

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 2010

David R. Schanker
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. 2008AP2694-CR

Cir. Ct. No. 2004CF153

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY JAMES MURRAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green County:
JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Ricky James Murray appeals from an order denying his motion for modified sentences. He contends that he is entitled to resentencing on new factors, and because he was sentenced on inaccurate information. We reject his arguments and affirm.

¶2 The State charged Murray in connection with a head-on collision that occurred when Murray lost control of his vehicle while heavily intoxicated.¹ Three of the occupants of the other vehicle suffered relatively minor injuries, and one, Cali M., then five, was grievously injured. Murray entered a guilty plea on two counts of injury by intoxicated use of a vehicle, as a repeat offender. The court sentenced Murray to seven-and-one-half years of initial confinement and five years of extended supervision on one count, and withheld sentence and imposed a ten-year term of consecutive probation on the second count.

¶3 The victims were injured in a vehicle manufactured by the Ford Motor Company. Cali subsequently sued Ford, alleging that a defective seatbelt caused her injuries in the accident with Murray. After extensive discovery Ford settled Cali's claim for 1.85 million dollars.

¶4 Murray moved for sentence modification, alleging that the fact and amount of the settlement were new factors, and also proved that he was sentenced on inaccurate information concerning his responsibility for Cali's injuries and the financial effect of the accident on Cali's family. The circuit court denied the motion, resulting in this appeal.²

¹ Murray recorded a .237% blood alcohol concentration after the accident.

² Contrary to the State's assertion, the fact that Murray commenced the appeal before the court entered its order denying his motion does not warrant dismissal of the appeal. *See* WIS. STAT. § 808.04(8) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

NEW FACTOR

¶5 A “new factor” is a fact or set of facts highly relevant to the defendant’s sentence that was unknown to the trial judge at the time of sentencing, either because it did not then exist or was unknowingly overlooked by the parties. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). To justify resentencing “[t]here must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court.” *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Whether a set of facts is a “new factor” is a question of law, which we review de novo. *Id.* at 97. Whether a new factor warrants a modified sentence lies within the circuit court’s discretion. *Id.*

¶6 Cali’s settlement with Ford was not a new factor because neither the extent to which a seatbelt defect contributed to Cali’s injuries, nor the financial burden they placed on the family, were issues that were highly relevant to Murray’s sentences. In sentencing Murray the court principally focused on: (1) the seriousness of the offenses, committed when Murray caused a head-on collision while highly intoxicated; (2) his extensive record of domestic violence and other alcohol related and/or violent crimes that included four prior OWI or prohibited alcohol concentration convictions (two motor vehicle and two boat); (3) the failure of prior jail and probation terms to control or curb his alcohol abuse and criminal behavior; (4) his failure to acknowledge and accept responsibility for his alcohol abuse; and (5) the likelihood that he would continue to drink and reoffend. The court noted the extent and cost of Cali’s injuries, but these were not the focus of the court’s comments. The clearly articulated purpose was to impose a sentence that reflected the seriousness of Murray’s conduct, and protected the public from the likelihood that Murray would continue to commit alcohol-related

offenses. These were matters that had little to do with whether a better seat belt might have mitigated Cali's injuries.

¶7 It may be true that Murray received a harsher sentence because his conduct resulted in serious injury, but it does not follow that the sentencing court was, or was required to be, concerned with the precise details of causation. It is often true when drunk drivers cause accidents that factors beyond the control of the drunk driver—such as the relative size of a victim's vehicle—dictate whether minor or, instead, severe injuries are the result. The logical extension of Murray's argument is that sentencing courts must, for example, consider whether a serious injury would have occurred if the victim had been riding in a safer car. No such inquiry is required. Rather a court may impose a harsher sentence based on the fact that a defendant caused a collision that resulted in a serious injury, without an analysis of contributing causal factors.

INACCURATE SENTENCING INFORMATION

¶8 A defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. We review de novo whether a defendant has been denied the right to be sentenced on accurate information. *Id.*, ¶9.

¶9 Murray has not shown that the court sentenced him on inaccurate information. Undeniably, Murray caused Cali's injuries, and those of the other

victims, because he caused the accident from which they resulted.³ The record does not show, however, that the court assumed that Murray was the sole cause of Cali's injury, or relied on that assumption when sentencing Murray. What is clear, instead, is that whether there were other causal factors, such as defective seat belts in the vehicle, was simply not an issue at sentencing. Consequently, while the information that later became available through the civil action may have supplemented the information available at sentencing, it did not render that information inaccurate. The sentencing court correctly viewed Murray as responsible for the accident and resulting injuries.

By the Court.—Order affirmed.

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

³ Murray's intoxicated use of a motor vehicle need not be *the* cause of Cali's injuries. All that is necessary is that it be *a* cause. Cali's injuries may have several causes. See, e.g., *Morgan v. Pennsylvania Gen. Ins Co.*, 87 Wis. 2d 723, 735, 275 N.W.2d 660 (1979).

