe that the act he committed was a crime or that it was wrongful." ***Id.***, ¶43.

¶22 In order to determine whether a statute is void for vagueness, "we must determine whether the statute is sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judges and juries of standards for the determination of guilt." ***Id.***, ¶35. In examining the language of the statute, we agree with the trial court that the statute is not vague. It very clearly states that no person may possess or "transport any machine gun or other ful[ly] automatic firearm." WIS. STAT. § 941.26(1)(a). Moreover, WIS. STAT. § 941.27(1) defines machine gun as "any of the following:"

> (a) Any weapon that shoots, is designed to shoot or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.
>
> (b) The frame or receiver of any weapon described under par. (a) or any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a weapon described under par. (a).

This language is clear and precise, setting forth in "sufficiently definite" terms the conduct that is prohibited under the statute involved. One cannot possess or transport a machine gun or fully automatic firearm. One cannot possess or transport a weapon that either shoots, is designed to shoot, or can be readily restored to shoot more than one shot with a single pull of the trigger. One cannot possess any part or combination of parts designed and intended for use in converting a weapon into a machine gun or fully-automatic weapon. Sileno conceded that he purchased the parts required to convert his rifle into a machine gun and had attached all but one of those parts to make that happen. Based on the foregoing statutory language, Sileno should have had reason to believe that his conduct was in violation of these statutes. Accordingly, we conclude that Sileno failed to establish his burden of proving § 941.26(1)(a) was unconstitutional, and we affirm the decision of the trial court.

C. Motion to Suppress.

¶23 Sileno also contends that the trial court erred in denying his motion to suppress the evidence discovered during the search of his vehicle. He claims that he did not give the police permission to search his vehicle, and, therefore, they could not constitutionally do so.

¶24 A motion to suppress evidence raises a constitutional question, which presents a mixed question of fact and law. To the extent the trial court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. *See* ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). The application of constitutional and statutory principles to the facts found by the trial court, however, presents a matter for independent appellate review. ***Id.***

¶25 Sileno accurately states that "[w]arrantless searches are per se unreasonable" and violate the Fourth Amendment. *See* ***State v. Milashoski***, 159 Wis. 2d 99, 110-11, 464 N.W.2d 21 (Ct. App. 1990). Police may perform a warrantless search of a vehicle "if there is probable cause to believe that the vehicle contains contraband." ***State v. Matejka***, 2001 WI 5, ¶23, 241 Wis. 2d 52, 621 N.W.2d 891. Sileno argues that the police here did not have probable cause to search his vehicle and therefore, the evidence discovered during the search should have been suppressed. He makes this argument, however, primarily as a formality to "preserve any and all future challenges to Sileno's conviction in this matter." In any case, if police obtain valid consent, probable cause to search is unnecessary.

¶26 This case was decided at the suppression hearing on the trial court's finding that the police account of what happened was more credible than Sileno's version of events. As Sileno concedes, "the trial court was in a position to assess the credibility of the witnesses and the trial court found that the officer was more credible" and this "may end the inquiry." This in fact does end the inquiry. The police testified that Sileno consented to the search of his vehicle. Sileno testified that he did not consent. The trial court found the police testimony to be more credible. Sileno does not challenge the trial court's credibility assessment.

¶27 It is undisputed that consent is one of the well-established exceptions to the warrant requirement of the Fourth Amendment. ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). Here, the trial court found that Sileno consented to the search based on the credible testimony of the police. This finding is not challenged by Sileno, and this court concludes that the trial court finding was not clearly erroneous. Accordingly, the warrantless search was not illegal as it was conducted pursuant to freely and voluntarily given consent. As a result, the trial court did not err in denying the motion to suppress and we affirm that determination.

D. Sentencing.

¶28 Sileno's last claim relates to sentencing. Although Sileno frames this claim by asserting that the trial court erroneously exercised its sentencing discretion, he is actually seeking sentence modification based on alleged new factors.[3]

[3] There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. ***State v. Paske***, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991) (citing ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Furthermore, "the trial court is presumed to have acted reasonably, and the burden is on the appellant to 'show some unreasonable or unjustifiable basis in the record for the sentence complained of.'" ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted). A trial court's sentence is reviewed for an erroneous exercise of discretion. ***Paske***, 163 Wis. 2d at 70.

It is similarly well-established and undisputed by the parties in this case, that trial courts must consider three primary factors in passing sentence. Those factors are "the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public." ***Id.*** at 62. In reviewing the record in the instant case, it is clear that the trial court considered all of the appropriate factors and reached a reasonable determination. Moreover, because Sileno does not challenge the sentence on these grounds, we decline to address further the trial court's overall exercise of sentencing discretion. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994) (court may decline to addressed undeveloped arguments).

¶29 Sentence modification involves a two-step process. First, a defendant must show the existence of a new factor thought to justify the motion to modify sentence. Then, if the defendant has demonstrated the existence of a new factor, the trial court must decide whether the new factor warrants sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

¶30 A new factor 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 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."

State v. Ralph, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990) (citation omitted). The mere discovery of a fact which the sentencing court could have considered at sentencing, but did not, does not satisfy this standard. *See* ***State v. Michels***, 150 Wis. 2d 94, 99-100, 441 N.W.2d 278 (Ct. App. 1989). Rather, 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.*** at 99. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***Franklin***, 148 Wis. 2d at 8-9. Whether a fact or a set of facts constitutes a new factor is a question of law decided by this court without deference to the trial court. Whether a new factor, once established, warrants sentence modification is a discretionary determination made by the trial court. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997).

¶31 Sileno argues that two new factors exist: (1) his sister was diagnosed with cancer; and (2) Sileno would not be able to participate in the

Challenge Incarceration Program despite being eligible due to a waiting list. We reject each in turn.

¶32 First, Sileno seeks sentence modification on the basis that after his sentence, his sister was diagnosed with cancer and Sileno's mother needs his help in caring for her. As noted by the trial court: "This factor is unfortunate; however, it is not an event or development which frustrates the purpose of the sentence." We agree. Moreover, as pointed out by the State, the trial court was aware at the time of sentencing that Sileno's sister suffered from other substantial disabilities, namely that she has cerebral palsy, is confined to a wheelchair, and requires round-the-clock care. Thus, the cancer development does not constitute a new factor.

¶33 Second, Sileno contends that his inability to participate in the Challenge Incarceration Program constitutes a new factor. We are not convinced. The trial court rejected this contention in its written postconviction order, ruling:

> The defendant also states that although the court and the Department of Corrections have found him eligible for the Challenge Incarceration Program, he will not be able to participate in the program due to the waiting list. A court's finding of eligibility for the Challenge Incarceration Program is merely a statement to the Department of Corrections that the court does not object to the defendant's participation in the program. The court recognizes that its recommendation is not a mandate but a privilege that may or may not be granted by the Department. Consequently, when a court finds an offender eligible for the program, it does so with the understanding that the defendant may not be able to participate in the program. In this instance, the court did not base its sentencing decision upon the defendant's participation in the Challenge Incarceration Program, and therefore, the court finds that the defendant's inability to participate in the program due to the waiting list does not allege a new factor for modification purposes.

The sentencing court's remarks reflect that eligibility for the program did not mean automatic entrance into the program. The trial court clearly thought Sileno would benefit from the program, but there is nothing to convince us that the trial court was relying on Sileno getting into the program. The sentence imposed was based on the seriousness of carrying around a fully-automatic weapon, the fact that this crime occurred while Sileno was on probation, the need to protect the public, and the lack of respect Sileno had for the court as evidenced by his bail jumping. The Challenge Incarceration Program was a bonus for Sileno to try to help him with his drug problem, but does not appear from the record to be "highly relevant" to the sentence. Thus, the purpose of the sentence was not frustrated by Sileno's inability to participate in the program.

¶34 In sum, we reject each of Sileno's claims on appeal and affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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