

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1965-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH M. CAMINATA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Joseph M. Caminata appeals from a judgment of conviction for battery as a habitual criminal pursuant to WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

§§ 940.19(1) and 939.62(2). Caminata also appeals from a postconviction order denying his motion for modification of his sentence. We affirm.

Facts and Procedural History

¶2 On November 23, 1999, following plea negotiations, the State and Caminata entered into a plea agreement under which Caminata entered an *Alford*² plea to a misdemeanor charge of battery as a habitual criminal pursuant to WIS. STAT. §§ 940.19(1) and 939.62(2). As part of the plea agreement, Caminata also entered *Alford* pleas to charges of disorderly conduct, criminal damage to property and carrying a concealed weapon. The agreement further provided that the trial court would immediately sentence Caminata. In exchange for Caminata's pleas, the State dismissed and read in a felony charge of robbery by force. In addition, the State was free to argue for substantial prison time.³

¶3 During the sentencing, the State, Caminata's attorney, and Caminata himself spoke to the issue of Caminata's mental health. The trial court also addressed this issue at some length in its sentencing remarks. The court imposed a three-year maximum sentence on the battery charge and consecutive periods of

² *North Carolina v. Alford*, 400 U.S. 25 (1970).

³ These proceedings followed an earlier plea proceeding before Judge Lee S. Dreyfus, Jr. in which Caminata pled guilty to the robbery charge and the battery charge was dismissed and read in together with five other uncharged offenses. However, Caminata later moved to withdraw his guilty plea. This matter was then assigned to Judge Patrick C. Haughney.

When the motion hearing commenced, the parties announced a new plea agreement under which Caminata would plead to the battery charge and the robbery charge would be dismissed. Judge Haughney then conducted the appropriate plea colloquy with Caminata. But when Judge Haughney indicated that the court would immediately proceed to sentencing, Caminata objected. Judge Haughney then vacated the plea agreement, returned to Caminata's motion to withdraw his earlier plea, and began taking testimony. However, during the motion hearing, Caminata changed his mind and stated that he wished to proceed with the plea agreement after all. Once again, Judge Haughney conducted a plea colloquy with Caminata and then immediately conducted the sentencing.

probation on the other charges. Caminata brought a motion to modify the battery sentence. In support, he provided a report from Barry D. Hargan, a licensed psychotherapist. Hargan's report detailed Caminata's mental health history and recommended a treatment program under conditional probation. The trial court denied the motion. Caminata appeals.

Discussion

¶4 Although Caminata appeals from the judgment of conviction and the postconviction order denying his motion for sentence modification, his appellate argument is targeted at the trial court's postconviction order. We therefore limit our discussion to that issue.

¶5 Caminata contends that his postconviction motion, supported by Hargan's report, demonstrated a new factor warranting sentence modification. This court recently summarized the applicable law governing sentence modification.

The purpose of a sentence modification is to correct an unjust sentence. Before a sentence will be modified, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying the court's reconsideration. A new factor is a fact relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing ... or which frustrates the sentencing court's intent.... We review without deference the question of law of whether the facts constitute a new factor.

State v. Koeppen, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530 (citations omitted). If a new factor is established, the question of sentence modification is addressed to the trial court's discretion. ***State v. Michels***, 150 Wis. 2d 94, 96-97, 441 N.W.2d 278 (Ct. App. 1989).

¶6 In its sentencing remarks, the State did not dispute Caminata's mental illness. This was based on various reports that had been previously

submitted to the trial court as a result of a competency evaluation. The State alluded to Caminata's prior mental health treatment and his medication regime. The State further observed that mental health treatment would be an appropriate condition of parole once Caminata was released.

¶7 In his sentencing remarks, Caminata's counsel spoke at length about Caminata's mental illness history. Counsel contended that the entire matter should have been processed as a WIS. STAT. ch. 51 commitment, not as a criminal prosecution. Counsel also referred to a letter from Dr. Pankiewicz detailing Caminata's need for mental health services. The trial court had also read this letter. Counsel asked the trial court to place Caminata on probation with mental health treatment as a probation condition. Counsel noted that Caminata had an appointment later in the week with Dr. Wilson at the mental health center.

¶8 Finally, Caminata himself spoke to the trial court about his mental health and alcohol abuse history.

¶9 The trial court's sentencing remarks focused squarely on Caminata's mental illness history. The court noted that the relaxation of the civil commitment laws had funneled mentally ill people into the criminal justice system. The court told Caminata, "Your mental health issues are significant." Nonetheless, based on Caminata's significant criminal history and the violence associated with the battery incident, the trial court concluded that a prison sentence was warranted on the battery charge. On the remaining charges, the court imposed consecutive periods of probation with conditions addressed to Caminata's mental illness and alcohol abuse needs.

¶10 Postconviction, Caminata filed a motion supported by Hargan's report. Caminata asked the court to commute his prison sentence to time served so

that he could commence his mental health treatment under the supervision of probation. His motion contended that Hargan's report constituted a new factor because it "details the defendants [sic] history, mental health problems, substance abuse problems, the treatment he has received, and recommends an alternative disposition."

¶11 The trial court ruled that the information provided by Caminata was not a new factor. We agree. As our review of the sentencing reveals, Caminata's mental health history was the focus of the sentencing hearing. At best, the Hargan report represented, in the words of the trial court, a "better articulated and ... clearer report." However, the court stated that it had taken Caminata's mental health issues into account at the original sentencing. Again, we agree. The Hargan report simply detailed yet again Caminata's significant and lengthy mental health history. Moreover, the report lobbied anew for a sentencing alternative which the trial court had already rejected—probation with appropriate conditions addressed to Caminata's mental health needs.

¶12 In summary, this was not information unknown to the trial court at the time of sentencing, nor was it information which frustrated the sentencing court's intent. *Koeppen*, 2000 WI App 121 at ¶33. We uphold the trial court's determination that Caminata did not present any new factor in support of his sentence modification request.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

