COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1355-CR **Cir. Ct. No. 2002CF1316**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBIE L. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Bobbie L. Wilson appeals from a judgment convicting him of one count of delivering cocaine on his no contest plea and from a postconviction order denying his sentence modification motion. On appeal,

Wilson challenges his sentence. We conclude that Wilson did not demonstrate the existence of a new factor requiring sentence modification. Therefore, we affirm.

¶2 In its sentencing remarks, the circuit court noted that as part of the plea agreement, the State agreed to dismiss four drug offenses and several penalty enhancers. The court noted Wilson's fairly extensive prior criminal record and his previous failure on probation in Illinois and Wisconsin. The court found that Wilson had a difficult upbringing, a poor work history, and had fathered five children with four different women. The court also noted that Wilson refused to participate in alcohol and drug treatment during a previous incarceration. The circuit court concluded that it was appropriate to incarcerate Wilson. The court then stated:

> I'm going to highly recommend that you be put into the Challenge Incarceration Program, because if you mean what you have said, that is going to be an opportunity for you to go through some alcohol and drug issues, turn your life around, change your way of looking at things and dealing with things; and if you are – if you successfully complete that program, you will not spend as much time in prison as I'm going to impose in the sentence this morning.

¶3 The court deemed Wilson eligible for the Challenge Incarceration Program and noted that "[i]f you are placed in and successfully complete the Challenge Incarceration Program as determined by the department, the court shall modify your sentence [to permit earlier release to extended supervision] …."

¶4 A postsentencing assessment by the Department of Corrections concluded that Wilson did not need alcohol and drug treatment, and therefore Wilson was not referred to the Challenge Incarceration Program. Wilson then moved the circuit court to modify his sentence, claiming that his ineligibility for the Challenge Incarceration Program constituted a new factor requiring sentence

modification. Wilson argued that his eligibility for the Challenge Incarceration Program was relevant to the circuit court's sentence because the court had "highly recommended" Wilson for the program. Wilson also argued that his completion of the Living Free program in April 2000 while in the Kenosha County jail constituted a new factor.[1]

¶5 The State opposed Wilson's sentence modification motion, noting that the Department of Corrections, not the circuit court, determines whether an inmate will be placed in the Challenge Incarceration Program, WIS. STAT. § 302.045(2) (2003-04),[2] and that the circuit court's sentencing rationale did not primarily focus on the need for treatment. In the State's view, the sentencing court focused on Wilson's prior criminal history and the offense.

¶6 The circuit court denied Wilson's sentence modification motion because he did not demonstrate the existence of a new factor, i.e., he did not show that the circuit court was unaware that the Department of Corrections might deem him ineligible for the Challenge Incarceration Program.

¶7 On appeal, Wilson argues that the Department of Corrections' failure to deem him eligible for the Challenge Incarceration Program constitutes a new factor. The new factor analysis was recently restated by our supreme court:

> We define a new factor as "an event or development which frustrates the purpose of the original sentence," and recognize it to be more than a change in circumstances since the time of sentencing. Specifically, we have held:

[1] The crimes in this case occurred almost two years later, in January 2002.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> [T]he 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 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.
>
> As previously noted, to qualify for a sentence modification based on a new factor, the defendant must show: (1) a new factor exists; and (2) the new factor warrants modification of his [or her] sentence.

State v. Trujillo, 2005 WI 45, ¶13, ___ Wis. 2d ___, 694 N.W.2d 933 (citations omitted). The new factor must be the event or development that frustrates the circuit court's original intent. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). The existence of a new factor is a question of law that we review de novo. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997).

¶8 Wilson first suggests that the circuit court's sentencing rationale is unclear. We disagree. Although the circuit court perceived that Wilson had alcohol and drug treatment needs and "highly recommended" placement in the Challenge Incarceration Program, the court's sentencing rationale clearly focused on Wilson's criminal history, his offense, and the need for incarceration. The circuit court also clearly understood that while it could recommend Wilson for the Challenge Incarceration Program, it would be up to the Department of Corrections to determine his placement in that program. Therefore, the fact that Wilson was not placed in the Challenge Incarceration Program did not frustrate the circuit

court's intent to incarcerate him or rise to the level of something overlooked or unknown by the circuit court.[3]

¶9 Wilson next argues that his completion of the Living Free program was a new factor. Because we have already concluded that the circuit court's sentencing rationale was not primarily driven by the need for alcohol and drug treatment, the fact that Wilson completed a program which had an alcohol and drug treatment component was not an event which was highly relevant to the imposition of the sentence.

By the Court.—Judgment and order affirmed.

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

[3] Wilson told the presentence investigation report author and his counsel told the circuit court at sentencing that he needed alcohol and drug treatment. However, Wilson told the assessor from the Department of Corrections that he declined to participate in treatment during his last incarceration because he had already completed a program with a treatment component. The record does not reveal that Wilson asked for treatment during his Department of Corrections assessment. Additionally, at the hearing on his sentence modification motion, Wilson testified that he does not think he needs treatment, but he would participate in such treatment if it would net him an earlier release from confinement.