COURT OF APPEALS
DECISION
DATED AND FILED

January 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-1179-CR
01-1180-CR

Cir. Ct. No. 96-CF-9
99-CM-406

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG A. FELTEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TIMOTHY A. VAN AKKEREN, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Craig A. Felten appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether Felten established the existence of a new factor which would warrant modification of his sentence.

Because we conclude that Felten has not established that his sentence should be modified, we affirm the judgment and order of the circuit court.

¶2 Felten pled guilty to two counts of uttering a forged writing (No. 01-1179-CR), and pled no contest to one count of obstructing a police officer (No. 01-1180-CR). The court withheld sentence and placed him on probation in both cases. His probation was subsequently revoked and Felten returned to court for sentencing. The court sentenced Felten to consecutive thirty-six month sentences on each of the two forgery charges, and a consecutive nine-month sentence on the obstructing charge.

¶3 Felten went to prison and was subsequently diagnosed with bipolar disorder. After receiving this diagnosis, Felten moved to modify his sentence on the basis of a new factor. Felten argued that the length of his sentence had been based on the sentencing court's concern that Felten could not manage his drug and alcohol abuse problems outside of the prison setting. In his motion, Felten argued that the bipolar disorder was the reason he was unable to manage his substance abuse problems. After being diagnosed with bipolar disorder and receiving treatment in prison, including medication, he was having success managing his mood swings. He argued that the diagnosis and treatment meant that his chances of managing his substance abuse problems were greatly improved. He argued, therefore, that his sentence should be modified.

¶4 The trial court held a hearing and received Felten's expert's testimony. The court then denied the motion. Felten appeals.

¶5 Sentence modification involves a two-step process:

> First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. 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.
>
> If a defendant has demonstrated the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence. This determination is committed to the circuit court's discretion and will be reviewed under an abuse of discretion standard.

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (citations omitted).

¶6 In this case, although the order appealed from states that the court found the existence of a new factor, it is not clear from the transcript of the hearing whether the circuit court actually did find that the diagnosis of bipolar disorder was a new factor. The State argues that the sentencing court was aware that Felten had bouts of depression, and therefore, this information was not new. While we agree with Felten that the bipolar diagnosis provided more specific information about his mental illness, this type of information is not necessarily a new factor. *See* ***State v. Scaccio***, 2000 WI App 265, ¶15, 240 Wis. 2d 95, 622 N.W.2d 449 (favorable progress in a prison rehabilitative system does not constitute a new factor); ***State v. Michels***, 150 Wis. 2d 94, 100, 441 N.W.2d 278 (Ct. App. 1989) (change in medical condition is not a new factor). For the purposes of this appeal, however, we will assume without deciding that a new factor was established, and consider only the second prong of the test for sentence modification.

¶7 The second prong requires the circuit court to determine whether the new factor justifies modification of the sentence. ***Franklin***, 148 Wis. 2d at 8. The transcript is clear that the circuit court determined that a modification of Felten's sentence was not justified. The circuit court had significant reservations about Felten's ability to succeed with treatment outside of a prison setting. The testimony presented at the postconviction hearing supports this determination. Felten's expert, a psychologist, testified that Felten's treatment would require highly structured programming. He testified that if Felten did not follow the structured programming or stopped taking his medication, he was almost certain to relapse. The expert also agreed that there were fewer temptations to relapse within the prison setting.

¶8 The court, noting also that there were fewer temptations to relapse with prison, concluded that the concerns which had prompted the original sentence still existed despite the new information. We conclude that the court properly exercised its discretion in reaching this determination. The purpose of the prison sentence, in this case to rehabilitate Felten, appears to be working. We should not, therefore, interfere with that process. *See* ***State v. Kluck***, 210 Wis. 2d 1, 10, 563 N.W.2d 468 (1997). The judgment of conviction and order denying the motion for postconviction relief are affirmed.

By the Court.—Judgment and order affirmed.

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