COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1839-CR **Cir. Ct. No. 00-CF-46**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANE M. COOK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 VERGERONT, P.J. Shane Cook appeals a judgment of conviction and sentence for two counts of forgery-uttering, as a party to the crime, in violation of WIS. STAT. §§ 943.38(2) and 939.05 (1999-2000)[1] to which he

[1] WISCONSIN STAT. § 943.38(2) provides:

pleaded no contest. On appeal Cook contends the forgery charges must be dismissed with prejudice because the preliminary examination was not timely held and because his right to a speedy trial was violated. We conclude that by pleading no contest, Cook waived the issues of the timeliness of the preliminary examination and the right to a speedy trial. Cook also seeks resentencing because the court conducted the plea and sentencing hearing by speakerphone. We conclude that, even if the court erred in utilizing that procedure with Cook's consent, that error was harmless. We therefore affirm the judgment and sentence.

BACKGROUND

¶2 In a criminal complaint filed in Columbia County on February 15, 2000, Cook was charged with seven offenses. Four of the offenses were forgery, as a party to the crime, in violation of WIS. STAT. §§ 943.38(2) and 939.05, with the complaint alleging that during December 1999, Cook, as a party to the crime, uttered as genuine forged checks. The other offenses were theft, criminal damage to property, and felony bail jumping. The charges stemmed from reported break-ins of cars in Columbia County on December 13, 1999. At the time Cook was on probation for a prior burglary conviction.

¶3 On March 9, 2000, Cook, with appointed counsel, appeared at the initial appearance and requested a preliminary examination. The preliminary

---

> **(2)** Whoever utters as genuine or possesses with intent to utter as false or as genuine any forged writing or object mentioned in sub. (1), knowing it to have been thus falsely made or altered, is guilty of a Class C felony.

WISCONSIN STAT. § 939.05 provides that a person may be convicted of the commission of a crime although the person did not directly commit it.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

examination took place on November 9, 2000. After Cook filed a request for substitution of judge, a Dodge County circuit court judge was assigned to the case on November 21, 2000. On January 8, 2001, Cook filed a demand for speedy trial under WIS. STAT. § 971.10.

¶4 Subsequently Cook reached a plea agreement in both the Columbia County case and the Sauk County case in which he was charged with another count of forgery-uttering arising out of the same series of incidents. Under that agreement, Cook would plead no contest to Count 1 in the Sauk County case and to Count 1 in the Columbia County case, both for knowingly uttering as genuine forged checks as a party to the crime in violation of WIS. STAT. §§ 943.38(2) and 939.05. In addition, Counts 2 and 3 of the Sauk County case and Counts 2 through 7 of the Columbia County case would be dismissed; however, the charges would be read in for purposes of restitution.[2]

¶5 The two cases were consolidated, and a plea and sentencing hearing for both cases took place on February 19, 2001. The Dodge County judge assigned to the Columbia County case presided. Cook, his attorney, and the prosecutor appeared in the Columbia County courthouse, along with the clerk who was taking minutes. The judge and the court reporter were in a courtroom in Dodge County, and the judge used a speakerphone to conduct the hearing.

¶6 As part of the plea agreement, the State and defense counsel jointly recommended a ten-year prison sentence, concurrent, for the two charges that were not dismissed. After determining that Cook freely pleaded no contest to the

[2] Cook also agreed to plead no contest to a charge of operating a motor vehicle while under the influence of an intoxicant, second offense, in violation of WIS. STAT. § 346.63. This conviction is not at issue in this appeal.

charges, the court proceeded to ask Cook about whether he agreed to the arrangement of the hearing:

> THE COURT: …. One thing that maybe we should have discussed at the top of this hearing was that it was somewhat difficult for the court to find a half-a-day to take the hour or more to drive to Portage, do this hearing, and then an hour or more to drive back. But with the agreement that the court could conduct this hearing by telephone, we were able to get this on in a timely manner. Mr. Cook, do you have any objection to proceeding the way that we are, with you being present in court with your lawyer, but with the judge being on the speaker phone.
>
> DEFENDANT: No, sir.
>
> THE COURT: All right. You agree that we can proceed in this fashion?
>
> DEFENDANT: Yeah.
>
> THE COURT: All right. Do either of the attorneys want to say anything or make any comment or raise any question about that?
>
> [PROSECUTOR]: No, Your Honor.
>
> [DEFENSE COUNSEL]: No, nothing, Your Honor.

¶7 The court then heard from the prosecutor, Cook, and his attorney on sentencing. The court sentenced Cook to six years on the Sauk County charge and six years, consecutive, on the Columbia County charge.

DISCUSSION

¶8 Cook contends that the charges must be dismissed with prejudice because the preliminary examination was not held within twenty days of the initial appearance as required by WIS. STAT. § 970.03(2).[3] He argues that the court lost

[3] WISCONSIN STAT. § 970.03(2) provides:

jurisdiction when it failed to hold the preliminary examination within twenty days of the initial appearance and provided no reason why the preliminary examination was not timely held. In addition, Cook contends without citation that, because the trial court did not inform him that he was entitled to a preliminary examination and because of the time delay, the court lost personal jurisdiction over Cook.

¶9 We conclude that Cook's no contest plea constituted a waiver of any defect in the timing of the preliminary examination. A defendant who claims error occurred at the preliminary examination may obtain relief only before trial. ***State v. Webb***, 160 Wis. 2d 622, 636, 467 N.W.2d 108 (1991). In addition, defects at the preliminary examination do not affect the personal or subject matter jurisdiction of the trial court. ***Id.*** at 634.[4]

¶10 Cook also argues that his constitutional right to a speedy trial was violated. However, a voluntary and knowing plea constitutes a waiver of all non-jurisdictional defects and defenses, including violation of constitutional rights occurring before the plea. ***Foster v. State***, 70 Wis. 2d 12, 19-20, 233 N.W.2d 411 (1975). Before accepting Cook's no contest plea, the trial court established that Cook voluntarily and knowingly made his no contest plea, and Cook does not argue otherwise. Therefore, entry of the valid no contest plea waived Cook's right to challenge the alleged denial of a speedy trial. ***Hatcher v. State***, 83 Wis. 2d 559, 563, 266 N.W.2d 320 (1978).

> **(2)** The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of $500. On stipulation of the parties or on motion and for cause, the court may extend such time.

[4] Because of this conclusion, we do not decide whether Cook agreed to waive the time limits for the preliminary examination, as the State contends.

¶11 Cook next seeks resentencing on several grounds. However, he filed no motion in the trial court challenging his sentence. Generally a motion to modify a sentence must be made in the trial court before the sentence is challenged on appeal. ***State v. Fearing***, 2000 WI App 229, ¶4, 239 Wis. 2d 105, 110, 619 N.W.2d 115. Accordingly, to the extent that Cook seeks a modification of his sentence on the ground that the court erroneously exercised its discretion, he has waived that issue.[5] We will, however, consider his challenge to the judge conducting the sentencing by speakerphone.

¶12 Cook contends that his constitutional rights were violated because the sentencing was conducted by the court by a speakerphone. Cook also argues that under WIS. STAT. § 971.04(1)(g), a defendant must be physically present at sentencing and may not waive the statutory right to be present.[6]

¶13 The State responds to Cook's constitutional argument by asserting that a defendant may waive the constitutional right to be present at sentencing, citing ***State v. Koopmans***, 202 Wis. 2d 385, 399-400, 550 N.W.2d 715 (Ct. App. 1996), *aff'd on other grounds*, 210 Wis. 2d 670, 563 N.W.2d 528 (1997), and that Cook plainly did waive the right to be in the physical presence of the judge at sentencing. Cook does not dispute either assertion in his reply brief and therefore

[5] Specifically, we do not address Cook's contention that the court erroneously exercised its sentencing discretion by sentencing him in excess of the plea agreement without sufficiently explaining why it was giving a longer sentence and why consecutive sentences were necessary. Nor do we address his contention that the trial court erroneously exercised its discretion because it did not personally observe Cook when sentencing him by speakerphone, and thus could not consider Cook's demeanor, although as we explain above, we do address Cook's right to be physically present before the judge at sentencing.

[6] Cook makes these same arguments with respect to the plea hearing and also argues that the plea hearing did not meet the requirement in WIS. STAT. § 971.08(1) of addressing the defendant personally when accepting a plea. However, Cook emphasizes that he does not seek to withdraw his plea, but seeks only a resentencing. Therefore, we consider his arguments only as they relate to the sentencing portion of the hearing.

we take them as concessions. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶14 We next address Cook's argument under WIS. STAT. § 971.04(1).[7] The construction of a statute and its application to a set of facts presents a question of law, which we review de novo. ***State v. Vennemann***, 180 Wis. 2d 81, 93, 508 N.W.2d 404 (1993).

¶15 WISCONSIN STAT. § 971.04(1) specifies at what proceedings a defendant "shall be present." Under § 971.04(1)(g), a defendant shall be present at "the pronouncement of judgment and the imposition of sentence."[8] In

[7] In Cook's initial brief, he did not make any argument under WIS. STAT. § 971.04. It was only in his reply brief, after the State raised and addressed the issues implicated by § 971.04, that Cook argued he could not waive his statutory right to be physically present before the judge. We do not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). However, we may in our discretion choose to do so. ***State v. Dyess***, 124 Wis. 2d 525, 536, 370 N.W.2d 222 (1985). Because the State did present its argument on § 971.04(1) in its brief, we will address Cook's argument on this statute.

[8] WISCONSIN STAT. § 971.04(1) provides:

> **Defendant to be present. (1)** Except as provided in subs. (2) and (3), the defendant shall be present:
>
> (a) At the arraignment;
>
> (b) At trial;
>
> (c) During voir dire of the trial jury;
>
> (d) At any evidentiary hearing;
>
> (e) At any view by the jury;
>
> (f) When the jury returns its verdict;
>
> (g) At the pronouncement of judgment and the imposition of sentence;
>
> (h) At any other proceeding when ordered by the court.

Vennemann, the court described § 971.04(1) as listing the stages of a criminal proceeding at which the defendant must be "physically present." 180 Wis. 2d at 93.

¶16 WISCONSIN STAT. § 967.08(2) sets forth the specific criminal proceedings that may be conducted by telephone.[9] Section 967.08(2) does not

---

WISCONSIN STAT. § 971.04(2) provides that a defendant charged with a misdemeanor may authorize in writing their attorney to appear on their behalf without the defendant's presence. Under subsec. (3) a trial may proceed without the defendant physically present if the defendant voluntarily absents himself or herself from the trial without leave of the court.

[9] Under WIS. STAT. § 967.08(1), "[u]nless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audiovisual means, if available." Section 967.08(2) and (3) provide:

> **(2)** The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.
>
> (a) Initial appearance under s. 970.01.
>
> (b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14 (4) or jury trial under s. 972.02 (1).
>
> (c) Motions for extension of time under ss. 970.03 (2), 971.10 or other statutes.
>
> (d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.
>
> **(3)** Non-evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.
>
> (a) Setting, review and modification of bail and other conditions of release under ch. 969.
>
> (b) Motions for severance under s. 971.12 (3) or consolidation under s. 971.12 (4).

include a sentencing hearing. The court in ***Vennemann*** concluded that when a defendant must be physically present, § 967.08 does not authorize the use of a telephone. 180 Wis. 2d at 96. Although ***Vennemann*** addressed a situation in which the defendant appeared by telephone from prison and his attorney, the prosecutor, and the judge were present in the courtroom, we see no principle upon which to distinguish that situation from this—where Cook, his attorney, and the prosecutor were in one courtroom and the judge was in another courtroom in another city, conducting the hearing by speakerphone. In both instances, the use of a telephone means that the defendant is not in the physical presence of the judge who is presiding over the hearing.[10]

¶17 The State argues that Cook waived his right under WIS. STAT. § 971.04(1) to be in the physical presence of the judge when he expressly agreed to the procedure. Cook replies that in ***State v. Koopmans***, 210 Wis. 2d 670, 679, 563 N.W.2d 528 (1997), the court held that "shall" in § 971.04(1) is mandatory, and "a defendant may not waive his or her statutory right to be present at sentencing even if the waiver is made knowingly and voluntarily." 210 Wis. 2d at 673.

> (c) Motions for testing of physical evidence under s. 971.23 (5) or for protective orders under s. 971.23 (6).
>
> (d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.
>
> (e) Motions in limine, including those under s. 972.11 (2) (b).
>
> (f) Motions to postpone, including those under s. 971.29.

[10] Relying on ***Vennemann***, we held in ***State v. Peters,*** 2000 WI App 154, ¶7, 237 Wis. 2d 741, 615 N.W.2d 655, *rev'd on other grounds*, 2001 WI 74, ¶¶18, 22, 244 Wis. 2d 470, 628 N.W.2d 797, that a defendant's appearance at the plea and sentencing hearing by closed-circuit television violated WIS. STAT. § 971.04.

¶18 We agree with the State that, because the defendant in ***Koopmans*** simply did not appear at sentencing and the court conducted the sentencing without his participation in any form, there is a reasoned basis for distinguishing ***Koopmans*** from this case. And in ***State v. Peters***, 2000 WI App 154, ¶7, 237 Wis. 2d 741, 615 N.W.2d 655, *rev'd on other grounds*, 2001 WI 74, ¶¶18, 22, 244 Wis. 2d 470, 628 N.W.2d 797, when we decided that a defendant's presence at his plea and sentencing by closed-circuit television procedure violated WIS. STAT. § 971.04(1), we observed that the defendant "did not explicitly waive his right to be physically present." This statement appears to suggest the defendant could have waived that statutory right. However, in ***State v. Harris***, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999), we relied on ***Koopmans***, 210 Wis. 2d at 679, in concluding that a defendant may not waive the right under § 971.04(1)(c) to be present at all proceedings when a jury is selected. In ***Harris***, after the court had questioned jurors without the defendant present and, for a time, without his counsel present either, the defendant stated on the record he did not object.

¶19 We will assume without deciding that Cook could not, as a matter of law, waive his right under WIS. STAT. § 971.04(1)(g) to be in the physical presence of the judge at sentencing. However, that does not completely resolve the issue, because violation of the right to be present under § 971.04(1) is subject to a harmless error analysis. ***Harris***, 229 Wis. 2d at 839-40; ***State v. Peterson***, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998) (concluding violations of § 971.04, like violations of a defendant's constitutional right to be present, are subject to harmless error analysis). An error is harmless if it does not affect the substantial rights of the defendant. ***Harris***, 229 Wis. 2d at 840.

¶20 We therefore examine the record to determine if the court's conducting the sentencing by speakerphone, rather than in Cook's physical

presence, violated a substantial right. In doing so, we bear in mind that a defendant's right to be present as a matter of due process exists to "the extent that a fair and just hearing would be thwarted by his absence and to that extent only." ***May v. State***, 97 Wis. 2d 175, 186, 293 N.W.2d 478 (1980).

¶21 The record here discloses that before the court imposed a sentence, the court gave Cook's attorney and the prosecutor an opportunity to speak. In addition, the court allowed Cook to make any statement for the court to consider. Cook spoke about the sentence he was facing in comparison with that of another person who also participated in the forgeries. The court then asked Cook about prior work experience, Cook's marital status, and whether he had any children. The court also allowed Cook to again address the court, at which time Cook stated that he was owning up to his responsibility by accepting the plea and that he hoped the court would take that into consideration when sentencing.

¶22 When the court sentenced Cook, it explained its reasons for the sentence it imposed. The court stated that it was imposing a sentence longer than that recommended because of Cook's "criminal lifestyle." The court found it significant that Cook was on probation for burglary and continued to commit burglary-related crimes in other counties. When Cook expressed his shock over the sentence to the court, the court responded that a pattern of crime had been indicated and, given the number of charges dismissed and read in, the court felt additional time was warranted.

¶23 The record establishes that the court properly exercised its sentencing discretion based on appropriate factors.[11] The sentence the court imposed was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Cook was given and exercised his right of allocution. Cook has not advanced any specific way in which his right to be fairly and justly sentenced was adversely affected because the court conducted the sentencing by speakerphone. We are satisfied that the sentencing proceeding was fair and just. We conclude that, assuming it was error for the court to conduct the sentencing by speakerphone even though Cook consented, the error was harmless.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[11] The primary factors the court is to consider in sentencing are: (1) the gravity and nature of the offense; (2) the offender's character and rehabilitative needs; and (3) the public's need for protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). As part of these primary factors, the court may consider: the vicious or aggravated nature of the crime; any past criminal record or history of undesirable behavior; the defendant's personality, character, and social traits; the presentence investigation; the defendant's demeanor at trial; the defendant's age, educational background, and employment record; and the defendant's remorse, repentance, and cooperativeness. ***State v. Borrell***, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992). The weight to be given each factor is within the discretion of the trial court. ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).