COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3001-CR **Cir. Ct. No. 00-CF-386**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY J. CZERNIAK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 SNYDER, J. Jeffrey J. Czerniak, pro se, appeals from an order denying a motion to modify his sentence. Czerniak argues that the circuit court's intent at sentencing was frustrated by the Department of Corrections' (DOC)

denial of his admission into the challenge incarceration program of WIS. STAT. § 302.045 (2001-02).[1] We disagree and affirm the order.

FACTS[2]

¶2 On March 22, 2001, Czerniak pled no contest to substantial battery as a party to a crime, causing substantial bodily harm to another. Czerniak was sentenced to a forty-two month bifurcated prison term, with thirty months' initial confinement and twelve months' extended supervision. In addition, the circuit court made a finding that Czerniak was eligible for the challenge incarceration program, specifically stating "whether or not you get into that program, I don't know. But you're at least eligible for it."

¶3 On January 24, 2002, Czerniak filed a motion to modify his sentence, arguing, somewhat confusingly, that because the circuit court found him eligible for the challenge incarceration program but the DOC denied his admission into that program, the court should order the DOC to enroll him in the program. This motion was denied on September 26, 2002. Czerniak appeals.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] As the State correctly notes, Czerniak failed to include a statement of facts and statement of the case with citations to the record, in violation of WIS. STAT. RULE 809.19(1)(d) and (3) of the rules of appellate procedure, which requires him to set out facts "relevant to the issues presented for review, with appropriate references to the record." An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record. ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957).

DISCUSSION

¶4 To obtain sentence modification, a defendant must establish that (1) a new factor exists and (2) the new factor justifies sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a fact or set of facts constitutes a new factor presents a legal issue which we decide de novo. ***Id***. Whether a new factor justifies sentence modification, however, presents an issue for the trial court's discretionary determination, subject to our review under the erroneous exercise of discretion standard. ***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 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). Further, a new factor is "an event or development which frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). A defendant bears the burden of proving the existence of a new factor by clear and convincing evidence. ***Franklin***, 148 Wis. 2d at 8-9; *see also* ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991).

¶6 This case also involves the interpretation of WIS. STAT. § 302.045, the challenge incarceration, or "boot camp," statute; statutory interpretation is a question of law we review independently. ***State v. Isaac J.R.***, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998).

¶7 Czerniak's argument appears to be that the circuit court's intent at sentencing was to sentence him to boot camp which was then frustrated by the DOC's denial of his admission into the boot camp program of WIS. STAT.

§ 302.045. First, this assertion is directly contradicted by the circuit court's very words at sentencing. The court declared Czerniak eligible for boot camp but then pointedly stated "whether or not you get into that program, I don't know."

¶8 WISCONSIN STAT. § 302.045(2) addresses boot camp eligibility:

> 302.045 **Challenge incarceration program for youthful offenders.**
>
> ....
>
> **(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, 948.075, 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.

Thus, as § 302.045(2) clearly delineates, and as we noted in ***State v. Steele***, 2001 WI App 160, 246 Wis. 2d 744, 632 N.W.2d 112, admission into the boot camp program is a two-step process. First, the sentencing court must determine that,

pursuant to WIS. STAT. § 973.01(3m),[3] the offender is eligible for boot camp. *See* ***Steele***, 246 Wis. 2d 744, ¶7. However, the DOC must then determine if the offender is eligible according to its standards and requirements. *See* ***id.***; *see also* § 302.045(2).

¶9 Therefore, while the circuit court may have determined Czerniak eligible for boot camp, the DOC determined he was not; the circuit court explicitly recognized this possibility when sentencing Czerniak. Thus the court's intent at sentencing was not frustrated nor was Czerniak's denial of admission into the program a "new factor" requiring sentence modification. We therefore affirm the order of the circuit court denying Czerniak's motion for sentence modification.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[3] WISCONSIN STAT. § 973.01(3m) addresses boot camp eligibility and states:

> **(3m)** CHALLENGE INCARCERATION PROGRAM ELIGIBILITY. When imposing a 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, 948.075, 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.