COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1812-CR **Cir. Ct. No. 00CF001540**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL E. CUNNINGHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Carl Cunningham appeals from an order denying his motion for sentence modification on a judgment entered following the revocation of his probation. We affirm for the reasons discussed below.

¶2 Cunningham was convicted, based on a guilty plea, of a fifth offense of operating a motor vehicle while intoxicated (OWI). Following the joint recommendation of the parties, the trial court withheld sentence and imposed a four-year term of probation with a condition of six months in jail. Cunningham's probation was revoked after he was arrested for another OWI offense. The trial court then sentenced Cunningham to three years of initial confinement with one year of extended supervision with 294 days of sentence credit, again following a joint recommendation by the parties.

¶3 Cunningham filed a motion for sentence modification, claiming that the trial court had failed to advise him at sentencing that he could no longer own or possess a firearm, that neither the court nor counsel had advised him that he had a right to appeal, that counsel performed ineffectively by failing to adequately investigate his case and to argue that Cunningham's alcoholism was a valid defense to the charge, and that the reclassification of his offense of conviction as a class H felony constituted a new sentencing factor. The trial court denied the motion without a hearing. Now, Cunningham essentially renews all but the last argument on appeal, with some minor variations.

¶4 We begin by clarifying the scope of the present appeal. An appeal from a sentence following revocation does not bring the underlying conviction before the court. ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Nor is it the proper mechanism for claiming relief from an alleged loss of appellate rights based on the ineffective assistance of appellate counsel. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992) (establishing a writ of habeas corpus as the way to raise claims of ineffective appellate counsel). The order which is the subject of this appeal is an order denying sentence modification. Therefore, the only issue before us is whether the trial court properly refused to

modify Cunningham's sentence. We will not consider Cunningham's arguments relating to whether he was adequately advised of his appellate rights or the prohibition against possessing firearms.

¶5 A sentence may be modified upon a showing of a "new factor." A new sentencing 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, which operates to frustrate the purpose of the original sentence. Whether a particular set of facts constitute a new factor is a question of law which we review *de novo*. However, whether a new factor warrants a modification of sentence is a discretionary determination to which we will defer. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (citations omitted).

¶6 Cunningham asserts that his alcoholism is a "new factor" warranting sentence modification. He claims that a recovering alcoholic has been recognized as a "handicapped party" within the meaning of the Rehabilitation Act of 1973, and, therefore, that the counsel should have argued against allowing him to be sentenced for having the disease. Cunningham's contention is flawed in multiple respects. First, Cunningham was not sentenced for being an alcoholic. He was sentenced for operating a motor vehicle while intoxicated. Even assuming that Cunningham was unable to control his drinking as a result of his disease, it does not follow that he could not have made arrangements for alternate transportation either before, during, or after becoming intoxicated. *See* ***State v. Koller***, 60 Wis. 2d 755, 210 N.W.2d 770 (1973) (rejecting the notion that driving an automobile is part of the pattern of the disease of alcoholism). In any event, the record shows that the trial court was well aware at the time of sentencing that Cunningham had a drinking problem. Therefore, Cunningham's alcoholism did

not constitute a new sentencing factor. The motion for sentence modification was properly denied without a hearing.

By the Court.—Order affirmed.

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