

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 14, 2015**

Diane M. Fremgen  
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. 2014AP2316-CR**

**Cir. Ct. No. 2010CF1313**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMIE F. DEJESUS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Jamie F. DeJesus appeals from a circuit court order denying his motion for sentence modification. DeJesus claimed that a new factor warranted modification. The circuit court held the motion was procedurally barred and, in any event, there was insufficient evidence of a new factor. We affirm.

## BACKGROUND

¶2 In June 2010, DeJesus pled guilty to misdemeanor battery and felony false imprisonment. He had physically attacked his girlfriend in their bedroom during an argument, choking her and ripping off her underwear and tank top. When his victim's daughter responded to her cries for help, DeJesus shut the bedroom door and pushed a dresser in front of it, barricading the victim in the room with him. DeJesus's explanation was that he "[w]oke up on the wrong side of the bed" that morning. The circuit court sentenced DeJesus to nine months' imprisonment for the battery, plus five years' initial confinement and two years' extended supervision for the false imprisonment. The sentences were consecutive to each other and to any other sentence.

¶3 DeJesus waived further representation by the State Public Defender, and his appointed postconviction counsel was allowed to withdraw in October 2011. In February 2012, DeJesus filed a twenty-five-page postconviction motion in which he sought to withdraw his pleas. The circuit court denied the motion, and this court affirmed. *See State v. Dejesus*, No. 2012AP1576-CR, unpublished slip op. (WI App May 7, 2013).

¶4 In August 2014, DeJesus filed the motion for sentence modification underlying this appeal. He alleged that since his incarceration under the Department of Corrections, "he has been diagnosed with a mental health illness" that was "unbeknownst to all parties during the prosecution and sentencing of this case." He asked to have his sentences modified from consecutive sentences to sentences concurrent with revocation time he was then serving.

¶5 The circuit court denied the motion. It concluded that DeJesus was procedurally barred under *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517

N.W.2d 157 (1994), because the mental health issue was first diagnosed in 2010 but not raised in the 2012 motion, and DeJesus failed to provide a sufficient reason in this motion for why the mental health issue was not raised in the earlier motion. The circuit court also concluded that DeJesus’s mental health issue was not a new factor because he had not offered “the opinion of a mental health expert to show that his mental health diagnoses have any bearing on his culpability in these offenses.” DeJesus appeals.

## DISCUSSION

¶6 A prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a “sufficient reason” for failing to raise it earlier. *See id.* at 185; *see also* WIS. STAT. § 974.06(4) (2013-14).<sup>1</sup> Whether a procedural bar applies is a question of law. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 The circuit court noted that DeJesus’s motion for sentence modification acknowledged that he first became aware of his mental health issues in September 2010. Nevertheless, DeJesus did not raise any claim for sentence modification based on those issues in his February 2012 motion. *See State v.*

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In his motion to the circuit court, DeJesus expressly disavowed that he was filing his motion under WIS. STAT. § 974.06. However, the circuit court is not bound by the label a litigant places on a pleading, *see bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983), and § 974.06 provides a mechanism for correcting errors when the sentence imposed exceeds the maximum or is “otherwise subject to collateral attack,” *see State v. Romero-Georgana*, 2014 WI 83, ¶32, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted).

*Casteel*, 2001 WI App 188, ¶¶16-17, 247 Wis. 2d 451, 634 N.W.2d 338 (where alleged “new factor” derived from law passed in 1989, and defendant-appellant had brought seven appeals between then and 2001, the new factor claim was procedurally barred).

¶8 In his appellate brief, DeJesus counters, “I just don’t see how a defendant [who] suffers from an undiagnosed mental health illness is suppose[d] to know that it is exactly that he or she suffers from.... The actual diagnosis did not occur until the year of 2013[.]” DeJesus also asserts that he was incompetent at the time of the earlier postconviction proceedings, which constitutes a sufficient reason for him not raising the mental health issue in 2012.

¶9 DeJesus points to no evidence to suggest that he was incompetent at any point in the proceedings, so we reject such a contention outright. Further, we note, as did the circuit court, that DeJesus’s present motion indicates that he was first diagnosed with “some type of mental health issues” shortly after his September 2010 sentencing. The motion also indicates that by November 4, 2011, the Department of Corrections had classified him as “having a serious mental health illness.” DeJesus’s affidavit in support of the current motion also states that “[p]rior to September 2010 it was unbeknownst to me that I suffered from any type of mental health illness[.]” (Emphasis added.) In short, DeJesus’s own allegations demonstrate that he knew he had mental health issues well before filing his 2012 postconviction motion. As DeJesus has not provided a sufficient reason for failing to raise the mental health issue in his 2012 motion, we conclude the circuit court did not err by invoking the procedural bar.

¶10 Despite the existence of a procedural bar, a circuit court may still modify a sentence if the defendant shows a new factor that warrants modification.

*See State v. Harbor*, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828. A “new factor” is a fact or 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) (reaffirmed by *Harbor*, 333 Wis. 2d 53, ¶¶40, 52).

¶11 “The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Harbor*, 333 Wis. 2d 53, ¶36. Whether facts constitute a new factor is a question of law. *See id.* If the defendant demonstrates that there is a new factor, the question of whether that new factor warrants sentence modification is committed to the circuit court’s discretion. *See id.*, ¶37.

¶12 Here, DeJesus claimed that his “mental health issue” was a new factor that was unknown to everyone at sentencing. The circuit court, however, concluded that DeJesus had not adequately demonstrated the existence of a new factor because he did not include “the opinion of a mental health expert” to show that his mental health issue bore on his culpability. DeJesus complains that the circuit court “placed an unrealistic onus” on him by requiring the “testimony of mental health experts rather than simply submitting the documents” placed in his mental health file. DeJesus misses the point of the circuit court’s expectations.

¶13 In his postconviction motion, DeJesus stated that he had been diagnosed with post-traumatic stress disorder, major depressive disorder, anxiety disorder, and dysthymia. He contended that had this information been available at sentencing, “the mitigating factors would have assuredly went toward [his] character, culpability, and nature of the offense.” DeJesus included descriptions of

his disorders and asserted he was suffering from certain symptoms at the time of his offenses: “[s]ymptoms apparent were feeling stressed and angry, he had trouble being affectionate, he was irritable, and aggressive to the point of becoming violent.”

¶14 But DeJesus points to nothing beyond his own suppositions to show how any of his mental health issues or symptoms actually reduce his culpability for his offenses or otherwise serve as mitigating factors here; many people feel “stressed and angry” without resorting to battery and false imprisonment. The fact that DeJesus may have suffered some symptoms from his mental illnesses does not mean that his mental illnesses prevented him from appreciating the wrongfulness of his conduct or from conforming his behavior to the requirements of the law.

¶15 Moreover, we note that the sentencing court was bothered by DeJesus’s post-arrest attempts to manipulate his victim through phone calls from the jail. Even if we accept that DeJesus’s mental health issues explain his violent behavior in the heat of an argument, he does not show how his mental health issues mitigate such calculated behavior in a subsequent period of calm. In short, the circuit court concluded that DeJesus failed to present clear and convincing evidence that his mental health issues were a mitigating factor “highly relevant to the imposition of sentence.” See *Rosado*, 70 Wis. 2d at 288; *Harbor*, 333 Wis. 2d 53, ¶40. We do not disagree.

¶16 DeJesus’s present motion also points primarily to the anger-related symptoms of his disorders. However, as the circuit court noted, “[p]rior to sentencing, [DeJesus] had been diagnosed with anger management issues, and the court was aware of that factor at the time it sentenced him.” DeJesus thus complains that the circuit court “assume[d] the role of a mental health expert”

when it “likened the anger management issues ... to an actual diagnosis” of a mental health disorder.

¶17 The circuit court’s point is simply that the sentencing court already knew that DeJesus had issues dealing with his anger. The specific clinical cause or name of DeJesus’s problem does not impart a greater relevancy for sentencing purposes than was already considered by the sentencing court. Thus, the circuit court concluded, the formal mental health diagnoses were also not clear and convincing evidence of a factor unknown at sentencing. We discern no error in the circuit court’s analysis.

*By the Court.*—Order affirmed.

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

