

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2009

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. 2008AP2700-CR

Cir. Ct. No. 2001CF6387

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EUGENE L. WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. MCMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Eugene L. Wilson appeals from an order denying his motion for sentence modification. The issues are whether a remand is warranted to require the trial court to explicitly apply the U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 factors (“§ 5K1.1 factors”) to Wilson’s

post-sentencing cooperation to warrant modification of his sentence rather than relying “only” on the offense for which Wilson was convicted, and whether Wilson was denied equal protection of the law because the prosecutor did not adequately advocate for sentence modification on Wilson’s behalf. We conclude that the trial court’s comments at the modification hearing demonstrate consideration of the § 5K1.1 factors, and that the trial court properly exercised its discretion in explaining why Wilson’s post-sentencing cooperation did not overcome the severity and violence of the felony murder for which he was convicted to warrant sentence modification; we further conclude that there was no denial of equal protection as a result of the prosecutor’s (in)action. Therefore, we affirm.

¶2 Wilson pled guilty to felony murder for his participation in an armed robbery that resulted in the victim’s death. The trial court imposed a thirty-eight-year sentence, comprised of twenty-three and fifteen-year respective periods of initial confinement and extended supervision.

¶3 Wilson moved for sentence modification in Milwaukee County, the county of his felony murder conviction, for his post-sentencing cooperation with officials in Wood County. Wilson attached correspondence from the Wood County District Attorney acknowledging Wilson’s cooperation, however, the Milwaukee County Assistant District Attorney who appeared at the sentence modification hearing had not been contacted about Wilson’s cooperation. Nevertheless, the trial court held a hearing on Wilson’s motion for sentence modification on the basis of two new factors; Wilson’s post-sentencing cooperation, and his rehabilitative progress in the correctional institution. Although there are not many details about Wilson’s cooperation, neither the

Milwaukee County prosecutor nor the trial court questioned the fact of Wilson's post-sentencing cooperation with Wood County.

¶4 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 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.”

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that “‘new factor’ ... frustrates the purpose of the original sentence.” *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). We use a two-part standard of review.

Whether a new factor exists is a question of law, which we review de novo. The existence of a new factor does not, however, automatically entitle the defendant to relief. The question of whether the sentence warrants modification is left to the discretion of the [trial] court.

State v. Trujillo, 2005 WI 45, ¶11, 279 Wis. 2d 712, 694 N.W.2d 933 (quotation marks and citations omitted).

¶5 The trial court conducted a hearing and determined that Wilson's post-sentencing cooperation was a new factor pursuant to *State v. Doe*, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, and that Wilson's rehabilitative progress “although it's commendable,” was not. It explained however, why it determined that his cooperation did not warrant a reduction in his sentence. Wilson does not pursue the trial court's determination on his rehabilitative progress; he challenges the trial court's exercise of discretion in determining that

sentence modification was not warranted despite his cooperation. He contends that the trial court failed to apply the § 5K1.1 factors, and instead only considered the crime for which he was convicted.

¶6 Wilson relies on *Doe* in which we held that post-sentencing cooperation “may constitute a new factor that the trial court can take into consideration when deciding whether modification of a sentence is warranted.” *Id.*, 280 Wis. 2d 731, ¶1. We adopted the § 5K1.1 factors “for the court’s use in assessing whether the assistance constitutes a new factor.” *Id.*, ¶9. These factors are:

- (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant’s assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant’s assistance.

Id. We reject Wilson’s challenge because: (1) these factors are to be considered in determining whether a defendant’s cooperation should constitute a new factor; the trial court already determined that Wilson’s cooperation did constitute a new factor; and (2) the trial court did consider these factors; although it did not apply them seriatim, it considered them in its explanation as to why it considered his cooperation a new factor, and why it also determined that his cooperation notwithstanding, it did not warrant sentence modification.

¶7 We review the trial court’s exercise of discretion in determining whether the new factor “frustrates the purpose of the original sentence” to determine whether sentence modification is warranted. See *Michels*, 150 Wis. 2d at 99; *Trujillo*, 279 Wis. 2d 712, ¶11. An exercise of discretion requires a reasoned and reasonable decision. See *State v. Larsen*, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). The trial court’s explanation, while not as Wilson had hoped, is reasoned and reasonable. That is what is required.

¶8 The trial court expressly stated that in “looking at all the factors ... [the] cooperation, given the nature and seriousness of this offense, the irrevocable nature of the loss of life,” modification was not appropriate. It also reflected on the crime for which Wilson was sentenced. It characterized the crime as “a very brutal homicide” where the victim was “beaten to death for the purpose of gaining drugs.” It referred to the original sentencing transcript and commented on the “excellent job [the trial court did] of setting forth all the factors,” including its concerns for rehabilitation, protection of the community, and punishment. It repeated the sentencing court’s remarks that its intention was that Wilson remain under supervision “for as long as [Wilson is] on earth.” It explained why it concluded that, while commendable, Wilson’s cooperation did not frustrate the purpose of the original sentence. The trial court properly exercised its discretion in explaining its reasons for determining that, notwithstanding the existence of a new factor, modification was not warranted.

¶9 Subsumed in that analysis is also our rejection of Wilson’s claim that the trial court relied exclusively on the crime for which he was convicted. The trial court considered the crime, as was a proper exercise of discretion in deciding a motion for sentence modification, and also considered other factors, including

Wilson's drug problem, his need for rehabilitation, and the need for community protection.

¶10 Wilson also contends that he was denied equal protection of the law because the Wood County District Attorney did not adequately advocate for Wilson's sentence reduction. Although the Milwaukee County Assistant District Attorney mentioned that it was unusual that he had not been contacted by Wood County, the Wood County District Attorney conveyed his opinion that Wilson had cooperated with authorities, and that his cooperation may serve as a basis for sentence modification. Moreover, neither the Milwaukee County prosecutor nor the trial court disputed Wilson's cooperation; in fact, the trial court determined that Wilson's cooperation constituted a new factor; it simply did not warrant sentence modification.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

