COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2167-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD L. BASKIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ronald Baskin appeals from a judgment convicting him of possession of cocaine with intent to deliver and delivery of cocaine, both as a repeat offender, and from an order denying his motion to modify his concurrent ten-year sentences. He claims the trial court erred in its determination that information about his delayed ineligibility for a boot camp program known as

Challenge Incarceration did not constitute a new sentencing factor.[1] However, we affirm because Baskin has failed to show that the purpose behind the original sentences was frustrated by the fact that he would not be immediately eligible for the boot camp.

BACKGROUND

¶2 Baskin pleaded no contest to the possession and delivery charges and the State agreed to dismiss two additional counts and a school-vicinity penalty enhancer, and not to recommend more than ten years in prison. Baskin submitted information about the Challenge Incarceration program and asked the court to consider boot camp as a sentencing option because he was young and had a family who needed his support. The trial court noted that it lacked authority to order Baskin to boot camp, since the statutes in effect at the time of sentencing left that determination to the Department of Corrections. The trial court proceeded to sentence Baskin to ten years on each count, in accordance with the State's recommendation.

¶3 Baskin moved to modify his sentences on the ground that the trial court had not been informed that a person who is sentenced to less than ten years in prison is immediately eligible for the boot camp program, while a person who is sentenced to ten years or more does not become eligible for the program until his first parole eligibility. The trial court denied the motion and Baskin appeals.

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[1] Baskin also contends that the sentence was too harsh. We will not consider this argument, however, because it was not presented to the trial court. *See* WIS. STAT. § 974.02(2) (1997-98); ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992) (for any issue other than the sufficiency of the evidence to be raised as a matter of right on appeal, it must first be preserved in the trial court).

STANDARD OF REVIEW

¶4 Whether a set of facts is a new factor is a question of law that we review without deference to the trial court. *See* ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). However, whether a new factor warrants a sentence modification is addressed to the trial court's discretion. *See* ***id***.

ANALYSIS

¶5 A new sentencing factor is 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, which operates to frustrate the purpose of the original sentence. *See* ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997).

¶6 The trial court was aware of the boot camp program at the time it imposed sentence, but was not informed that the ten-year sentences recommended by the State would preclude Baskin from immediate eligibility for the program. However, nothing in the trial court's comments at sentencing indicated that the trial court intended Baskin to be immediately eligible for boot camp. To the contrary, the trial court specifically noted:

> I think you reach a point in time where the rest of us say we have had enough; we're not going to put up with this. We want to impress upon drug dealers how mad we are about it, and if nothing else, we are going to lock them up for a period of time, because we can guarantee ourselves one thing, if they're in prison, they're not out in our communities, and they're not out there dealing and not out there with larger amounts of crack, such as you were, and they're not out there feeding those who are living on the pipe…. In light of your prior activity on the other case, and now on this case, to not send you to prison for a significant period of time would unduly depreciate the seriousness of what I have before me and what you were convicted of. It is necessary, at this point in time, you, having been given

> the benefit of parole and throwing that away, are dealt an even stronger message than you were the last time….

¶7 The trial court's expressed belief that Baskin needed to serve "a significant period of time," combined with its accurate knowledge that it could not order the Department of Corrections to place Baskin in boot camp, show that the trial court understood that its sentences could require Baskin to serve the full time until his parole eligibility date. Because Baskin has not established that the trial court's original sentencing purpose would be frustrated by requiring him to serve his minimum parole eligibility time prior to being considered for placement in the boot camp, the trial court did not err in finding he had failed to present a new sentencing factor.

By the Court.—Judgment and order affirmed.

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