COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0657-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC J. DEBROW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Eric J. Debrow appeals an order denying his motion for a reduced sentence. Debrow received an eight-year prison term for possessing cocaine with intent to deliver it. At the hearing on his motion, Debrow alleged a new factor contending that the trial court based the sentence on incorrect information. The trial court denied relief, and we affirm that decision.

Debrow's parole officer prepared his presentence investigation report and testified at the sentencing hearing. She reported, among other things, that Debrow had a 1990 concealed weapon conviction from Illinois, and that he had failed to complete several rehabilitation programs, including one known as "U-Turn," while serving various prison and probation terms. At the postconviction hearing, Debrow presented evidence that he did not have a concealed weapon conviction, and that he never participated in the "U-Turn" program.

The trial court may modify a sentence if the defendant shows new factors. A new factor is one that is highly relevant to sentencing, but unknown to the trial court at the time of sentencing because it did not then exist or was unknowingly overlooked. *See* ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). To obtain relief on that basis, Debrow has the burden of proving, by clear and convincing evidence, not only that the information presented at sentencing was incorrect, but that it prejudicially affected the sentence. *See* ***State v. Littrup***, 164 Wis.2d 120, 131-32, 473 N.W.2d 164, 168 (Ct. App. 1991). Whether a particular fact constitutes a new factor is a question of law. *See* ***State v. Hegwood***, 113 Wis.2d 544, 547, 335 N.W.2d 399, 401 (1983).

Debrow failed to meet his burden because there is no evidence in the record that the allegedly inaccurate information affected his sentence. At sentencing, the trial court relied most heavily on the seriousness of the offense, and the undisputed fact that Debrow had prior drug convictions, and had failed to rehabilitate himself despite numerous opportunities. The trial court's sentencing remarks contained no reference to the alleged 1990 conviction, nor the alleged "U-Turn" participation. At the postconviction hearing, the trial court unequivocally stated that neither the specific conviction in question nor the

"U-Turn" failure played any part in the sentencing decision. Given that unequivocal statement, and the absence of any contrary indication in the record, we necessarily affirm. We do not go beyond the trial court's statements on the record to speculate as to its state of mind. *See* ***State v. Thompson***, 146 Wis.2d 554, 567, 431 N.W.2d 716, 721 (Ct. App. 1988).

Debrow also contends that his sentence should have been reduced to allow him to enter the Department of Corrections "boot camp" program. Debrow briefly mentioned this issue in his postconviction motion. However, at the hearing on the motion, he presented no evidence nor advanced any argument concerning this claim, and the trial court therefore did not rule on it. We deem it waived.

By the Court.—Order affirmed.

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