

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 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 Nos. 2006AP109-CR
2006AP110-CR**

**Cir. Ct. Nos. 1999CF6507
2000CF5358**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID VELEZ,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. David Velez appeals from an order denying his motion to modify his sentence on new-factor grounds. We affirm.

¶2 In 2000, Velez was convicted of robbery with threat of force. While sentencing was pending, Velez was then charged with a separate threat to injury felony related to an incident that occurred while he was an inmate. He pled no contest to those charges and received sentences for both crimes on March 15, 2001. In December 2005, he filed a motion for sentence modification under both cases based on new factors. The circuit court denied the motion without a hearing.

¶3 A “new factor [is] ‘an event or development which frustrates the purpose of the original sentence.’” *State v. Trujillo*, 2005 WI 45, ¶13, 279 Wis. 2d 712, 694 N.W.2d 933. It 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.’

Id. (citation omitted). “Whether a new factor exists is a question of law, which we review de novo.” *Id.*, ¶11.

¶4 Velez argues that a new factor exists because the sentencing court did not consider his cooperation with the State by testifying in a homicide trial, or the fact that he was sexually assaulted in jail while this case was pending. However, Velez’s trial counsel informed the court of both these factors at sentencing. Because the court was aware of them at the time of sentencing, they are not new factors. As stated above, the test is whether the court was unaware of the information, not whether it specifically discussed that information during sentencing.

¶5 Velez also may be arguing that a new factor exists because he was sexually assaulted by prison staff after the original sentencing. However, there is

no basis in the record to argue that the post-sentencing sexual assault may be considered an event highly relevant to the circuit court's sentencing decision or was an event that frustrates the purpose of the sentence. *See State v. Klubertanz*, 2006 WI App 71, ¶¶40-43, 291 Wis. 2d 751, 713 N.W.2d 116. In addition, it has previously been held that a defendant's shorter-than-normal life expectancy or declining health are not new factors. *Trujillo*, 279 Wis. 2d at ¶14 n.9. We acknowledge that a post-sentencing sexual assault may have a traumatic effect on a prisoner, but we conclude it is similar to health issues for purposes of new factor analysis.

By the Court.—Order affirmed.

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

