COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-2024

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

THOMAS W. WOOD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

¶1 NETTESHEIM, J. The State of Wisconsin appeals from a postconviction order that modified Thomas W. Wood's prison terms from consecutive to concurrent sentences. We affirm the order.

FACTS

¶2 The State filed two criminal complaints against Wood. The first complaint charged Wood as a party to the crimes of criminal damage to property and battery. That complaint also alleged that both crimes were committed by use of a dangerous weapon. The second complaint charged Wood with receiving stolen property, misdemeanor bail jumping and two counts of felony bail jumping. Eventually Wood entered pleas of guilty to all of the charges except misdemeanor bail jumping.

¶3 The trial court fashioned a sentence which both punished Wood and provided him an opportunity for rehabilitation. The court sentenced Wood to consecutive fifteen-month sentences on the two counts recited in the first complaint. On the remaining counts, the court withheld sentences and imposed various periods of probation that would continue after Wood was released from prison. The court said that it did not want to simply "warehouse" Wood. Instead, the court wanted Wood to "take a firm grip on what you're going to do with your life," "continue your education, get some sort of skill, determine whether or not alcohol is or is not some problem…."

¶4 At the conclusion of the sentencing hearing, Wood's counsel questioned whether the Department of Corrections (DOC) would accept Wood as a prisoner because the sentences were the result of misdemeanor convictions.[1] Counsel was concerned that Wood might have to serve his sentences in the county jail. In response, the court said, "If they do, I'm going to do a resentencing because it would frustrate my purpose."

[1] Although misdemeanors, the sentences on each count exceeded one year because of the dangerous weapon penalty enhancer.

¶5 After the sentencing, Wood filed a postconviction motion seeking sentence modification on two grounds: the State had incorrectly represented his juvenile record at the sentencing hearing, and the trial court had improperly imposed consecutive periods of probation. However, at the modification hearing, Wood's counsel provided additional arguments in support of the modification request. Counsel revealed that the DOC had not enrolled Wood in any programs and, instead, was seeking to transport him to a Texas correctional facility due to prison overcrowding. Wood asked the court to release him on probation supervision.

¶6 The trial court granted Wood's motion to the extent of making the sentences concurrent instead of consecutive. The court stated that it had assumed that the DOC would place Wood in appropriate programs. The court concluded that the DOC's failure to do so frustrated the purpose of the sentences. The State appeals.

DISCUSSION

¶7 Both the State and Wood analyze the trial court's ruling under the law of new factors. *See* ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). The State contends that the DOC's institutional treatment is part of the rehabilitative process and, as such, is not a new factor that permits modification of the sentence. *See* ***State v. Prince***, 147 Wis.2d 134, 136-37, 432 N.W.2d 646, 647 (Ct. App. 1988). However, Wood additionally analyses the court's ruling under the law of harsh or unconscionable sentences. *See* ***State v. Ralph***, 156 Wis.2d 433, 438, 456 N.W.2d 657, 659 (Ct. App. 1990) ("A trial court may modify a sentence even though no new factors are presented.").

¶8 We hold that the law of new factors governs this case. We do not read the trial court's ruling to say that the original sentences were harsh or unconscionable or that the new information rendered them so. Instead, the court clearly indicated that the information regarding the DOC's plans for Wood was new information that frustrated the court's sentencing structure and intent.

¶9 A new factor meriting possible sentence modification 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 then 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) (quoted source omitted). The purpose of sentence modification is to allow a court to correct a sentence when new factors frustrate the purpose of the sentencing court. *See* ***id***. at 14, 434 N.W.2d at 613-14. Whether a set of facts is a new factor is a question of law that we review without deference to the trial court. *See* ***State v. Michels***, 150 Wis.2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). However, whether the new factor warrants a sentence modification is addressed to the trial court's discretion. *See* ***id***.

¶10 We have no quarrel with the State's contention that institutional treatment in a prison setting is part of the rehabilitative process. But it does not necessarily follow from this that sentence modification can never be granted when the request is premised upon the institution's inability or unwillingness to provide such treatment or programs. Rather, we believe that each case must be assessed on its own facts and with a particular view to the sentencing goals of the trial court. Thus, in some cases the institution's inability to deliver needed programs and services to a prisoner will constitute a new factor and in other cases it will not.

¶11 For instance, in ***State v. Krueger***, 119 Wis.2d 327, 351 N.W.2d 738, (Ct. App. 1984), the sentencing court was aware at the time of sentencing that a correctional setting could be inadequate for and interfere with the defendant's rehabilitative needs. *See* ***id***. at 333-34, 351 N.W.2d at 742. Thus, the court of appeals held that the institution's inability to provide alcohol and drug treatment was not a new factor warranting sentence modification. *See* ***id***. at 334-35, 351 N.W.2d at 742. Contrast ***State v. Sepulveda***, 119 Wis.2d 546, 350 N.W.2d 96 (1984), where the sentencing court ordered probation on the condition that the defendant be admitted to a mental health institution. When the institution refused to admit the defendant, the trial court modified the sentence to one of imprisonment. *See* ***id***. at 549-50, 350 N.W.2d at 98-99. The supreme court upheld the modification, likening the situation to a new factor which "entirely frustrated the judge's intent and circumvented the dual purposes of probation—to rehabilitate the defendant, yet protect society." ***Id***. at 560-61, 350 N.W.2d at 104.

¶12 In ***Franklin***, the defendant argued that a change in parole policy constituted a new factor justifying a sentence modification. *See* ***Franklin***, 148 Wis.2d at 6, 434 N.W.2d at 610. The supreme court rejected this argument because the sentencing court did not refer to the possibility of parole when sentencing the defendant. *See* ***id***. at 14, 434 N.W.2d at 613. However, the court's choice of language is interesting and relevant to this case: "We conclude that a change in parole policy cannot be relevant to sentencing *unless parole policy was actually considered by the circuit court*." ***Id***. (emphasis added).

¶13 It is apparent from these cases that the sentencing court's expectations and intent play a crucial role in a sentence modification request premised upon new factors. In this case, the trial court spoke to Wood's needs for educational and employment skills at the sentencing hearing. The court also

wanted an assessment of Wood's possible alcohol problem. The court stressed that it did not wish to simply warehouse Wood in prison. In fact, the court said that if the DOC would not accept Wood because he was convicted of misdemeanors, the court would not warehouse Wood in the county jail. Instead, the court said it would resentence Wood because that development would frustrate the court's sentence. In fact, at the modification hearing, the court observed, "If I wanted [Wood] to sit in [the] county jail, I could have done a nice solid year without Huber."

¶14 The trial court's sentence was premised, in part, on the court's reasonable expectation that the DOC would provide the programs or treatment that would address Wood's rehabilitative needs. But instead the DOC simply "handed off" Wood to a correctional facility in Texas. As the court explained, that placement was the equivalent of warehousing Wood—the very condition that the court had tried to avoid in the first place. Therefore, we reject the State's claim that the trial court engaged in the prohibited practice of revising a sentence based upon further reflection. *See* ***Cresci v. State***, 89 Wis.2d 495, 504, 278 N.W.2d 850, 854 (1979). Instead, the court properly determined that new factors were present and properly exercised its discretion by modifying the original sentences.

CONCLUSION

¶15 The trial court correctly ruled that Wood had established new factors in support of his request for a sentence modification. We further hold that the court did not err in the exercise of its discretion to modify the sentences.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.