COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP1062-CR
2004AP1063-CR

Cir. Ct. Nos. 2002CF6946
2003CF1199

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID T. HALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. David T. Hall, acting *pro se*, appeals from the judgment of conviction entered against him, and from the order denying his motion for sentence modification and his request to reconsider his eligibility for

the Challenge Incarceration Program. Hall argues that the circuit court erred when it concluded that he did not establish the existence of a new factor warranting modification of his sentence, and denied his request to be transferred to the Challenge Incarceration Program. Because we conclude that Hall has not shown the existence of a new factor, and that the court properly exercised its discretion when it denied his request to reconsider eligibility for the Challenge Incarceration Program, we affirm.

¶2 Hall pled guilty to one count of possession with intent to deliver cocaine in one case, and one count of possession with intent to deliver marijuana, and one count of bail-jumping in the second case. The court sentenced him to five years of initial confinement and thirty-three months of extended supervision on the cocaine charge, forty-four months on the marijuana charge to be served consecutively, and six months on the bail-jumping charge to be served concurrently.

¶3 At the sentencing hearing, the prosecutor told the court that Hall had been arrested at his home on May 21, 2003, when the police recovered marijuana. The prosecutor also said that Hall told the police that he and his mother smoke weed in the house. The prosecutor then said that the State did not intend to charge Hall with this incident and the court stated that it would not consider the incident. When explaining the sentence, the court then stated:

> Mr. Hall admits to smoke [sic] marijuana as recently as March 2003 on the top of page 8 in the PSI. That's while these cases are pending. Clearly the distribution around the house, the admission that his mother is involved means that marijuana is part of Mr. Hall's lifestyle.

¶4 Hall argues that the court improperly considered the May 2003 incident and that this constitutes a new factor, and that it was a new factor because it was erroneous or inaccurate information.

> Sentence modification involves a two-step process in Wisconsin. First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). A new factor, as defined in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), 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, 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." Whether a fact or set of facts constitutes a new factor is a question of law which may be decided without deference to the lower court's determinations. ***Hegwood***, 113 Wis. 2d at 547.
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> If a defendant has demonstrated the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence. ***Id.*** at 546 [335 N.W.2d 399]. This determination is committed to the circuit court's discretion and will be reviewed under an abuse of discretion standard. ***Id.***

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

¶5 In this case, Hall has neither demonstrated that the information was new or unknowingly overlooked, nor that it was inaccurate. Hall has never contested the accuracy of the information nor denied that the court was aware of it at the time of sentencing. Instead, Hall argues that the court improperly considered information that it said it would not. The information that he had admitted to smoking marijuana in March 2003 was part of the presentence investigation report, as was information about his mother's involvement with drugs. Hall never challenged the accuracy of the presentence investigation report.

We agree with the circuit court's conclusion that the court did not consider the May 2003 incident *per se*, but rather Hall's admissions to the writer of the PSI.

¶6 Hall also has not established that the circuit court erred when it denied his request to reconsider his eligibility for the Challenge Incarceration Program. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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