

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 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 Nos. 01-2290-CR
01-2291-CR**

**Cir. Ct. Nos. 99-CF-760
99-CF-1028**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BARBARA J. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
MICHAEL S. FISHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. On June 8, 2000, Barbara J. Anderson was sentenced to concurrent five-year prison terms based upon convictions for uttering a forged check and bail jumping. Sentence was withheld for a second count of uttering a forged check, and Anderson was placed on ten years' probation,

consecutive to the prison sentences. Anderson has now appealed from an order denying her motion for sentence modification. We affirm the trial court's order.

¶2 At the hearings on her motion for sentence modification and her motion for reconsideration of the trial court's original denial of the motion, Anderson presented evidence indicating that she suffers from severe posttraumatic stress disorder (PTSD), and that she is being treated only with medication, not with psychotherapy, in the prison. Anderson also presented evidence that she could receive appropriate treatment for her mental disorders in the community. The trial court denied both the original motion for sentence modification and the motion for reconsideration. In both of its decisions, it stated that even if it had known at sentencing of Anderson's diagnosis of PTSD with psychotic features, it nonetheless would have imposed the same prison time. In its decision denying the motion for reconsideration, it stated that Anderson "clearly needs structure as well as treatment."

¶3 Motions for sentence modification involve a two-step process. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). First, the defendant must demonstrate the existence of a new factor. *Id.* If he or she does so, then the trial court must determine whether the new factor justifies modification of the sentence. *Id.*

¶4 A defendant must establish the existence of a new factor by clear and convincing evidence. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). The issue of whether a set of facts constitutes a "new factor" for sentencing purposes presents a question of law which we review without deference to the trial court. *Id.*

¶5 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 sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Id.* at 96. In addition, it must be an event or development which frustrates the purpose of the original sentence. *Id.* at 99. There must be some connection between the factor and the sentencing which strikes at the very purpose for the sentence selected by the trial court. *Id.*

¶6 The existence of a new factor does not automatically entitle a defendant to relief. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). Whether a new factor warrants a modification of sentence lies within the trial court’s discretion. *Id.*; *Michels*, 150 Wis. 2d at 97.

¶7 Even if, as acknowledged by the trial court, it was unaware of Anderson’s specific diagnosis of PTSD at the time of sentencing, we conclude that it acted within the scope of its discretion in denying modification. The record reveals that when it imposed sentence on June 8, 2000, the trial court’s primary purpose was to incarcerate Anderson to prevent her from reoffending. It stated that it was familiar with Anderson because of her lengthy history of contacts with the court system. It stated that Anderson was “in her own way a career criminal,” and that she had made a career of stealing, lying and being deceitful. It concluded that she had not been deterred in the past and had a “track record of continually violating.” Based upon her criminal record, it concluded that she very likely would violate again if she was not removed from the community. It then imposed the concurrent five-year prison terms, followed by ten years of probation.

¶8 The trial court’s primary purpose in sentencing Anderson was thus to prevent her from committing future crimes by incarcerating her. Information

indicating that Anderson had been specifically diagnosed with PTSD and had better treatment opportunities outside the prison setting did not frustrate the trial court's purpose of incarcerating her to prevent her from committing new crimes. No basis therefore exists to conclude that Anderson presented a new factor which struck at the very purpose of the sentence chosen by the trial court.¹ The trial court therefore acted within the scope of its discretion in refusing to modify Anderson's sentence based upon a new factor.

By the Court.—Order affirmed.

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

¹ We recognize that when it first denied the motion for sentence modification, the trial court stated that if it had known specifically that Anderson had PTSD in addition to the many other problems she has, it still would have imposed the same period of incarceration in the Wisconsin prisons, “where we can be assured she will get treatment for the disorders that she suffers from, whatever they may be.” In her motion for reconsideration, Anderson presented expert testimony indicating that she needed psychotherapeutic treatment, as well as medication, but could not get adequate therapy in the prison. However, this evidence does not alter our conclusion that the trial court acted within the scope of its discretion in refusing to modify the sentence because even after the trial court heard this evidence, it reiterated that if it had known of the diagnosis, it would have imposed the same prison time.

