COURT OF APPEALS
DECISION
DATED AND RELEASED

October 31, 1996

NOTICE

No. 95-1715-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY L. MC AFFEE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Larry McAffee appeals from a judgment and postconviction order denying his sentence modification motion.[1] Because we

[1] Although McAffee styles his appeal as one of the sentence and of the adverse postconviction order, his real challenge is to the postconviction order denying sentence modification.

conclude that McAffee failed to make a prima facie showing that a "new factor" existed, we affirm.

BACKGROUND

During the afternoon and night of November 25, 1992, McAffee consumed six to seven ounces of brandy. He also smoked two rocks of crack cocaine. After becoming intoxicated, he went to a Burger King around midnight and committed a robbery with his hand stuck in his pants to simulate a gun. He committed a similar robbery at an Ember's restaurant around 3:30 in the morning of November 26, 1992.

McAffee was charged with two counts of armed robbery and pleaded no contest. McAffee was sentenced to two eight-year sentences, consecutive to one another and consecutive to other sentences he became liable to serve because of parole violations. In 1994, McAffee became aware that his girlfriend had put LSD into his beer on the night of November 25, 1992. McAffee moved the circuit court to modify his sentence based on the previously unknown factor of involuntary LSD intoxication. The court denied his motion without a hearing.

STANDARD OF REVIEW

In order to prevail on a motion to modify sentence, a defendant must demonstrate by "clear and convincing evidence" that a "new factor" exists unknown to any party at the time of sentencing, and the circuit court must agree that the new factor warrants sentence modification. ***State v. Franklin***, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611-12 (1989). The new factor must be not only previously unknown, but must strike 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). It is within a circuit court's discretion whether to hear a sentence modification motion. *See* ***Cresci v. State***, 89 Wis.2d 495, 506, 278 N.W.2d 850, 855 (1979). Whether facts constitute a "new factor" is a question of law, which we review *de novo*. ***Michels***, 150 Wis.2d at 97, 441 N.W.2d at 279.

ANALYSIS

McAffee argues that involuntary LSD intoxication is a defense to criminal liability. Under § 939.42, STATS., involuntary intoxication by alcohol or drugs is a defense to criminal liability.[2] Intoxication is involuntary where it is perpetrated by force or fraud by a third party. ***Loveday v. State***, 74 Wis.2d 503, 511-12, 247 N.W.2d 116, 122 (1976).

In support of his modification motion, McAffee attached an affidavit by a psychologist. In the psychologist's evaluation, the amount of alcohol and crack cocaine McAffee had consumed made it reasonable to assume McAffee was "highly intoxicated" when he set off on his spree. However, based in part on McAffee's own report that previous LSD ingestion had not caused loss of control or hallucinations, the contribution of LSD to his criminal behavior "cannot be determined to the requisite degree of professional certainty."

In light of this conclusion, we affirm. Although McAffee presented evidence that he had involuntarily ingested an unknown amount of LSD, McAffee did not present to the circuit court "clear and convincing evidence" that a "new factor" existed which "strikes at the very purpose" of the sentence previously imposed. In the absence of any showing as to how much LSD he unknowingly ingested and in the absence of any showing that the LSD made his condition worse[3] than the "high" degree of intoxication he had

[2] Section 939.42, STATS., reads:

> **Intoxication.** An intoxicated or a drugged condition of the actor is a defense only if such condition:
>
> (1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or
>
> (2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24 (3).

[3] McAffee's girlfriend submitted an affidavit which stated that about one hour after she slipped him the LSD, his behavior became erratic and unusual. However, in light of the other intoxicants then in McAffee's system, such an observation, standing alone, is not unexpected and does not substantiate a finding of a "new factor."

voluntarily achieved with alcohol[4] and crack cocaine, the LSD was not a "new factor" in the legal sense.

Because McAffee's motion was undercut by his own psychologist's affidavit, McAffee did not make a prima facie showing that a new factor existed. Therefore, the circuit court did not erroneously exercise its discretion in failing to conduct a hearing.

By the Court.—Judgment and order affirmed.

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

[4] McAffee's psychologist estimated McAffee's blood alcohol concentration at .15%.