

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-0508-CR
No. 95-0509-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN R. COLEMAN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Rock County:
J. RICHARD LONG, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Shawn R. Coleman appeals from a postconviction order denying his motion for sentence modification. The issue is whether the discoveries that Coleman's mental disorder is treatable and may have contributed to his criminal conduct constitute new factors entitling him to sentence modification. We conclude that the treatability of Coleman's disorder

does not frustrate the purpose of the original sentence and that he has not proven, by clear and convincing evidence, that his mental disorder contributed to his criminal conduct. Therefore we affirm.

Coleman was convicted of operating a motor vehicle without the owner's consent (OMVWOC), recklessly endangering safety, and two burglaries. The trial court imposed two concurrent eleven-year sentences on the OMVWOC and reckless endangering convictions. On the burglary convictions, it imposed but stayed two concurrent ten-year sentences and ordered two concurrent ten-year terms of probation to run consecutive to the other sentences. Although defense counsel recommended that all of these sentences run concurrently, he agreed with the presentence investigator that imposition of the maximum sentences was appropriate. Consequently, the trial court deviated from defense counsel's sentencing recommendation only by imposing the burglary sentences consecutive to the other sentences.

The presentence investigation report mentioned that Coleman had been treated for depression and had problems controlling his anger.¹ The investigator concluded that Coleman "feels fine now and feelings of depression ceased" Coleman confirmed to the sentencing court that he "ha[s] no depression ... [but has] an anger control problem." Eighteen months after sentencing, Coleman moved for sentence modification on a new factor, namely, that he was mentally ill, and that illness is treatable and had contributed to his criminal conduct. The trial court concluded that Coleman had not established a new factor which would entitle him to sentence modification. We agree.

The trial court is empowered to modify its sentence if (1) the defendant demonstrates, by clear and convincing evidence, that there is a new factor, and (2) that the new factor justifies sentence modification. *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A new factor is

¹ The report is not in the appellate records consolidated for appeal. However, the information we are using from the report is not disputed and is substantially paraphrased in the transcripts of the original sentencing and the postconviction hearings.

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, 73 (1975). "The new factor must be an event or development that `frustrates the purpose of the original sentencing.'" *State v. Johnson*, 158 Wis.2d 458, 466, 463 N.W.2d 352, 356 (Ct. App. 1990). "There must be some connection between the factor and the sentencing--something which strikes at the very purpose for the sentence selected by the trial court." *State v. Michels*, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989).

"Whether a set of facts is a `new factor' is a question of law which we review without deference to the trial court. Whether a new factor warrants a modification of sentence rests within the trial court's discretion." *Michels*, 150 Wis.2d at 97, 441 N.W.2d at 279 (citation omitted).

The postconviction court read its sentencing transcript aloud to demonstrate that it was aware of Coleman's problems with depression. It also noted that medication, administered while in prison, ameliorated his depression. The postconviction court was unpersuaded that it had relied on inaccurate information or had overlooked relevant information when it originally sentenced Coleman. It concluded that nothing Coleman presented in his modification motion "in any way frustrate[d] the purpose of original sentencing." We agree.

Although Coleman filed additional psychological reports with the postconviction court to demonstrate that his mental disorder is treatable, the sentencing court was aware that he had responded favorably to treatment in the past. While the sources of this information may have changed, the treatability of his condition has not. The sentencing court had concluded that Coleman's treatment needs would be more suitably met in a correctional institution than in a community facility. We agree with the trial court that Coleman has not

presented any new information about his treatability which "frustrate[d] the purpose of [the] original sentenc[e]." Moreover, Coleman has not persuaded us, by clear and convincing evidence, that his mental problems contributed to his criminal conduct.²

By the Court.--Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

² Coleman has shown that alcohol contributed to his criminal conduct. However, that was shown when he was originally sentenced.