

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 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. 01-1684-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CM86

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY T. BLUE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed and cause remanded with directions.*

¶1 CURLEY, J.¹ Anthony Blue appeals the judgment convicting him of resisting an officer and bail jumping contrary to WIS. STAT. §§946.41(1) and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

946.49(1)(a) (1999-2000).² Blue requests this court to modify his sentence to one year from the trial court imposed two consecutive nine-month sentences. He argues that what occurred here was an “abuse of the courts [sic] discretion,” and that new factors require changing his sentence. This court affirms.

¶2 Blue was originally charged with one count of disorderly conduct, as a habitual criminal, one count of resisting arrest, as a habitual criminal, and one count of misdemeanor bail jumping. As a result of plea negotiations, Blue pled guilty to the resisting an officer and bail jumping charges, and the State agreed to dismiss the disorderly conduct charge, dismiss a battery charge issued in another case, and strike the penalty enhancers. On February 23, 2001, the trial court accepted his plea and, as noted, sentenced him to the maximum nine months on both counts, to be served consecutively.³ Although Blue claims otherwise, the record contains a Notice of Right to Seek Postconviction Relief, with the checked box indicating “I do not plan to seek postconviction relief,” and what purports to be Blue’s signature. Nevertheless, Blue, acting *pro se*, has brought postconviction motions seeking a modification of his sentence on February 27, 2001, March 12, 2001, May 29, 2001, June 5, 2001, June 7, 2001, June 13, 2001, and June 19, 2001. Blue filed this appeal on June 19, 2001.

¶3 Many of Blue’s arguments are difficult to understand. It is clear, however, that he wishes this court to commute his sentence to one year. Blue

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

³ The judgment indicates that the penalty enhancer found in WIS. STAT. § 939.62 was applied to the resisting an officer charge. However, the assistant district attorney has argued in his brief that the penalty enhancers were dismissed. On remand, the trial court is directed to determine the correct charges and correct the judgment, if necessary.

claims that at sentencing the trial court failed to consider his rehabilitative needs or to believe that Blue's fear of retaliation by members of the House of Correction staff was a legitimate concern. Blue also appears to be arguing that new factors support his request. These allegedly new factors consist of a failure by jail officials to dispense his medication for an undisclosed medical condition and his transfer to the Rock County jail.⁴

¶4 Although it would appear that not all of Blue's motions in the trial court were timely filed (WIS. STAT. § 973.19 only permits the filing of a motion seeking a modification of sentence within ninety days of the sentencing), this court will address all of the issues he has raised in his appellate brief that are understandable, in the hopes of ending this litigation.

¶5 This court cannot review the claim that the trial court failed to consider the appropriate factors at sentencing, or failed to give due regard to Blue's concerns about being jailed at the House of Correction, because no transcript of the sentencing proceeding was included in the record. The appellant has a responsibility to provide this court with transcripts. When the appellant fails to do so, our review is limited to the portions of the record available to us. *See Ryde v. Dane County Dep't of Soc. Servs.*, 76 Wis. 2d 558, 563, 251 N.W.2d 791 (1977). "[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial

⁴ Blue also raises other matters, clearly not properly before this court, consisting of claims that "the victim was not able to give statements regarding why they did not seek charges," and he was denied a request for a change of judge. It is a general principle of law that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of constitutional dimension. *State v. Riekkoff*, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983).

court's ruling.” *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). Moreover, there is a strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably. *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). Without a transcript, this court must presume that the trial court acted properly.

¶6 Next, this court determines that no new factors have occurred which would require a modification in sentencing. Whether a fact or set of facts constitutes a new factor is a question of law. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). Thus, this issue is subject to *de novo* review. See *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983).

¶7 The seminal case defining a new factor is *Rosado v. State*, 70 Wis. 2d 280, 234 N.W.2d 69 (1975). The phrase “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 the event, although it was in existence, was unknowingly overlooked by all of the parties.” *Id.*, 70 Wis. 2d at 288. The new factor must not only be previously unknown, but must strike at the very purpose for the sentence selected by the trial court. *Michels*, 150 Wis. 2d at 99. The burden is upon an appellant to demonstrate a new factor by clear and convincing evidence. See *State v. Franklin*, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Once the appellant has met its burden of proof, the trial court must then exercise its discretion and determine whether the new factor frustrates the purpose of the original sentencing. See *Michels*, 150 Wis. 2d at 97.

¶8 Blue's medication problem is not a new factor. This court does not have jurisdiction over the medical care of prisoners. Medical care and treatment of prisoners is statutorily within the province of the Department of Corrections. *See* WIS. STAT. § 302.38. The court has no authority to order the Department of Corrections to obtain particular treatment for a defendant or to interfere with the internal operations of the prison system. *Cf. Michels*, 150 Wis. 2d at 96-100 (holding that a change in defendant's medical condition is not a new factor). Further, this court has no idea of the seriousness of Blue's illness or the type of medication he claims has been withheld from him as Blue has failed to inform this court as to the nature of his illness or what medication he is taking.

¶9 Blue's transfer to a different jail is also not a new factor. The trial court's order, denying one of Blue's motions for sentencing modifications, advises:

House of Correction Administrator Richard Cox has informed the court that the defendant was administratively transferred from the House of Correction to Rock County Jail because of repeated unfounded complaints and allegations he made against HOC staff. The court declines to interfere with the administrative authority of the House of Correction by modifying the sentence to electronic surveillance; to do so would unduly depreciate the seriousness of the offenses and frustrate the court's original intent for the defendant to serve jail time for his crimes. Mr. Cox has further assured the court that the defendant's medical needs are not being ignored.

¶10 The transfer of inmates among correctional institutions is within the purview of the Department of Corrections, rather than the trial court, see WIS. ADM. CODE § DOC 302.20. Thus, for the reasons stated, this court affirms the trial court's decisions denying Blue's many postconviction motions.

By the Court.—Judgment affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

