

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

September 21, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 99-0064-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY MYERS,

DEFENDANT-APPELLANT.

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APPEAL from judgments and an order of the circuit court for Brown County: VIVI L. DILWEG and RICHARD G. GREENWOOD, Judges. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

PER CURIAM. Anthony Myers appeals judgments convicting him of forgery and uttering and an order denying his postconviction motion. One week after the court allowed Myers to change his plea to not guilty by reason of mental disease or defect (NGI), Myers entered no contest pleas to both charges. He argues that (1) the court erred when it accepted Myers' plea without determining

whether he withdrew his NGI plea; (2) the trial court erroneously exercised its discretion when it refused to adjourn the trial to allow additional time to prepare the NGI defense and when it failed to appoint a psychological expert to examine Myers; and (3) the court erred when it determined that Myers' discovery that he is HIV positive does not constitute a new factor warranting a sentence reduction. We reject these arguments and affirm the judgments and order.

The court properly accepted Myers' no contest pleas. In the context of the proceedings, it is clear that the pleas were not meant to preserve the NGI defense. The court called the parties' attention to the fact that Myers had entered an NGI plea at the plea hearing, neither Myers nor his attorney indicated that they intended to present that defense. Since the plea was entered on the day trial was scheduled, Myers should have expected to present his defense that day unless he withdrew that defense. Instead, Myers indicated that he would give up his right to offer evidence and to call witnesses as a result of his no contest pleas. At the sentencing hearing, neither Myers nor his attorney suggested that sentencing was improper because the second phase of his bifurcated trial had not taken place. In fact, the proposition that Myers never withdrew his NGI plea was presented for the first time more than two years after the plea. From these circumstances, we conclude that Myers abandoned his NGI pleas when he entered his no contest pleas.

Myers' arguments regarding adjourning the trial and appointing a psychological expert were rendered moot by his no contest plea. To the extent he contends his no contest plea was involuntary due to the lack of time to prepare the NGI defense, we reject that argument because it is not supported by the plea colloquy which shows no reservations of issues relating the NGI defense.

Finally, Myers' HIV positive status does not constitute a new factor. A new factor is a fact "highly relevant" to the imposition of sentence. *See Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). It is a factor that frustrates the purpose of the original sentencing. *See State v. Michels*, 150 Wis.2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). Assuming that a diagnosis of HIV translates into a reduced life expectancy, a fact not established in the record, Myers' health and life expectancy were not substantial factors in setting the original sentence and the purposes of the original sentence are not frustrated by changes in his health. Therefore, the trial court properly refused to reduce Myers' sentence.

*By the Court.*—Judgments and order affirmed.

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

