

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2585-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GEORGE W. PERKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Richland County: MICHAEL T. KIRCHMAN, Judge. *Affirmed.*

Before Eich, Vergeront, and Deininger, JJ.

¶1 VERGERONT, J. George Perkins appeals a judgment of conviction on two counts of sexual assault as a repeater, contending that conviction on both counts constitutes double jeopardy. He also seeks remand for resentencing, contending the trial court violated his right to due process when it imposed the

maximum sentence based upon inaccurate information. We conclude Perkins was not subject to double jeopardy and his right to due process in sentencing was not violated. We therefore affirm.

BACKGROUND

¶2 The complaint charged Perkins with two counts of second-degree sexual assault in violation of WIS. STAT. § 948.02(2) (1997-98)¹ as a repeater under WIS. STAT. § 939.62(1)(a).²

¶3 According to the complaint, in July 1998 Perkins visited his neighbors at their home. After spending the evening there, he was asked to leave because the family was going to bed. Several hours later Perkins returned to his neighbors' house. He entered the house and went into the bedroom of Eric, who was fourteen years old. Perkins removed Eric's pajamas and began fondling Eric's genitals, then performed oral sex on Eric. At this point, Eric awoke and rolled over onto his stomach in an effort to stop Perkins. Perkins then rolled Eric over onto his back and engaged in oral sex again.

¶4 Perkins entered a guilty plea to both counts.

¶5 Perkins estimated to the author of the presentence investigation report (PSI) that the incident lasted approximately eight to ten minutes, that he fondled the child's genitals for two to three minutes, he performed oral sex on the

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² The complaint also alleged a burglary count, but the State dismissed that count.

child for four to five minutes, and, after the boy rolled over, for another two to three minutes.

¶6 The PSI report noted that Perkins had previously been convicted of one count of second-degree sexual of a child and three counts of fourth-degree sexual assault for conduct involving his son. In the latter case, the trial court withheld sentence and placed Perkins on probation for four years on various conditions, one of which was to serve nine months in jail with work release privileges. The offense in this case occurred two months after Perkins was discharged from probation on the prior convictions. The PSI report related that before being discharged from probation, Perkins had stopped taking the medication prescribed to control his sexual fantasies, although this was not known at the time Perkins was discharged.

¶7 At the sentencing hearing, the prosecutor discussed Perkins' prior convictions for assaulting one "young man" and argued that this second time there should be no leniency. The prosecutor accurately related that Perkins was "convicted on four counts, one of which was a felony," but erroneously stated that Perkins went to prison and "was off parole" two months when the assault in this case occurred. In sentencing Perkins, the trial court stated:

I don't think that the maximum sentence is necessary for punishment, nor even for deterrence. Generally we give prison sentences for deterrence and it's not so important the length of the sentence as to the fact that the sentence is for imprisonment. I think the issue here is protection of the community. When we're talking about the community we're talking about the protection of children because that's who is primarily at risk from Mr. Perkins. Mr. Perkins is a pedophile, and as Mr. Jackson points out, there's not going to be too much treatment for him while he's in prison.

What chance does he [Perkins] have for rehabilitation? More importantly, what protection is there to the community when Mr. Perkins gets out of prison. I mean, if the past is any indication of the future, why we know what has happened in the past. Mr. Perkins has been convicted of sexual assault. He has been sent to prison and he's come out on parole and did well on parole until the end when he stopped his medications and then within a couple of months of being off parole committed these offenses in this case. It was a struggle for him. He wasn't out there lurking around but he did see his opportunity. He did voluntarily intoxicate himself to release his inhibitions and even before that he had stopped taking his medication and going to the group sessions, which were helpful to him, and knew that he was losing control.

The overriding consideration here has to be protection of children, protection of the community. That's why a lengthy period of incarceration is the only way to do that as I see it here. Supervision after a prison sentence, either on probation or parole, certainly is absolutely necessary.

I come to the conclusion that the maximum term of imprisonment is necessary for the protection of the community.

The trial court sentenced Perkins to an indeterminate term up to the maximum of twenty-two years on each count, to be served consecutively.

¶8 Perkins brought a postconviction motion, asserting that the two counts were multiplicitous, thus violating his right against double jeopardy, and that he was entitled to resentencing because the reliance on inaccurate information violated his right to due process. The court denied both claims. In denying the claim for resentencing, the court explained:

It seems to me that I did know that he was on probation and went to jail, rather than to prison. But I don't seem to find that. I'm looking at the pre-sentence report. So far I can't, I could see where—it says probation for second degree sexual assault. At any rate during the sentence hearing the district attorney mentioned prison. And I picked that up in my sentencing remarks.

But the important thing, the significant thing was that Mr. Perkins was on supervision for sexual assault and that toward the end of his supervision period, whether it was probation or parole, he stopped taking his medications, and within a short time committed the offenses that are alleged in this case. And that is ... [a] significant thing. Whether it's prison or jail; whether it was parole; or probation makes not much difference. The fact ... is that ... toward the end of the supervision, he stops taking his medications and then commits the new offenses. Really it is not important whether it was prison or jail, or whether it was probation or parole.

....

But I opted for two prison sentences because of the serious nature of the offense and the need to protect the community from somebody who was repeating.

....

These omissions or mistakes were not—are not highly significant in regard to what the court's determination was as to what sentence would be appropriate, and they're not highly significant to the reasons that the court had for giving the mandatory, giving, rather, the maximum sentences for each of the two counts.

DISCUSSION

Double Jeopardy

¶9 The United States Constitution and the Wisconsin Constitution protect a defendant from being punished twice for the same offense. *See State v. Anderson*, 219 Wis. 2d 739, 747, 580 N.W.2d 329 (1998). The protections provided by the double jeopardy principle are: protection against a second prosecution for the same offense either after acquittal or conviction and protection against multiple punishments for the same offense. *See id.* In this case, we are concerned with the third type of protection. “Multiplicity is defined as the charging of a single criminal offense in more than one count.” *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992) (citations omitted). An individual’s

constitutional right to be protected from double jeopardy is a question of law, which we review de novo. *See Anderson*, 219 Wis. at 747.

¶10 Claims of multiplicity are analyzed using a two-part test. *See State v. Warren*, 229 Wis. 2d 172, 178, 599 N.W.2d 431 (Ct. App. 1999). Under the first part, we decide whether the charged offenses are identical in law and fact. *See id.* If they are, the charges are multiplicitous. *See id.* at 178-79 If they are different in law or fact, under the second part of the test we decide whether the legislature intended to allow multiple convictions for the offenses charged. *See id.* at 179. If we decide the legislature intended the charges be brought as a single count, the charges are multiplicitous not because they constitute double jeopardy but because they violate legislative intent. *See id.* Since Perkins does not assert the legislature intended multiple offenses under WIS. STAT. § 948.02(2) to be brought as a single count, we confine our analysis to the first part of the test.

¶11 Perkins and the State both concede the two second-degree sexual assault charges are identical in law. We therefore address only whether they are different in fact. The challenge to multiple charges brought under the same statute is generally referred to as a “continuous offense challenge.” *Warren*, 229 Wis. 2d at 179. In analyzing a continuous offense challenge, “we focus on the facts giving rise to the charged offenses and ask if the offenses are either separated in time or significantly different in nature.” *Id.* at 180. Offenses are separated in time when there is a sufficient break in the defendant’s conduct to constitute more than one offense occurred. *See id.* Offenses are significantly different in nature either when proof of a fact is required for conviction of one offense that is not required for the other, or when there is a “new volitional departure in the defendant’s conduct.” *See Anderson*, 219 Wis. 2d at 751. “[S]uccessive intentions make [the

defendant] ... subject to cumulative punishment." *Id.* (quoting *Irby v. United States*, 390 F.2d 432, 435 (D.C. Cir. 1967)).

¶12 Perkins asserts that the conduct underlying each count is not significantly different in fact, but rather, is one continuous act. However, we conclude that there was a new volitional departure in his conduct after Eric rolled over on his stomach, and, therefore, a charge based on Perkins' conduct before that point and a charge based on his conduct after that point are not multiplicitous.

¶13 Eric was sleeping when Perkins entered his bedroom, removed his pajamas, fondled his genitals and performed oral sex. A distinct break in Perkins' actions occurred when Eric awoke and rolled over on his stomach to avoid further contact. This act by Eric interrupted Perkins' act of performing oral sex on Eric. Perkins had the opportunity to stop and reflect upon his conduct, with the new information that Eric was awake and was turning away from him in order to stop him. Nevertheless, instead of deciding to stop at that point, Perkins made a conscious decision to turn Eric over and engage in oral sex again, knowing that Eric was awake and did not want him to do this.

¶14 Perkins contends that *State v. Hirsch*, 140 Wis. 2d 468, 410 N.W.2d 638 (Ct. App. 1987), supports his position, but we disagree. In *Hirsch* this court affirmed a trial court's ruling that three counts of sexual assault were multiplicitous. *Hirsch* engaged in one continuous act of sexual assault, a movement from the victim's vagina to the anus and back to the vagina again, with "apparently little, if any, lapse of time between the alleged acts."³ We stated that

³ The exact time period in which the *Hirsch* assault occurred is not provided in either the information or the complaint. *State v. Hirsch*, 140 Wis. 2d 468, 475, 410 N.W.2d 638 (Ct. App. 1987).

we could not determine that “the defendant had sufficient time for reflection between the assaultive acts to again commit himself.” *Id.* at 475. In contrast, in this case Eric’s rolling over on his stomach provided Perkins with the time and the opportunity to reflect on whether to again commit himself to assaulting Eric.

¶15 Perkins argues the two assaults were not separated in time because the entire assault lasted approximately eight to ten minutes, and no case concludes this short time span is sufficient to avoid multiplicity. However, since we have concluded the offenses are significantly different in nature, we need not address whether the offenses are separated in time. *See Warren*, 229 Wis. 2d at 180.

Sentencing

¶16 On appeal Perkins renews his argument that he is entitled to resentencing because his due process rights were violated in sentencing.⁴ “Defendants have a due process right to be sentenced on the basis of accurate information.” *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citing *United States v. Tucker*, 404 U.S. 443, (1972)). In order to establish a due process violation, the defendant has the burden of proving by clear and convincing evidence both that the information used in sentencing was inaccurate and that he was prejudiced by the misinformation; that is, that it influenced the court’s sentencing decision. *See State v. Littrup*, 164 Wis. 2d 120, 132, 473, N.W.2d 164 (Ct. App. 1991).

⁴ The State contends Perkins waived the right to raise this issue on appeal because he did not object to the prosecutor’s erroneous statement at sentencing. Perkins responds that the State did not object on this basis at the postconviction proceedings, and, had it done so, Perkins would have claimed his trial counsel was ineffective for failing to object. We choose to address Perkins’ argument.

¶17 Sentencing is within the trial court's discretion. A reviewing court presumes the trial court acted reasonably in imposing the sentence and upholds the sentence unless the trial court erroneously exercised its sentencing discretion. *See id.* at 126. However, the question of whether due process rights were violated is a question of law, which this court reviews *de novo*, without deference to the trial court. *See id.*

¶18 In this case both parties concede that it is not accurate that Perkins was sentenced to prison and released on parole for the prior three misdemeanors and one felony. However, they dispute whether the trial court relied on this information in determining Perkins' sentence. Perkins asserts it is plain from the record that the trial court relied on the erroneous information because the court repeated the erroneous information in explaining the sentence it imposed. The State contends that the court did not rely on it because the relevant factors in this part of the court's analysis were the prior convictions and Perkins' reoffense within two months after release from supervision, not the precise sentence or nature of the supervision.

¶19 We conclude that the trial court did not rely on the misstatement that Perkins had been in prison and on parole rather than on probation with jail time in sentencing Perkins. The PSI states in a very prominent manner Perkins' past record and the disposition—probation with jail time—for each of the prior offenses. The trial court's comments at the sentencing hearing indicate it read the PSI. The court's comment at the post-sentencing hearing—"it seems [the court] did know that Perkins was on probation and went to jail, rather than to prison"—and its then locating that information in the PSI are further indications the court did know the accurate information at the time it sentenced Perkins, even though it repeated the prosecutor's inaccurate statement.

¶20 Most importantly, the trial court explained at the post-sentencing hearing that the distinctions between prison and jail and between probation and parole were not significant in its analysis: the significant fact was that Perkins was on supervision for sexually assaulting a child, stopped taking his medication and within a short time committed another offense. The court's post-sentencing statements about what it considered significant at the time of sentencing are supported by the record of the court's comments at sentencing.

¶21 We disagree with Perkins that we must reject the trial court's comments at the post-sentencing hearing concerning what it considered significant at sentencing and what the court did and did not know. We did do that in *State v. Anderson*, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998), because there the trial court's post-sentencing determination, that it had not relied on the alleged inaccurate descriptions of sexual abuse in the PSI in its sentencing decision, was contradicted by the record: the record showed that the court specifically referred to the events described in the PSI as "some of the most aggravated violations I have ever heard about or read about." *Id.* at 406-07. In contrast, in this case the trial court's determination that the prison/jail and parole/probation distinctions were not significant in its sentencing decision is supported by the record of the sentencing hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

