

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 29, 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. 96-2346-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES WARE,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. James Ware appeals from a judgment convicting him of second-degree intentional homicide. See § 940.05(1)(b), STATS. Ware also appeals from an order denying his postconviction motion for sentence modification.

Ware pled guilty to second-degree intentional homicide in connection with the death of Eric Lucas. The trial court sentenced Ware to 40 years in prison. The trial court later denied Ware's motion to modify sentence. Ware claims that: (1) his post-sentencing remorse and acceptance of responsibility for the crime were "new factors" upon which modification of sentence was warranted; (2) his sentence was unduly harsh and unconscionable; and (3) the trial court erred in denying him a hearing on his sentence modification motion. We affirm.

First, Ware claims that "new factors" justified sentence modification. Ware claims that the trial court should have modified his sentence because of his post-sentencing admissions that he accepted responsibility for the shooting and showed remorse for his actions. "A trial court may, in its discretion, modify a criminal sentence upon a showing of a new factor." *State v. Michels*, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). "The phrase 'new factor' refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the original sentencing, either because it was not then in existence or because, even though it was in existence, it was unknowingly overlooked by all of the parties." *Id.* "[A] 'new factor' must be an event or development which frustrates the purpose of the original sentence." *Id.*, 150 Wis.2d at 99, 441 N.W.2d at 280.

Based on these standards, we conclude that Ware's post-sentencing remorse and acceptance of responsibility for the crime were not "new factors." While it may reflect a change in attitude by Ware, such factors may be considered by the department of corrections and parole board, but do not constitute new factors for purposes of sentence reduction. See *State v. Krueger*, 119 Wis.2d 327,

335, 351 N.W.2d 738, 742 (Ct. App. 1984); *State v. Wuensch*, 69 Wis.2d 467, 478, 230 N.W.2d 665, 671 (1975).¹

Next, Ware challenges the 40-year sentence imposed by the trial court claiming that it was unduly harsh and unconscionable. Because trial courts have wide discretion in sentencing, our review is limited to whether the trial court erroneously exercised its discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors to be considered by the trial court are the gravity of the offense, the character of the offender, and the need to protect the public. *Id.*, 141 Wis.2d at 427, 415 N.W.2d at 541. An erroneous exercise of discretion occurs if the trial court fails to state on the record the factors influencing the sentence or if too much weight is given to one factor in the face of contravening factors. *Id.*, 141 Wis.2d at 428, 415 N.W.2d at 542.

In denying his motion for sentence modification, the trial court noted that Ware “has an additional charge pending. He’s a high school dropout. He has had minimal employment and he is the father of two children he does not support.” The trial court also acknowledged the seriousness of the crime. Further, the trial court considered the need to protect the public by imposing a sentence to “deter other people” from committing these kinds of crimes. The trial court considered the appropriate factors. Further, Ware was convicted of shooting Lucas in the back as Lucas was running away. Given the seriousness of the crime, the sentence was not unduly harsh or unconscionable.

¹ In a post-brief letter to this court, Ware argues that the recent supreme court decision in *State v. Carter*, 208 Wis.2d 142, 560 N.W.2d 256 (1997), supports his contention that his post-sentencing remorse should have been considered by the trial court. We disagree. *Carter* is limited to a resentencing “after the initial sentence has been held invalid.” *Id.*, 208 Wis.2d at 147, 560 N.W.2d at 258. The decision does not apply to requests for sentence modification. *Id.*, 208 Wis.2d at 146, 560 N.W.2d at 258. *Carter* is not germane to this appeal.

Finally, Ware claims that the trial court erred in denying him a hearing on his sentence modification motion. The trial court must hold an evidentiary hearing when a postconviction motion alleges facts which would entitle the defendant to relief. *State v. Bentley*, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996). Ware's motion did not allege facts which demonstrate the existence of new factors or that his sentence was unduly harsh or unconscionable. The trial court, therefore, was not obliged to hold a hearing on the motion.

By the Court.—Judgment and order affirmed.

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

