

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 15, 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. 97-0631-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JERRY GRILLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

SCHUDSON, J.¹ Jerry Grillo appeals from a judgment of conviction, following his guilty plea, for disorderly conduct. He also appeals from an order denying his motion for sentence modification. Grillo claims that the trial

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

court erred in denying his motion to modify his sentence based on a new factor. This court affirms.

I. BACKGROUND

On January 7, 1997, Grillo pleaded guilty to an amended charge of disorderly conduct. The trial court imposed and stayed ninety days at the House of Correction and placed Grillo on probation for eighteen months. As a condition of probation, the trial court ordered that Grillo serve ten days at the House of Correction, with work release privileges.

On January 29, 1997, Grillo moved for modification of his sentence based on a "new factor." In his written motion, Grillo alleged:

The 'new factor' in this case is that the defendant's [psychiatrist] ... [wrote a letter to counsel stating his belief] that incarceration of Mr. Grillo would destroy his progress to date.... Mr. Gillo has made significant progress since his arrest. However, [the doctor] feels that "the possibility of Mr. Grillo being incarcerated has resulted in an undermining of this process and actually, incarceration would result in stopping or destroying this process altogether." At the time of sentencing, counsel was aware that Mr. Grillo was seeing [the doctor] for treatment, however, counsel was not aware of the extent of Mr. Grillo's depression and anxiety.... As counsel was not aware of Mr. Grillo's serious mental health issues, she did not make the court aware of the issues.

For these reasons, it is respectfully requested that the 10 days condition time be modified to 50 hours of community service or in the alternative that Mr. Grillo be allowed to serve the 10 days on electronic monitoring.

At sentencing, no argument was presented regarding the significance of Grillo's mental health problems. The court, however, was told that Grillo was seeing a psychiatrist, and the "Guilty Plea Questionnaire and Waiver of Rights

Form" indicated that he had undergone psychiatric care for the treatment of depression.

II. ANALYSIS

A sentence may 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 sentencing but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it." *State v. Toliver*, 187 Wis.2d 346, 361, 523 N.W.2d 113, 119 (Ct. App. 1994). In addition, the new factor must frustrate the purpose of the original sentence. *Id.* at 362, 523 N.W.2d at 119. "Whether a new factor exists presents a question of law which this court reviews *de novo*. If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification." *Id.*

Grillo claims that his doctor's opinion that ten days of incarceration would impede or hinder his treatment for depression constitutes a new factor. He argues that "[i]f rehabilitation was the goal of the court with its original sentence, that goal was frustrated by the new factor." This court rejects his arguments.

Grillo's postconviction submission does not present a new factor because the new fact it alleges does not operate to frustrate the sentencing court's original sentencing intent. While it is true that Grillo's rehabilitation was one of the goals of the sentence, it was not the only goal. At sentencing, the court also considered the protection of the public and the severity of the offense. *See McCleary v. State*, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519 (1971). In addition, the court considered Grillo's character and needs, and acknowledged that Grillo was seeing a doctor for treatment of depression, that he had no criminal record,

and that he was a professional person with a long career. At the same time, however, the court considered the fact that Grillo had received a municipal ticket for similar conduct in 1993. In imposing sentence, the court specifically addressed its concern about Grillo's repeat offender status, stating:

What concerns me, Mr. Grillo, is also that this is not an isolated incident, that you have one prior contact with the justice system for this kind of offense.... This court must take into consideration the protection of the community to make sure that this doesn't happen again.

....

... I do feel that there should be a jail component also here to serve as part of your rehabilitation, and the Court as a condition of your probation is going to order that you serve ten days in the House of Correction, with work release.

At the motion for sentence modification, the sentencing court considered Grillo's alleged new factor and concluded:

Well certainly the Court did not have the information ... [contained in the doctor's letter] at the time of the sentencing. The Court, however, was aware that the Defendant was under [a psychiatrist's] care and understood the ramifications of that given the nature of this offense. Notwithstanding this information, I do not find that having the Defendant serve ten days in jail ... would destroy the progress he's made with [his psychiatrist].... I just don't see how that would happen. And notwithstanding that fact, I find that the ten days is important and imperative for the Defendant's rehabilitation. I think it's important that the Defendant serve this time to act as a deterrent and to impress upon Mr. Grillo how important it is that he cooperate with the other conditions of his probation to avoid the 90 days, which I did impose and stay.... I am also aware of the facilities at the House, and I'm sure they will be able to accommodate him. If there's any type of

anxiety or anything of that nature, they would be able to handle it.

The purpose of the sentence was to address Grillo's repeat offender status and to aid in his rehabilitation. Nothing Grillo has alleged in his motion or brief subverts the sentencing court's intent in the original sentence. Accordingly, this court concludes that the trial court appropriately denied Grillo's motion seeking sentence modification.

By the Court.—Judgment and order affirmed.

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

