COURT OF APPEALS
DECISION
DATED AND RELEASED

July 24, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3561-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES C. KOEPP,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MICHAEL B. TORPHY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. James C. Koepp appeals from an order denying his postconviction motion for sentence reduction. He argues that: (1) he should have been given alternatives to probation revocation because he suffers from mental health problems; (2) he received an improper sentence because of those mental health problems; and (3) the trial court should have recognized these problems as a

"new factor" warranting sentence modification. Koepp also contends that he received ineffective assistance of counsel. We conclude that Koepp was properly sentenced, that there is no "new factor" that warrants sentence modification, and that Koepp's counsel performed competently. Therefore, we affirm the trial court's order.

In 1984, Koepp was convicted on four counts of second-degree sexual assault. He was sentenced to concurrent five- and ten-year prison terms on two counts and was given concurrent ten-year terms of probation on the remaining counts, to be served consecutive to the prison terms. He was released from prison in 1993 and began serving probation. In September 1995, the Department of Corrections revoked Koepp's probation. Koepp waived his probation revocation hearing and on December 8, 1995, the trial court sentenced him to concurrent six-year prison terms. On September 9, 1996, Koepp filed a *pro se* motion for sentence reduction or resentencing. The trial court denied this motion. Koepp appeals.

First, Koepp argues that his mental health problems (*e.g.*, his depression, alcohol abuse and suicide attempts) led to the aberrant behavior that resulted in probation revocation. Because the Department of Corrections and the trial court did not consider these problems, Koepp argues that he was improperly denied alternatives to revocation.

The right of review of a revocation hearing is by writ of certiorari directed to the court of conviction. ***State ex rel. Johnson v. Cady***, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971). Judicial relief on certiorari will generally be denied until the parties have exhausted their administrative remedies. ***State ex rel. Braun v. Krenke***, 146 Wis.2d 31, 39, 429 N.W.2d 114, 118 (Ct. App. 1988).

Moreover, once the Department of Correction revokes probation and orders the probationer before the court under § 973.10(2), STATS., sentencing is mandatory. *See* ***State v. Balgie***, 76 Wis.2d 206, 208, 251 N.W.2d 36, 38 (1977).

The trial court could not impose alternatives to revocation at a sentencing hearing, nor could it review Koepp's probation revocation on a motion for sentence reduction. Review was beyond its discretion and alternatives to revocation were beyond its statutory authority. We conclude that the trial court properly denied Koepp's postconviction motion for relief on each of these issues.

Next, Koepp argues that the trial court erroneously exercised its discretion in sentencing him to concurrent six-year prison terms upon his probation revocation. Had the court considered his mental problems, he contends that a two-year sentence would have been appropriate. He argues that his counsel failed to bring these problems to the sentencing court's attention or call additional character witnesses, and therefore the six-year sentence is based solely on an inaccurate and misleading presentence report.

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. J.E.B.***, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). The primary factors that the trial court considers in imposing sentences are the gravity of the offense, the character of the offender, and the need to protect the public. ***McCleary v. State***, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519 (1971). The weight to be attributed to any of these factors is for the trial court to determine in the exercise of its discretion. ***Anderson v. State***, 76 Wis.2d 361, 364, 251 N.W.2d 768, 770 (1977). In reviewing a sentencing court's exercise of discretion, we start with the presumption that the trial court acted reasonably and with the

requirement that the complainant must show some unreasonable or unjustifiable basis in the record for the sentence. ***Jung v. State***, 32 Wis.2d 541, 548, 145 N.W.2d 684, 688 (1966).

We conclude that the trial court properly exercised its discretion in sentencing Koepp to concurrent six-year prison terms. The record shows that the sentencing court reviewed the State's revocation order and warrant, along with the revocation summary and investigation report. It reviewed the probation officer's recommendation and the 1984 presentence report. It heard testimony from two witnesses and heard arguments from counsel. Koepp also spoke on his own behalf, and both Koepp and his counsel informed the court of Koepp's past mental problems. After hearing all the evidence, the court explained the reasons for issuing a six-year sentence: Koepp's two violent sexual assaults, his continued alcohol problems, and his unsatisfactory progress toward rehabilitation.

Koepp has not shown what was misleading or inaccurate about the presentence report. He has not shown how the court used any unreasonable or unjustifiable basis for his sentence. He has not shown that the information the court did rely on was irrelevant or improper. Because the court appears to have considered only appropriate factors and Koepp has failed to demonstrate the use of inappropriate factors, we conclude that the trial court did not erroneously exercise its discretion in sentencing.

Next, Koepp argues that his mental condition is a "new factor" that warrants sentence reduction. A "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 time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the

parties. ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor must be an event or development that frustrates the purpose of the original sentence selected. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). A defendant must demonstrate by clear and convincing evidence that this "new factor" is highly relevant to the sentence imposed. ***State v. Franklin***, 148 Wis.2d 1, 8-10, 434 N.W.2d 609, 611-12 (1989).

Koepp contends that his serious mental problems caused the aberrant behavior that resulted in his probation revocation. Had his attorney investigated and explained this to the trial court at sentencing, Koepp argues that alternatives to revocation or a reduced sentence may have resulted. Therefore, Koepp argues that these mental problems are a "new factor" that warrant sentence modification. We disagree.

The sentencing record shows that counsel did bring to the court's attention Koepp's problems with attempted suicide, depression and alcohol. The court acknowledged that in spite of Koepp's rehabilitation efforts, these same problems were present when probation was originally imposed and had now resurfaced. Accordingly, probation was revoked and Koepp was sentenced because these same problems occurred again. There was nothing new about these facts, even if counsel had failed to bring them to the court's attention. Because Koepp's mental problems were not a "new factor," the trial court appropriately denied his motion for sentence reduction.

Finally, Koepp argues that he received ineffective assistance of counsel. Ineffective assistance of counsel is a mixed question of fact and law, and the lower court's underlying findings will be reversed only if clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). To show

ineffective assistance of counsel, a defendant must prove that his or her counsel performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. ***Id.*** at 690.

Koepp claims that three omissions in his counsel's performance resulted in ineffective assistance of counsel: counsel's failure to request a competency hearing under § 971.14, STATS.; his failure to seek alternatives to revocation; and his failure to call additional character witnesses. We disagree.

Koepp presents no evidence that a competency hearing was warranted before sentencing. Competency is the ability to understand the proceedings or assist in one's own defense. Section 971.13(1), STATS. The record is persuasively clear that Koepp understood the proceedings and, in fact, assisted in his own defense when he spoke on his own behalf and wrote the court a five-page letter. Rather, Koepp really complains of an incompetent state of mind at the time he committed the acts resulting in probation revocation. That incompetency should have been addressed, if at all, at the probation revocation hearing, which Koepp waived. Because Koepp was not represented by this counsel at revocation and because there is no evidence of Koepp's incompetency at sentencing, we conclude that there is no merit to this contention.

Likewise, Koepp's counsel, rather than ineffectively failing to seek alternatives to revocation at sentencing, was precluded from doing so by statute. *See* § 973.10(2), STATS. Following revocation, the court has no allowance for the imposition of more probation because sentencing is mandatory. ***State v. Balgie***, 76 Wis.2d 206, 208, 251 N.W.2d 36. 38 (1977). Nonetheless, Koepp's counsel

still implored the court for leniency and argued for a sentence of less than five years, which appears to be all that he could do given the sentencing constraint. Therefore, we conclude that there was no deficiency in performance here as well.

Last, Koepp does not explain how the testimony of additional character witnesses may have changed the outcome. While Koepp identifies a social worker and an Alcoholics Anonymous sponsor as possible witnesses, he fails to identify what necessary information they would have added. The defendant must show that counsel's deficient performance prejudiced the defense. ***State v. Sanchez***, 201 Wis.2d 219, 232, 548 N.W.2d 69, 74 (1996). Koepp has not provided this information or shown why the two character witnesses counsel did call were not sufficient. Therefore, we are also unconvinced by this allegation.

Koepp has not made a clear showing of deficient performance or shown how counsel's performance prejudiced his defense. Therefore, we conclude that there is no reason to reverse the trial court's underlying findings regarding the effectiveness of Koepp's counsel.

Koepp has not shown ineffective assistance of counsel; has not shown a "new factor" that should be considered; and has not shown that he received an inappropriate sentence. Therefore, we conclude that the trial court properly denied Koepp's motion for sentence reduction.

By the Court.–Order affirmed.

Not recommended for publication in the official reports.