

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 8, 1997

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. 96-1010-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Randy L. Burke, Sr.,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Randy L. Burke, Sr. appeals from a judgment entered after he pled guilty to one count of armed robbery, contrary to § 943.32(a), STATS. He also appeals from orders denying his postconviction motions seeking sentence modification based on a new factor and requesting that he be transferred for a physical examination. Burke claims that the trial court erred in denying these motions because:

(1) his medical condition constitutes a new factor justifying sentence modification; and
(2) the trial court has the authority to order a transfer for a physical examination.
Because the trial court did not err in denying Burke's motions, we affirm.

I. BACKGROUND

On July 24, 1993, Burke committed the crime of armed robbery when, at gunpoint, he took a purse from the victim outside a tavern. When Burke followed the victim into the tavern, one of the patrons shot him in his right arm, shattering his humerus. Burke pled guilty to one count of armed robbery on March 9, 1994. He was sentenced on April 25, 1994. At the time of sentencing, Burke told the trial court that he could barely use his right arm and that it was held by two rods and screws.

Subsequent to sentencing, Burke filed a motion asking the trial court to order that he be transported for a physical examination because he was not satisfied with the care that the Department of Corrections was providing. He also filed a motion seeking sentence modification, claiming that a new factor warranted modification of the previously imposed sentence. Burke proffered that the new factor was that, contrary to his belief prior to sentencing, his right arm was not healing properly and would need treatment that was not being provided in his current custodial setting. The trial court denied both motions. Burke now appeals.

II. DISCUSSION

A. Transport for Physical Examination.

Burke claims that the trial court erroneously exercised its discretion in denying his request for an order to transport him for a physical examination. The trial court ruled:

On February 7, 1996, the defendant by his attorney filed a motion seeking a court order requiring the Department of Corrections to transport him to a private doctor's office in Racine for a physical evaluation and provide an escort. The defendant is currently incarcerated at Racine Correctional Institution. This court does not have jurisdiction over the medical care of prisoners. Medical care and treatment of prisoners is statutorily within the province of the Department of Corrections. Sec. 302.38, Wis. Stats. The court has no authority to order the Department of Corrections to obtain particular treatment for the defendant or to interfere with the internal operations of the prison system. If the defendant is not receiving necessary treatment, his remedy may be to file a civil lawsuit in the county in which he is incarcerated. (Citation omitted).

We agree.

Burke is incarcerated in a Wisconsin correctional facility. The Wisconsin Administrative Code governs the procedure by which an inmate may seek review of his medical care if he is dissatisfied. WIS. ADM. CODE § DOC 310. Moreover, Burke may file a civil action in the county of incarceration if he does not agree with any decisions made pursuant to our administrative code. *See generally Swatek v. County of Dane*, 192 Wis.2d 47, 531 N.W.2d 45 (1995).

B. New Factor.

Burke also claims that a new factor exists justifying sentence modification and, therefore, the trial court erred in concluding that no new factor existed. He asserts that the new factor is his recent discovery that his arm is not healing properly and his inability to receive proper treatment. The trial court determined that no new factor existed, ruling:

[Burke] indicated at sentencing that he could barely use his arm and that it was held by two rods and screws. The worsening of a defendant's health has been held not to constitute a new factor for purposes of sentencing modification.... The court concludes that the defendant has failed to set forth the existence of a new factor.

We agree with the trial court.

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 independently of the trial court's conclusion. *Id.* at 97, 441 N.W.2d at 279. Whether a new factor warrants a modification of sentence rests within the trial court's discretion. *Id.* 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).

We conclude that Burke has failed to satisfy this burden. We reject Burke's claim that the condition of his arm or the treatment he is receiving constitutes a new factor. Burke's medical condition was known to all parties at the time of sentencing. The trial court was aware of it both at the guilty plea hearing and at sentencing. The fact that Burke has received contradictory opinions with respect to the condition of his arm subsequent to the sentencing does not constitute a new factor because it does not frustrate the purpose of the trial court's sentence.

The trial court sentenced Burke to ninety months in prison because of the seriousness of the offense, because he had a history of criminal activity and because it was concerned about protecting the public. A change in his medical condition does not impact on the purposes that the court concluded warranted a lengthy sentence. Burke's medical concerns are more properly a consideration for the Department of Corrections. *Michels*, 150 Wis.2d at 100, 441 N.W.2d at 280-81. Therefore, we conclude that the fact

that Burke now believes his arm is not healing properly and that he is not receiving appropriate treatment does not constitute a new factor. These issues need to be addressed to the Department of Corrections and, if necessary, acted upon through the procedures provided within the administrative code.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

