

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 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. 2006AP823-CR

Cir. Ct. No. 1998CF2770

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTRON L. KENT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
KAREN E. CHRISTENSON, Judge. *Reversed and cause remanded with
directions.*

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

¶1 WEDEMEYER, P.J. Antron L. Kent appeals from an order denying his postconviction motion. He claims the trial court erroneously exercised its discretion in denying his motion seeking to modify his sentence

based on a new factor. Because the trial court erroneously concluded that Kent's post-sentencing cooperation in a homicide prosecution was not a new factor without assessing the pertinent sentencing factors adopted in *State v. Doe*, 2005 WI App 68, ¶1, 280 Wis. 2d 731, 697 N.W.2d 101, we reverse the order and remand for further proceedings consistent with the dictates of this opinion.

BACKGROUND

¶2 In May 1998, Kent was charged with one count of mayhem as party to a crime. Kent and his girlfriend, Amy Lindstrom, arranged a plot to throw acid on Kent's ex-girlfriend, Jennifer White. Kent hired Daythol Sykes to throw acid on White. Lindstrom bought and mixed the acid. Another friend, Artency McClellan, gave the acid to Sykes, who actually threw it on White. White suffered second- and third-degree burns to 20-30% of her body and was permanently disfigured.

¶3 Kent pled guilty to the charge and was sentenced to thirty-eight years in prison. While serving that sentence, Kent was housed with a man named William Avery, who bragged about a homicide he had committed in Wisconsin. Kent then contacted law enforcement and provided information regarding Avery. As a result of this information, Avery was charged with first-degree reckless homicide. The case went to trial in March 2005, and Kent testified on behalf of the State. Although a second inmate was supposed to testify against Avery as well, he recanted his testimony at the last minute. Avery was convicted.

¶4 Kent subsequently filed a postconviction motion seeking sentence modification based on a new factor. The trial court denied the motion. Kent now appeals.

DISCUSSION

¶5 Kent argues that the trial court erred in denying his motion seeking sentence modification based on a new factor. Specifically, he argues that his post-sentencing substantial assistance to law enforcement constitutes a new factor, which warrants sentence modification. The State responds that Kent's post-sentencing assistance was not a new factor and, even if we conclude it is a new factor, it does not warrant modification of the sentence. We conclude that the trial court's reasoning was erroneous. We reverse the order and remand with instructions to the trial court to apply the factors set forth in the federal sentencing guidelines, adopted in *Doe*.

¶6 Before addressing the merits of this issue, we set forth the pertinent standards governing our review. We acknowledge that the trial court is vested with the discretion to modify a sentence if a defendant presents information that constitutes a new factor. *State v. Macemon*, 113 Wis. 2d 662, 668, 335 N.W.2d 402 (1983). 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). In addition, in order to constitute a new factor, the information proffered must frustrate the purpose of the original sentence. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). The defendant has the burden of proving the existence of the new factor by clear and convincing evidence. *Id.* Whether the proffered information constitutes a new factor is a question of law that we decide independently. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

¶7 Accordingly, in order to succeed on a motion for sentence modification, a defendant must satisfy both steps in the process: (1) the defendant must prove that a new factor warranting modification exists; and (2) if the defendant so proves, then the trial court must determine whether the new factor warrants modification. *Id.* at 8. In addition to these standards, in *Doe* we adopted the federal sentencing guidelines for addressing situations when a defendant, post-sentencing, offers substantial assistance to law enforcement. *Id.*, 280 Wis. 2d 731, ¶9. We held that “a defendant’s substantial and important assistance to law enforcement after sentencing may constitute a new factor,” *id.*, ¶1, and further ruled:

We are satisfied that the broader rule of permitting the trial court, in appropriate cases, to modify a sentence after substantial assistance has been given to authorities, promotes sound public policy. Sentence modification should be available to those already sentenced who possess and can provide valuable information to law enforcement to assist in ferreting out and curtailing crime.

Id., ¶10.

¶8 The federal sentencing guidelines permit a sentence reduction when “the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.” FED. R. CRIM. P. 35(b)(1)(A). The U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) provides the following factors for the purpose of determining whether a defendant’s assistance constitutes a new factor:

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;

- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

Doe, 280 Wis. 2d 731, ¶¶8-9.

¶9 In Kent's case, the trial court did not apply any of the sentencing guidelines we adopted in *Doe*. Thus, upon remand, we direct the trial court to conduct another hearing on Kent's motion so that the two-step sentence modification process may be correctly conducted. First, the trial court must permit Kent to present evidence with respect to whether his post-sentencing assistance to law enforcement was a new factor. The trial court shall decide, based on the information presented and utilizing the federal guidelines listed above, whether Kent has satisfied his burden of proving by clear and convincing evidence that a new factor has been established. After that determination has been made, the trial court shall proceed to the second step—which is to decide whether the new factor justifies modification.

¶10 Based on the foregoing, we reverse and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

