

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2002

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. 01-1452-CR

Cir. Ct. No. 00-CF-97

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BERNARD A. JAMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT DeCHAMBEAU, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 VERGERONT, P.J. Bernard James appeals the judgment of conviction and sentence for armed robbery contrary to WIS. STAT. § 943.32(2) (1999-2000),¹ as a party to a crime, and the order denying his postconviction

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

motion for sentence modification because of a new factor. He contends that the decision of the Department of Corrections (DOC) not to permit him to participate in the challenge incarceration program under WIS. STAT. § 302.045(2)² was a new factor and the trial court erred in concluding that it was not. He also contends the

² WISCONSIN STAT. § 302.045 provides:

Challenge incarceration program for youthful offenders.

(1) PROGRAM. The department shall provide a challenge incarceration program for inmates selected to participate under sub. (2). The program shall provide participants with strenuous physical exercise, manual labor, personal development counseling, substance abuse treatment and education, military drill and ceremony and counseling in preparation for release on parole or extended supervision. The department shall design the program to include not less than 50 participants at a time and so that a participant may complete the program in not more than 180 days. The department may restrict participant privileges as necessary to maintain discipline.

(2) PROGRAM ELIGIBILITY. Except as provided in sub. (4), the department may place any inmate in the challenge incarceration program if the inmate meets all of the following criteria:

(a) The inmate volunteers to participate in the program.

(b) The inmate has not attained the age of 30, as of the date the inmate will begin participating in the program.

(c) The inmate is incarcerated regarding a violation other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.08 or 948.095.

(cm) If the inmate is serving a bifurcated sentence imposed under s. 973.01, the sentencing court decided under s. 973.01 (3m) that the inmate is eligible for the challenge incarceration program.

(d) The department determines, during assessment and evaluation, that the inmate has a substance abuse problem.

(e) The department determines that the inmate has no psychological, physical or medical limitations that would preclude participation in the program.

trial court did not understand that it is required by WIS. STAT. § 973.01(3m)³ to exercise its discretion in deciding whether to declare him eligible or ineligible for that program. We conclude that DOC’s decision not to permit him to participate in the program is not a new factor for purposes of sentence modification. We also conclude that the trial court understood it was required to exercise its discretion in deciding whether to declare him eligible or ineligible for the program. We therefore affirm.

BACKGROUND

¶2 James entered a plea of guilty to the charge of armed robbery. The presentence report prepared by the Division of Community Corrections—DOC stated that James “does meet the criteria for the Challenge Incarceration Program and is seen as an appropriate candidate for this program”; the author recommended an eight-to-ten-year period of confinement with a seven-to-ten-year period of extended supervision. The prosecutor concurred with this recommendation for a sentence and with the eligibility for the challenge incarceration program. James’s counsel argued for a term of imprisonment of approximately twenty months and a lengthy extended supervision.

³ WISCONSIN STAT. § 973.01(3m) provides:

(3m) CHALLENGE INCARCERATION PROGRAM ELIGIBILITY. When imposing bifurcated sentence under this section on a person convicted of a crime other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.08 or 948.095, the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible for the challenge incarceration program under s. 302.045 during the term of confinement in prison portion of the bifurcated sentence.

¶3 The court sentenced James to six years of prison, followed by twelve years of extended supervision. Before imposing this sentence, the court discussed in detail James's criminal history of five years—James was only eighteen years old at the time—and his failure to change his criminal behavior in spite of the numerous interventions of the juvenile justice system; the court also noted the seriousness of the offense and the need to protect the public. After imposing the sentence, the court explained the conditions under which the prison time could be extended and for how long, the conditions under which his extended supervision could be revoked, and then stated:

You are eligible for the Challenge Incarceration Program. If you are placed in and successfully complete the Challenge Incarceration Program, as determined by the department, the court shall modify your sentence in the following manner. You will be released to extended supervision within 30 days after the court is notified that you have successfully completed the Program. The unserved confinement portion of your sentence will be added to the extended supervision portion of your sentence. The total length of your sentence does not change.

¶4 Approximately five months after James was sentenced, he moved the court for resentencing on the ground that a new factor justified a modification of his sentence. The new factor, according to James's affidavit, was that when he attempted to participate in the challenge incarceration program, he was told his crime was too violent and he could not participate. As a result, he averred, he was being denied the opportunity for early release.

¶5 The trial court⁴ denied the motion, concluding that DOC's decision not to permit James to participate in the challenge incarceration program did not

⁴ The judge presiding at the postconviction hearing was the same judge who had sentenced James.

frustrate its intent in sentencing him. Referring to the sentencing transcript, the court stated that its reasons for the sentence were clearly stated before it imposed the sentence; after it imposed the sentence, it was reading from the statements courts are required to give to explain the bifurcated sentence.⁵ The court acknowledged that it was required by statute to determine eligibility in the challenge incarceration program, but pointed out that it did not discuss that program other than to “read the challenge incarceration program block at the bottom of the written explanation of the sentence.” The court described the explanation it is required to give of the determinant sentence in a felony case as “somewhat of a pro forma type of thing that comes after the conclusion of the remarks by the court as to why the court is doing what it is doing” The court stated that the intent of its sentence was that James serve six years in prison, and its determination of eligibility for the challenge incarceration program meant simply that if DOC decided that James should be in the program and therefore serve less time in prison, DOC could assign him to the program.

DISCUSSION

¶6 Sentence modification involves a two-step process: the defendant must first show the existence of a new factor justifying the motion to modify a sentence by clear and convincing evidence; the court must then decide whether the new factor warrants sentence modification. *State v. Franklin*, 148 Wis. 2d 1, 8,

⁵ WISCONSIN STAT. § 973.01 provides for bifurcated sentences of imprisonment and extended supervision, and applies to persons sentenced for felonies committed on or after December 31, 1999. Section 973.01(8) requires that, when the court sentences a person under this section, it explain certain information about the sentence orally and in writing. If the court under § 973.01(3m) provides that the person is eligible for the challenge incarceration program, then the oral and written explanation must include certain information about that program. Section 973.01(8)(a)5(am).

434 N.W.2d 609 (1989). This appeal concerns only the first step. Whether a fact or set of facts constitutes a new factor is a question of law, decided by this court de novo. *State v. Ralph*, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990).

¶7 A new factor

refers to 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, the factor

must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court.

State v. Michels, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶8 James contends on appeal that because the trial court decided that he was eligible for the challenge incarceration program, his inability to participate in it is, as a matter of law, a new factor. This is so, according to James, because the court did not have to declare him eligible for the challenge incarceration program; since it did so, it must have considered his participation highly relevant to the sentence it imposed. We disagree. The sentencing transcript fully supports the trial court's statement at the post-sentencing hearing on its intent in imposing the sentence: it intended that James serve six years in prison but that DOC have the

option of placing him in the program if it chose.⁶ Therefore, DOC's decision not to permit James to participate in the program does not frustrate the court's intent in imposing sentence on him. Accordingly, we conclude it is not a new factor.

¶9 James also asserts that the court's statement that the explanation it is required to give of a determinant sentence is "somewhat of a pro forma type of thing" is inconsistent with *State v. Steele*, 2001 WI App 160, 246 Wis. 2d 744, 632 N.W.2d 112, *review denied*, 2001 WI 114, ___ Wis. 2d ___, 634 N.W.2d 322 (Wis. Aug. 27, 2001) (No. 00-2864-CR). In *Steele*, the defendant appealed the trial court's determination that he was ineligible for the challenge incarceration program because of the seriousness of his offense. *Steele* contended that in deciding eligibility for the challenge incarceration program, a court could apply only those factors specified in WIS. STAT. § 302.045(2). *Id.* at ¶5. We rejected *Steele's* argument because we concluded that, even if a defendant met all the eligibility criteria under § 302.045(2), the trial court had the discretion under WIS. STAT. § 973.01(3m) to declare an offender ineligible. *Id.* at ¶8. We concluded that the trial court had not misused its sentencing discretion in declaring Steele ineligible because of the seriousness of his offense. *Id.* at ¶11.

¶10 As we understand James's argument, the trial court's "pro forma" comment shows that the court made a perfunctory decision when it declared him eligible for the challenge incarceration program and did not exercise its discretion as required by *Steele*. We are satisfied from the court's comments at the post-

⁶ DOC does not have this option if a court declares an offender sentenced under WIS. STAT. § 973.01 to be ineligible for the program, because one of the requirements an offender must meet before DOC may place him or her in the program is that the court has decided the offender is eligible for the program. WIS. STAT. § 302.045(2)(cm).

sentencing hearing that it understood that it had the discretion to declare James either eligible or ineligible for the program, and further that the court understood that if it declared James eligible, DOC would ultimately decide whether James could participate.

¶11 We conclude that James has not shown a new factor and that he is not entitled to a remand. Accordingly, we affirm the trial court's order denying James's postconviction motion, and his judgment of conviction and sentence.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

