

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 26, 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.

**Nos. 95-1753-CR  
95-1754-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**CHANDRA D. DENNIS,**

**Defendant-Appellant.**

APPEALS from judgments and orders of the circuit court for Dane County: MICHAEL B. TORPHY, JR., Judge. *Judgments affirmed; order denying postconviction motion affirmed in part and reversed in part; restitution order reversed and cause remanded for further proceedings.*

Before Dykman, P.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Chandra D. Dennis appeals from judgments of conviction and orders setting restitution and denying her postconviction motion. The issues are whether the restitution order stated the proper amount

and whether Dennis presented a new factor for purposes of sentence modification. We reverse and remand for further proceedings on the restitution order and otherwise affirm the judgment and the order denying postconviction relief.

Dennis pleaded no contest to several felony counts of issuing worthless checks, forgery and financial transaction card crime. Additional similar charges were dismissed and read in for sentencing. The court sentenced Dennis to a term of imprisonment and a consecutive period of probation and ordered restitution.

Dennis argues that the restitution amount improperly included conduct for which she was not charged or convicted. The State does not appear to dispute that the restitution amount includes conduct not charged. It first argues that Dennis agreed to have both charged and uncharged conduct read in for purposes of restitution. Such an agreement is not apparent from the plea hearing, at which the prosecutor said the State "will move to dismiss and read in the remaining counts in 94-CF-1002." There was no mention of reading in uncharged conduct. In a pre-sentencing letter and at sentencing, the State proposed restitution of approximately \$32,000, in contrast to the presentence report's calculation of approximately \$18,000. The trial court ordered restitution of approximately \$27,000.

The State is correct that Dennis did not object to its proposed restitution amount at sentencing. However, after considering the terms of the plea agreement stated on the record, combined with Dennis's current objection, we decline to view her silence at sentencing as a waiver. If that is our conclusion, the State argues that amendment of the restitution order is not the appropriate remedy. Rather, we should remand for an evidentiary hearing to confirm that Dennis is arguing that the uncharged conduct was not read in, thereby leaving open the possibility of prosecution for those offenses. We agree. At that time the parties can also address various other computational discrepancies that were noted on appeal.

Dennis also argues that the trial court erred by denying, without a hearing, her postconviction motion seeking sentence modification. The court

must hold an evidentiary hearing when a postconviction motion alleges facts which would entitle the defendant to relief. *State v. Bentley*, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996).

Dennis asserts that her motion presented a new factor which should have been considered by the trial court. She argues that the new information concerned Marsha Jones, which was the name on one of the bank accounts. The presentence report stated that Dennis told the investigator the account had been opened with Jones's consent, that they went shopping together, and that much of the merchandise was purchased for Jones. The report stated that police and the investigator could not reach Jones.

Dennis's postconviction motion asserted further details about Jones and her involvement in the crimes. Dennis argues that if the court had been made aware of Jones's role in the conspiracy, the information could have mitigated Dennis's sentence, and the court would have been informed that Dennis did not keep much of the merchandise and did not initiate the check scheme.

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 in existence, it was unknowingly overlooked by all of the parties." *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). Whether the defendant has demonstrated the existence of a new factor is a question of law we review *de novo*. *Id.*

The additional information about Jones was not a new factor. Dennis's knowledge about Jones's involvement was in existence at the time of sentencing and was at least partly conveyed to the trial court through the presentence report. To the extent that the information was not completely conveyed, Dennis could have provided further information at sentencing. There is no assertion in her postconviction motion that the information was unknowingly overlooked. Because the motion did not allege facts which demonstrate the existence of a new factor, the court was not obliged to hold a hearing on the motion.

On remand, the trial court shall hold an evidentiary hearing on restitution as described in this opinion and amend the restitution order as necessary.

*By the Court.*—Judgments affirmed; order denying postconviction motion affirmed in part and reversed in part; restitution order reversed and cause remanded for further proceedings.

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