

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2004

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. 03-3045-CR

Cir. Ct. No. 02-CF-48

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT E. LAITURI,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Washburn County:
ROBERT RASMUSSEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Scott Laituri appeals orders denying his post-conviction motion for resentencing or, in the alternative, for modification of his existing sentence. Laituri was convicted upon no contest pleas to burglary of a dwelling and theft of movable property. He argues that new factors give rise to grounds to modify his sentence. First, he states he contracted Hepatitis C in prison. He argues he should be released from prison early so he can obtain

employment to afford medical treatment he cannot get while in prison. Second, he states he is a severe alcoholic and needs AODA treatment that is not available until he has thirteen to eighteen months left on his prison sentence. We conclude these are not new factors and affirm the orders.

BACKGROUND

¶2 On January 2, 2003, Laituri was convicted on his no contest plea to burglary of a dwelling. He was sentenced to six years in prison followed by four years' extended supervision. He also pled no contest to theft of movable property. His sentence was stayed and he was placed on ten years' probation, consecutive to his sentence on the burglary charge.

¶3 While in prison, Laituri became ill and was diagnosed with being in the early stages of Hepatitis C. The prison system only has the financial and medical resources to treat inmates with more advanced stages of the disease. Thus, Laituri would not be able to receive treatment at this time. However, the record shows that he will be eligible for different types of treatment as the disease progresses. On June 2, 2003, he filed a motion for reconsideration or, in the alternative, for modification of his sentence, asking to be placed on extended supervision early so that he could work and pay for medical care.¹

¶4 Laituri also argued that he suffers from severe alcoholism. He will not be eligible for transfer to a facility offering extensive AODA treatment until he has thirteen to eighteen months left on his prison sentence. Thus, he asked that his

¹ The record shows that the treatment has mixed results and costs approximately \$50,000 per year.

sentence be modified so that he would be able to transfer immediately to a facility where he could get extensive treatment.

¶5 The circuit court denied the motion based on WIS. STAT. § 974.06.² That section states that a motion filed under the section must claim

the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or ... laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack

The court concluded Laituri did not meet these criteria.

DISCUSSION

¶6 Laituri first argues that the circuit court erroneously based its decision on WIS. STAT. § 974.06. He maintains that a motion asking the court to modify a sentence based on new factors is not governed by § 974.06. *See State v. Grindemann*, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. The State concedes that the circuit court should not have based its decision on § 974.06. However, we may affirm the court's decision on alternate grounds even if the court did not invoke that ground as the basis for its order. *See State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

¶7 A defendant seeking modification based on a new factor must first show that a new factor exists. *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242. A “new factor” is

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

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). A new factor must be a development that frustrates the purpose of the original sentence, and must be proved by clear and convincing evidence. *Champion*, 258 Wis. 2d 781, ¶4. Whether something constitutes a new factor is a question of law we review independently. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶8 Laituri first contends his diagnosis with Hepatitis C is a new factor. However, he does not show how his contraction of Hepatitis C frustrates the purpose of the original sentence. As we stated in *Michels*, 150 Wis. 2d at 99-100, a post-sentencing defendant's worsening health is not a new factor because it does not frustrate the original intent of the sentence.

¶9 Here, the court considered many factors in imposing its sentence. It noted that Laituri had a history of committing offenses while intoxicated and that there was a need to protect the public. Further, the court stated that Laituri had many opportunities to straighten out his life but had not done so. The court concluded that supervision as an initial disposition was not an option given Laituri's extensive criminal record and the likelihood he would fail on probation. Laituri's diagnosis with Hepatitis C does nothing to frustrate the purpose behind the sentence. Thus, it is not a new factor.

¶10 Laituri next argues "the second new factor is that [he] suffers from severe alcoholism." However, the court was aware of Laituri's alcoholism when it sentenced him. The State informed the court that Laituri had problems with

alcohol and had failed to “come to grips with his alcoholism.” The State also emphasized that Laituri would need AODA treatment while in prison. Laituri’s attorney further referenced Laituri’s alcoholism. He stated that Laituri’s family knows Laituri has “an ongoing battle with alcohol” and that consuming alcohol is “a struggle for him.” Finally, the court stated during the postconviction motion hearing that Laituri’s alcoholism “was known by the court and counsel at the time of sentencing.” Thus, Laituri’s alcoholism is not a new factor.

¶11 In Laituri’s reply brief, he clarifies that the new factor is not his alcoholism. Instead,

[t]he new factor is that the prison system is filling up faster than the budget allows for and [he] can not receive the assessment and treatment that the Court originally anticipated. It becomes a new factor when the Judge Orders [sic] incarceration so a Defendant can receive treatment and the Defendant cannot receive the treatment as anticipated.

Laituri mischaracterizes the court’s ruling. At no time did the court say that AODA treatment should begin immediately. The court only stated that Laituri should receive AODA treatment while he is in prison, which he will receive when he has thirteen to eighteen months left on his sentence.

By the Court.—Orders affirmed.

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