

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2007

A. John Voelker
Acting 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. 2005AP1328-CR

Cir. Ct. No. 2001CF5952

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD M. BLAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD and JOHN FRANKE, Judges.
Affirmed.

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

¶1 PER CURIAM. Edward M. Blau pled guilty to one count of forgery, uttering. See WIS. STAT. § 943.38(2) (2001-02). The court sentenced Blau to ten years of imprisonment, comprised of five years of initial confinement

and five years of extended supervision. Blau filed a postconviction motion, arguing that his postconviction diagnosis of bi-polar disorder constituted a new factor that warranted sentence modification.¹ The circuit court denied the motion and Blau appeals. Because the diagnosis of bi-polar disorder does not constitute a new factor under the facts of this case, we affirm.²

¶2 A defendant seeking 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).

¶3 In his postconviction motion, Blau asserted he was “recently diagnosed” with bi-polar disorder and was now receiving “appropriate treatment

¹ In his postconviction motion, Blau also argued that the reduction in the maximum penalty for the forgery, uttering, under “Truth-in-Sentencing II” constituted a new factor. In light of the supreme court’s rejection of that contention in *State v. Trujillo*, 2005 WI 45, ¶2, 279 Wis. 2d 712, 694 N.W.2d 933, Blau does not pursue that argument on appeal.

² Blau was sentenced by the Honorable M. Joseph Donald and Judge Donald entered the judgment of conviction. The postconviction order was entered by the Honorable John Franke.

with psychotropic medications.” Blau argued that the “diagnosis of this significant behavioral disorder was unknown to the court, the parties, or to the defendant” at the time of sentencing. Blau further contended that, if the sentencing court had known of the bi-polar diagnosis and its effect on his behavior, “the court’s assessment of the primary sentencing factors would have necessarily been affected.”

¶4 The circuit court properly denied Blau’s postconviction motion. In his sentencing remarks, Blau’s attorney informed the court that Blau had “a drug problem” and “an issue of depression” for which he was taking psychotropic medications while in custody. In his allocution, Blau spoke at length about his childhood physical abuse and family background. Blau told the court that “[t]he depression got so bad” and “there has always been something wrong for a long time.” Blau informed the court, “[i]n talking with the psychiatrist, ... the depression has been going on for quite awhile.... The medication has helped considerably. I still go through it, but I know now what I’m going through, and I have some pretty good ideas why I’m going through it.”

¶5 Thus, it is evident that the sentencing court knew that Blau had mental health issues and that he suffered from depression. That Blau’s mental health diagnosis was modified after sentencing to bi-polar disorder does not constitute a new factor. *See State v. Slogoski*, 2001 WI App 112, ¶11, 244 Wis. 2d 49, 629 N.W.2d 50 (A postconviction psychiatric report that contradicted other mental health evidence in the record “simply establishe[d] that mental health professionals will sometimes disagree on matters of diagnosis and treatment.”).

¶6 Moreover, the purpose of the sentence was not frustrated. When imposing sentence, the court noted that Blau began to “address some deep-seated

issues” only after he was incarcerated on these charges. The sentencing court emphasized the continuing need to incarcerate Blau “to protect the community from further criminal activity” and to give him an opportunity to “address [his] extensive treatment needs.” We agree with the State that regardless of the formal diagnosis, “the court’s purposes in the sentence remain the same”—that Blau continue to address his treatment needs in a confined setting that would protect the community from further criminal activity. The purpose of the original sentence is not frustrated by the postconviction diagnosis of bi-polar disorder. Therefore, a new factor does not exist.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

