

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 31, 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. 2005AP2328-CR**

**Cir. Ct. No. 2002CF105**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RANDY J. STAHL,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for La Crosse County:  
RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Randy Stahl appeals an order denying his postconviction motion for sentence modification. Among other things, he claims the trial court erred in concluding that he had not presented a new sentencing factor and erroneously exercised its discretion by failing to address several of the

issues in his motion. Because we agree that Stahl presented a new factor warranting resentencing, we reverse the order and remand for further proceedings.

### BACKGROUND

¶2 Stahl was sentenced to three years of initial confinement and twenty-six years of extended supervision on an arson conviction under Truth In Sentencing (TIS)-I. Stahl's motion for sentence modification alleged: (1) the lengthy term of extended supervision was imposed in anticipation of a large restitution award which was never entered; (2) the maximum sentence for arson had been reduced under TIS-II; and (3) the Presentence Investigation (PSI) report contained inaccurate, misleading, and/or improper information which Stahl was unable to refute at the sentencing hearing because he had not been given adequate time to review the report. The trial court denied Stahl's motion without a hearing on the ground that reduced penalties do not constitute a new sentencing factor. The court did not address Stahl's other claims.

### DISCUSSION

¶3 Stahl does not challenge on appeal the trial court's conclusion that a reduction in the maximum penalty for an offense does not constitute a new factor warranting resentencing. *See State v. Tucker*, 2005 WI 46, ¶2, 279 Wis. 2d 697, 694 N.W.2d 926. However, he renews his claims that the significantly smaller than anticipated size of the restitution order constituted a new sentencing factor and that he was also sentenced based on inaccurate and/or improper information in the PSI.

¶4 The PSI stated that two restitution claims had been filed: one by Capitol Indemnity for \$95,822.82 in insurance proceeds that the company paid on

Stahl's fire claim, and one by Allen Radke for \$59,302 plus interest based on a mortgage interest in the property on which the arson had occurred. At the sentencing hearing, defense counsel pointed out that the insurance proceeds had actually been paid to Park Bank rather than to Stahl. Defense counsel went on to note that Stahl would be contesting Radke's claim at a restitution hearing but seemed to indicate that Stahl was not disputing the insurance company's claim.

¶5 In the course of explaining the sentence imposed, the trial court stated:

I'm satisfied that 26 years of extended supervision will give [Stahl] a significant amount of time in which to pay back the restitution that is due and owing in this case, whether it's paid to Park Bank or Mr. Stahl, the fact of the matter is the insurance company is out the money and they must be reimbursed.

The court then acknowledged that Stahl would be requesting a hearing to determine the actual amount of restitution.

¶6 Circuit court docket entries show that a restitution hearing commenced on May 6, 2003 and continued on May 23, 2003.<sup>1</sup> The exhibits introduced at the May 23 hearing relate only to Radke's restitution claim. The docket entries further indicate that the circuit court denied any additional restitution at the hearing, stating: "I'm going to have to deny your restitution claim from Mr. Stahl (sic)—Restitution will stand as previously ordered."

¶7 Regardless of what occurred and was decided at the May 2003 restitution hearings, the only restitution order in the record is for \$965, which the

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<sup>1</sup> The record on appeal does not include a transcript for either restitution proceeding.

judgment of conviction directs be reimbursed to the Justice Sanctions program for electronic monitoring. Therefore, Stahl's assertion that, after sentencing, he was not ordered to pay restitution to the insurance company or Radke appears, on the present record, to be accurate.

¶8 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 sentencing, which operates to frustrate the purpose of the original sentence. A trial court has discretion whether to modify a sentence based upon a new sentencing factor, but whether a particular set of facts constitute a new factor is a question of law which we review de novo. *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (citations omitted).

¶9 Here, it is plain from the circuit court's comments at the sentencing hearing that the principal reason for the lengthy term of extended supervision it imposed was to allow Stahl to pay tens of thousands of dollars in restitution that the court anticipated it would later order Stahl to pay. It would be unreasonable to conclude that the court would have believed that twenty-six years of extended supervision was necessary in order for Stahl to pay restitution of only \$965. We are therefore persuaded that the lack of a postsentencing order for payment of restitution to either Capitol Indemnity or Radke is a new sentencing factor because it frustrates the court's stated purpose for imposing twenty-six years of extended supervision.

¶10 Because the trial court erroneously concluded that Stahl had failed to show a new factor for sentencing, it erroneously exercised its discretion in denying the sentence modification motion. We therefore reverse the trial court's order and remand with directions that the trial court hold a new sentencing hearing.

¶11 In light of our decision to remand for resentencing, we do not address Stahl's additional claims regarding the accuracy of the PSI. Stahl will have the opportunity to address the accuracy of the PSI at the resentencing hearing. The circuit court may also clarify at the new hearing whether it had ordered restitution to the insurance company, and if so, in what amount.

*By the Court.*—Order reversed and cause remanded for further proceedings.

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

