

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1068-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID MARSCHKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Marschke appeals a judgment sentencing him to twenty years in prison, followed by five years' probation, based on his guilty pleas to burglary and substantial battery while using a dangerous weapon as a repeater, and bail jumping. Various other counts were amended or dismissed

and read in as part of a plea agreement. Marschke also appeals an order denying his motion in which he requested a sentence reduction based on new factors. He argues that the trial court should have allowed him to call witnesses at his sentencing hearing rather than relying on his counsel's recitation of what the witnesses would say, and that he established new factors sufficient to justify a sentence reduction. Because we conclude that Marschke has not established any prejudice from the court's refusal to allow testimony at the sentencing hearing and that Marschke failed to establish a new factor, we affirm the judgment and order.

¶2 The burglary and substantial battery charges arose when Marschke entered his former girlfriend's home, cut her with a knife and beat her with a wrench. The bail jumping charge arose from Marschke writing her a letter, violating a condition of his bail bond. At sentencing, the trial court would not allow Marschke to call three witnesses, but allowed his attorney to summarize the testimony they would give. Counsel indicated that the witnesses would have confirmed that Marschke had a history of mental illness and memory problems unrelated to this case, that he was a good father, and that the victim of the battery left town for reasons other than fear of Marschke, contradicting a statement in the presentence report.

¶3 Marschke has not established that he was prejudiced by the court's decision to allow only counsel's recitation of the witnesses' information. To show prejudice, he must show that there is a reasonable possibility that the error contributed to the sentencing decision. *See State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Counsel provided a detailed account of the witnesses' information. The court accepted information regarding Marschke's history of mental illness and stated that it assumed he was a good father. The court concluded that it was not required to determine whether Marschke failed to

remember the battery incident. It was not a significant issue to the court in determining the appropriate sentence. Likewise, the court did not mention the victim leaving town when determining the impact of the brutal attack on her. Marschke does not identify any specific information that these witnesses could have provided that was not called to the trial court's attention. He has not established a reasonable possibility that limiting the method of presentation to counsel's summary resulted in a greater sentence.

¶4 A new factor is a fact highly relevant to the imposition of sentence but not known to the trial judge at the time of sentencing. See *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor is one that frustrates the purpose of the original sentence. See *State v. Michels*, 150 Wis. 2d 94, 99-100, 441 N.W.2d 278 (Ct. App. 1989). Marschke argues that he established a new factor by showing that his doctor changed his diagnosis from bipolar disorder to major depressive disorder and has concluded that Marschke's memory problems may be the result of electroconvulsive therapy. He emphasizes that the new medical information legitimizes his assertion that he cannot remember beating and cutting the victim.

¶5 Marschke has not established a new factor justifying a reduction in sentence. The trial court was aware of Marschke's mental health problems regardless of the specific name given to the diagnosis. At the sentencing hearing, the court expressly refused to determine whether Marschke's alleged memory problems were legitimate. Additional information about his mental illness and memory problems were not highly relevant to the sentence. In addition, none of the new information frustrates the purpose of the original sentence which was imposed to punish Marschke for the seriousness of the offenses, the victim's

trauma and to prevent him from injuring others. Neither the legitimacy of his memory problems nor the different diagnosis frustrates those purposes.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

