

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 9, 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. 96-1017-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL K. STAVLO,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County:
MICHAEL FISHER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Michael K. Stavlo appeals pro se from an order denying his sentence modification motion without a hearing.¹ Because we conclude that the trial court properly denied Stavlo's sentence modification motion without a hearing, we affirm.

In October 1992, Stavlo pled no contest to attempted first-degree murder of a police officer while armed with a dangerous weapon. A battery charge was dismissed. In December 1992, the trial court sentenced Stavlo to fifteen years in prison and denied Stavlo's pro se February 1993 postconviction motion challenging his plea and sentence.²

In March 1996, Stavlo filed a sentence modification motion claiming that certain facts about the crime, specifically the length and shape of the knife which he used to stab the officer and the alleged actions of the police during the incident, constituted new factors warranting sentence modification. In a letter advising that his motion was denied, the trial court stated that after reviewing the motion, "no new factors have developed since the last time your motion was denied."

Stavlo argues that the following constitute new factors: (1) the knife he used to stab the officer was not a lethal weapon because the blade was not straight; and (2) he was shot in the back by police after he was no longer a threat. He alleged that if

¹ The State argues that the trial court's March 20, 1996 letter to Stavlo denying his sentence modification motion, which is the document from which this appeal is taken, was not filed in the office of the circuit court. *See* § 807.11(2), STATS. On its own motion, the court has ordered the record on appeal corrected to include the March 20, 1996 letter, which appears in the trial court record. Such a document is an appealable order because the trial court clearly intended to dispose of Stavlo's motion. *See Town of Fitchburg v. City of Madison*, 98 Wis.2d 635, 647-48, 299 N.W.2d 199, 205 (1980) (we look beyond the form and label of the document to the substance and nature of the determination); *cf. In re Marriage of Soergel*, 154 Wis.2d 564, 566 n.1, 453 N.W.2d 624 (1990) (memorandum decision appealable because no further order or judgment contemplated).

² Stavlo did not appeal that disposition.

the trial court had known “the true facts” of the incident, it would have imposed a shorter sentence.

A new factor is a fact relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing, *see State v. Kaster*, 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989), or which frustrates the sentencing court's intent. *See State v. Michels*, 150 Wis.2d 94, 100, 441 N.W.2d 278, 281 (Ct. App. 1989).

We conclude that the motion demonstrated no new factors warranting a hearing. *See Nelson v. State*, 54 Wis.2d 489, 497, 195 N.W.2d 629, 633 (1972) (hearing required if postconviction motion alleges facts which would entitle defendant to relief).

In sentencing Stavlo, the trial court considered the gravity of the crime, protection of the community, and Stavlo's character and history of criminal activity. Neither counsel nor Stavlo (who exercised his right of allocution) argued that the condition of the knife and the circumstances of Stavlo's shooting warranted a lighter sentence. Even if they had, evidence of the shooting and the condition of the knife were irrelevant to Stavlo's sentencing. The shooting occurred after Stavlo stabbed the officer and is irrelevant to punishing Stavlo for the stabbing. In light of the trial court's sentencing rationale, the condition of the knife was not a fact which frustrated the court's sentence or was relevant to the imposition of sentence.

By the Court.—Order affirmed.

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

