

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2007

David R. Schanker
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. 2006AP1750-CR

Cir. Ct. No. 2003CF4758

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KONGPHACHANH PHOUDAVONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kongphachanh Phoudavong appeals from the judgment of conviction entered against him and the order denying his postconviction motion. He argues that the circuit court erred when it denied his postconviction motion without holding a hearing. In that motion to the circuit

court, Phoudavong argued that the trial court did not address “cultural considerations” when it sentenced him, and that these considerations are a new factor that entitle him to be resentenced. We conclude that the cultural considerations did not present a new factor, and we affirm the judgment and order of the circuit court.

¶2 Phoudavong was convicted of six counts of first- and second-degree sexual assault of a child with the use of force. The victim in the case was Phoudavong’s twelve-year-old niece. He brought her to his apartment and asked her to help him carry some things inside. Once inside, he cornered her and sexually assaulted her. He then told her that he would kill her if she told anyone. The court sentenced him to twenty years of initial confinement and ten years of extended supervision on each count, to be served concurrently.

¶3 Phoudavong then moved for sentence modification. He argued that there was a new factor that should have been considered at sentencing, and that trial counsel was ineffective for failing to present it. Phoudavong argued that the new factor was the difference between Laotian culture and American culture in the criminalization of sexual contact between adults and children.

¶4 The circuit court, by the same judge who originally sentenced Phoudavong, denied the motion without holding a hearing. The circuit court stated that it “was incumbent upon the defendant to acquaint himself with the laws of the nation he chose as his own,” and that “his many years in the United States and his experiences with American courts for sexual misconduct sufficed to teach him all that is required to comply with the law.” The court further concluded that it would not construe cultural considerations as a “new factor.” The court noted that a new factor must be 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,” citing *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). Further, the new factor must be “an event or development which frustrates that purpose of the original sentence,” citing *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). The court concluded that in this case the purpose of the sentence was “punishment, deterrence, and the absolute need for protection in the community from Mr. Phoudavong.” The court further found that consideration of the alleged cultural differences would merely have increased the need for the protection of the community because Phoudavong “apparently held the belief ... that the forcible rape of a struggling, screaming twelve-year old girl is not necessarily a serious offense.” The court also noted in a footnote that even though the defendant’s information regarding cultural differences was not explicitly argued at sentencing, the court “was aware that minors in foreign countries may have fewer protections and limited rights.”

¶5 Phoudavong argues to this court that the circuit court erred when it would not allow him to present evidence of the cultural differences at a hearing on his postconviction motion. Phoudavong further argues that a defendant is entitled to be sentenced on accurate information, and that the circuit court relied on inaccurate information when it sentenced him.

¶6 Sentence modification involves a two-step process in Wisconsin. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. *Hegwood*, 113 Wis. 2d at 546. A new factor, as defined in *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), 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.” Whether a fact or set of facts constitutes a new factor is a question of law which may be decided without deference to the lower court’s determinations. *Hegwood*, 113 Wis. 2d at 547. If a defendant has demonstrated the existence of a new factor, then the circuit court must determine whether the new factor justifies modification of the sentence. *Id.* at 546. This determination is committed to the circuit court’s discretion and we will review it for an erroneous exercise of discretion. *Id.* Additionally, a defendant alleging that a sentencing decision was based on inaccurate information must establish that “there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information.” *State v. Tjepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

¶7 In this case, we agree with the circuit court that there was no new factor for the reason that Phoudavong’s cultural background was in existence at the time of sentencing and was not overlooked by all of the parties. In his brief to this court, Phoudavong admits as much when he states that the writer of the presentence investigation report referenced Laotian culture in the report, and that his trial counsel “put forward specific representations as to the cultural variances between American and Laotian families.” The fact that Phoudavong now wants to put the issue into sharper focus by adding additional information about these differences, does not transform what was in existence and known by the parties at the time of sentencing into a new factor. Because Phoudavong did not demonstrate the existence of a new factor, he was not entitled to a hearing on his motion.

¶8 Although it does not appear that Phoudavong argued this issue to the circuit court, he argues here that the circuit court relied on inaccurate information

when it sentenced him. Specifically, he asserts that the circuit court considered only his character and that without a proper consideration of the cultural differences, the court could not fully understand his character. Ignoring the inherent contradiction between this argument and the new factor argument, we conclude that he has not established that the information before the sentencing court was inaccurate. Consequently, he is not entitled to be resentenced. 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. (2005-06).

