

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 20, 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.

**Nos. 96-0165-CR &
96-0166-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIO F. BLASNIG,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Mario F. Blasnig appeals from judgments of convictions entered after he pled guilty to endangering safety by reckless use of a weapon and resisting an officer, contrary to §§ 941.21(a) and 946.41(1), STATS. He also appeals from an order denying his postconviction motion seeking sentence modification.² Blasnig claims the trial court erred in denying his

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

² By order dated April 16, 1996, this court granted Blasnig's motion to consolidate cases numbered 96-0165-CR (appeal from the resisting an officer conviction) and 96-0166-CR (appeal

motion seeking sentence modification because new factors existed justifying modification of his sentence. Because no new factors existed, this court affirms.

I. BACKGROUND

Pursuant to a plea agreement, on January 3, 1994, Blasnig pled guilty to one count of endangering safety by reckless use of a weapon and one count of resisting an officer. The trial court found Blasnig guilty and judgment was entered. Sentencing, however, was withheld and Blasnig was placed on two years probation.

In December of 1994, Blasnig's probation agent began revocation proceedings for violation of his probation. As a result, Blasnig was sentenced on the above referenced convictions on May 4, 1995. The trial court sentenced him to six months in jail on the endangering safety count and six months in jail (to be served consecutively) on the resisting an officer count.

In December 1995, Blasnig filed a postconviction motion seeking sentence modification, claiming new factors existed which justify reducing his sentence. The trial court denied Blasnig's motion. Blasnig now appeals.

II. DISCUSSION

Blasnig claims that his civil commitment and treatment with medication, both of which occurred post-sentencing in this case, constitute a new factor justifying reduction of his sentence. In essence, he argued that because of this mental health treatment, he no longer posed a danger to the community. The trial court ruled that such did not constitute a new factor. This court agrees.

(..continued)

from the endangering safety conviction). Although each case generated a separate judgment, only one order was entered on the postconviction motion because the trial court heard the cases together.

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. *Id.* There must also be a nexus between the new factor and the sentence, i.e., 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). Whether a new factor exists presents a question of law which this court reviews *de novo*. *Michels*, 150 Wis.2d at 97, 441 N.W.2d at 279. Further, it is the defendant's burden to show by clear and convincing evidence that a new factor exists that would warrant sentence modification. *State v. Littrup*, 164 Wis.2d 120, 131, 473 N.W.2d 164, 168 (Ct. App. 1991).

This court concludes that Blasnig has failed to satisfy that burden. This court rejects Blasnig's assertion that the mental health treatment he received post-sentencing, including use of medication to modify his behavior, constitutes a new factor. A defendant's post-sentencing conduct does not constitute a new factor. *State v. Ambrose*, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). Therefore, Blasnig's subsequent mental health treatment is not "a fact that is highly relevant to the imposition of sentence." Further, a post-sentencing finding that a defendant's behavior was treatable and that the defendant was responding favorably to treatment are not new factors for sentence modification purposes. *State v. Prince*, 147 Wis.2d 134, 136, 432 N.W.2d 646, 647 (Ct. App. 1988); *State v. Krueger*, 119 Wis.2d 327, 335, 351 N.W.2d 738, 742 (Ct. App. 1984).

Accordingly, this court rejects Blasnig's claims that his subsequent mental health treatment and his use of medication to modify his behavior constitute a new factor justifying sentence modification. Therefore, this court affirms the judgments of conviction and the order denying postconviction relief.

By the Court. – Judgments and order affirmed.

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