

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 30, 1996

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.

No. 95-3564-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANNIE B. JENKINS,

Defendant-Appellant.

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

FINE, J. Annie B. Jenkins appeals from the judgment convicting her of battery, see § 940.19(1), STATS., and from the trial court's order denying her post-conviction motion for sentence modification.

Jenkins was convicted by a jury of hitting and kicking Carole J. Peters following a dispute over whether Jenkins' son had hit Peters' daughter. The trial court sentenced Jenkins to a forty-five day term at the Milwaukee

House of Correction, with work-release and child-care release privileges.¹ The trial court noted that Peters was, in its words, “severely beaten,” and that, despite Jenkins' contention to the contrary, Jenkins started the fight “and just wailed the daylights out of the victim.” Jenkins does not challenge the sentence as such; rather, she contends that she presented to the trial court “new factors” and that the trial court improperly refused to modify the sentence.

A sentence can be modified to reflect consideration of a new factor. *State v. Macemon*, 113 Wis.2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a fact that is highly relevant to the imposition of sentence but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it. *Ibid.* There must also be a nexus between the new factor and the sentence—the new factor must operate to frustrate the sentencing court's original intent when imposing sentence. *State v. Michels*, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Although sentencing is within the reasoned discretion of the trial court, *Ocanas v. State*, 70 Wis.2d 179, 183-184, 233 N.W.2d 457, 460 (1975), whether a circumstance is a “new factor” is an issue of law that we resolve *de novo*, *State v. Ambrose*, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). If a new factor exists, however, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification. *Jones v. State*, 70 Wis.2d 62, 72, 233 N.W.2d 441, 447 (1975).

Jenkins' motion to modify her sentence asserted the following “new factors”:

¹ Although the sentencing transcript does not indicate that the trial court also granted Jenkins work-release privileges, the judgment of conviction specifies that Jenkins' period of incarceration is subject to both work-release privileges and child-care release privileges. The addition of work-release privileges was not, however, inadvertent; at the post-conviction hearing the trial court had the following colloquy with Jenkins' counsel:

[Jenkins' counsel]: ... So the record is clear, the Court is ruling that her obtaining a job since sentencing is not a new factor?

THE COURT: No, because I provided for that in the Huber sentence for work and child-care release.

Said motion shall be based upon “new factors,” in the form of defendant's employment since the time of sentencing which, along with her child care responsibilities for six children with no one available to help, would not only work an extreme hardship on defendant, but would have the unintended effect of leaving her young children with no one to watch them during her incarceration.

At the hearing on Jenkins' motion to modify her sentence, her attorney told the trial court that the child-care problems stemmed from the fact that Jenkins “doesn't have family or friends locally who are able to take on five children who are still living at home with her nightly for the next 45 days.”

In denying Jenkins' motion to modify her sentence, the trial court ruled that Jenkins had not presented “new factors.” We agree. First, the trial court knew at sentencing that Jenkins was a single parent and had children living with her. Indeed, Jenkins' lawyer told the trial court at sentencing that “given her situation in life ... [Jenkins] does not have anyone else ... who can care for her six children while she does any incarceration time.” Second, as noted, the judgment of conviction gives Jenkins work-release privileges as well as child-care release privileges. Thus, as the trial court noted during the course of the post-conviction motion hearing, it envisioned at sentencing the possibility that Jenkins would get employment. Moreover, the thrust of Jenkins' motion was that she would not be able to care for her children. She did not explain, however, either in the motion or at the post-conviction hearing, how her job would affect her child-care responsibilities. Significantly, as we have seen, Jenkins' lawyer told the trial court that incarceration would prevent her from caring for her children *at night*.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.