

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP1011-CR

Cir. Ct. No. 2003CF5466

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK RONALD BLISS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Derek Bliss appeals from the judgment and amended judgment of conviction entered against him, and the order denying his motion for postconviction relief. He argues that the circuit court erred when it declined to modify the judgment of conviction to make him eligible for the

Challenge Incarceration Program (“CIP”). Because we conclude that the circuit court properly exercised its discretion when it denied the motion, we affirm.

¶2 Bliss pled guilty to homicide by the negligent use of a firearm, and felon in possession of a gun. The court sentenced him to five years of initial confinement and five years of extended supervision for the homicide charge, and nine months concurrent on the felon in possession of a gun charge. The sentencing court also found him eligible for the CIP after he served two years of initial confinement.

¶3 After the court sentenced Bliss, defense counsel learned that Bliss was not statutorily eligible for CIP because of the homicide conviction. Bliss then sought to have the judgment modified. Bliss asked the court to restructure the sentence by reversing the sentences for the two crimes. Bliss argued that this restructuring would achieve the same goals and make Bliss statutorily eligible for CIP. The court denied the request, stating it had intentionally and with forethought structured the sentence so that the maximum term was on the homicide charge. The court admitted that it had made a mistake when finding Bliss eligible for CIP. The court also stated that since Bliss was not eligible for CIP, it would amend the judgment of conviction to remove the statement of eligibility.

¶4 Bliss then brought a motion for postconviction relief arguing that the circuit court did not exercise its discretion when it denied the defense request to modify the judgment, and asked the court again to modify the sentence. The court stated that the defendant’s eligibility for CIP was a “statutory impossibility” and that the sentence imposed “was not impacted by defendant’s eligibility or ineligibility for CIP.” The court denied the motion.

¶5 Bliss argues to this court that the circuit court erred when it refused to modify the sentence “when presented with a proposal to effectuate its original intent.” Specifically, he argues the court failed to exercise discretion when it refused to restructure the sentence, that restructuring is an appropriate remedy to effectuate the court’s original intent, that the court had made up its mind before the hearing, and that the result was unjust.

¶6 A defendant seeking sentence modification based on a new factor must first show that a new factor exists. *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242. A “new 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, 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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor must be a development that frustrates the purpose of the original sentence, and must be proved by clear and convincing evidence. *Champion*, 258 Wis. 2d 781, ¶4. Whether something constitutes a new factor is a question of law we review independently. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶7 We conclude that the circuit court did not err when it refused to modify Bliss’s sentence. First, ineligibility is not a new factor. Even if it were, however, it did not frustrate the court’s purpose. The court stated that its intent was to impose a fairly lengthy sentence on the homicide conviction and that it simply had “made a mistake ... with respect to the programs available for the different types of offenses for individuals that are going to the Wisconsin state prison system....” When the court found him eligible for CIP, the court did so to

allow the Department of Corrections to determine whether Bliss was an appropriate candidate for that program. The court further stated that it had considered all of the factors and fashioned a sentence “intentionally and with forethought” for the reasons set forth on the record, and that it would not change the sentence imposed. The court said, however, that since Bliss was not statutorily eligible for the program, it had simply made a mistake and would correct the judgment to correct that error.

¶8 From this, we conclude that the court’s initial intent was to impose the stated sentence, and to allow Bliss to participate in CIP if he was eligible. The two offenses to which Bliss pled were not interchangeable. Because he was not statutorily eligible for CIP, the court properly corrected the judgment to reflect its own mistake. The amended judgment did not frustrate the original purpose of the sentence, therefore, but rather effectuated it. The circuit court properly exercised its discretion when it denied the motion for sentence modification.

¶9 Further, we reject Bliss’s argument that the court’s comments at the hearing on the motion indicated that the court had made up its mind before sentencing. Bliss supports this argument by once again stating that the court refused to exercise its discretion. We disagree. The court did exercise its discretion, it listened to and considered the arguments. The court, however, did not agree with the argument Bliss made. This does not indicate a refusal to exercise discretion, but rather a decision not to reach a particular result. Nor does it establish that the court improperly prejudged the motion. This was a proper exercise of the court’s discretion. 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.

