

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2011

A. John Voelker
Acting 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. 2010AP1351-CR

Cir. Ct. No. 2008CF229

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS A. SKENANDORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Nicholas A. Skenandore appeals from a judgment of conviction for armed robbery and an order denying his motion for postconviction relief. Skenandore argues that his sentence should be modified on the basis of new factors, the circuit court erroneously exercised its sentencing

discretion when it found he was not eligible for the Earned Release or Challenge Incarceration Programs, he was sentenced on the basis of inaccurate information, and the author of his presentence investigation report (PSI) was biased against him. We conclude that none of these issues have merit and we affirm the judgment and order of the circuit court.

¶2 Skenandore pled guilty to one count of armed robbery. The court sentenced him to twelve years each of initial confinement and extended supervision to be served concurrently to another sentence for armed robbery in a Washington county case. After he was sentenced, Skenandore had his own presentence investigation report prepared. Skenandore then moved to modify his sentence, and the circuit court denied the motion.

¶3 Skenandore first argues that he is entitled to sentence modification because the independent PSI stated new facts that were unknown at the time of sentencing and that frustrated the purpose of his sentence. Specifically, he argues that the independent PSI explained the mitigating circumstances of his life, including a failed suicide attempt, and presented the court with a dual mental health diagnosis. Skenandore also argues that the risk reduction statute, WIS. STAT. § 973.031,¹ is a new factor that warrants modification.

¶4 A new factor, as defined, 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.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a fact or set of facts constitutes a new factor is a question of law which may be decided without deference to the lower court's determinations. *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). If a defendant has demonstrated the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence. *See id.* at 546. This determination is committed to the circuit court's discretion and will be reviewed under an abuse of discretion standard. *See id.* "A defendant must prove a new factor by clear and convincing evidence." *State v. Crochiere*, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ___Wis. 2d ___, 797 N.W.2d 828.

¶5 We conclude that the circuit court properly exercised its discretion when it denied Skenandore's motion. The circuit court stated that it was aware at the time it sentenced Skenandore that he had attempted suicide and that he had mental health issues. These issues, therefore, were not new factors.

¶6 The risk reduction statute also did not constitute a new factor. First, as the State argues, it is questionable whether the statute even applies to Skenandore. Even if it did, however, the circuit court considered that Skenandore was a serious threat to the public and required a greater sentence than the State recommended. In other words, the court intended to give Skenandore a lengthy sentence. The risk reduction statute, however, which would have resulted in a decreased sentence, was not germane to what the trial court wanted to do. The circuit court properly exercised its discretion when it found that the risk reduction statute did not constitute a new factor.

¶7 Skenandore also argues that the circuit court erroneously exercised its discretion when it found him ineligible for the Earned Release and Challenge Incarceration Programs. Specifically, he says that the court’s decision was neither “rational nor explainable.” The circuit court knew that Skenandore was eligible for both programs, but decided that neither program was appropriate for him given the seriousness of the offense he had committed and the sentence the court imposed. The court stated that to give Skenandore “any additional credit or consideration in this matter by making those programs eligible for [his] early release” would frustrate the court’s sentence. We conclude that the circuit court explained its reason for finding Skenandore ineligible for these programs and that the court’s reasons were rational. The court properly exercised its discretion.

¶8 Skenandore argues that the court’s sentence was based on inaccurate information contained in the PSI. “[I]n a motion for resentencing based on a circuit court’s alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information.” *State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Skenandore argues that the following statements in the initial PSI were inaccurate:

1. He was seeing a counselor and had sought programming. This was not enough.
2. He turned away from programming that was available to him and continued to live a lie say[ing] he was getting better.
3. He failed to follow through with the programming available to him.
4. He voiced remorse which appears to be only because he was caught and sitting in prison as he also voiced his lawyer is trying to get his time to run concurrent. It appeared that he was again only thinking of himself and how little time he could bargain for.

5. [He was unwilling] to accept responsibility for his behaviors.

¶9 Skenandore claims that the first three statements were inaccurate because he did complete some programming but then was unable to afford to continue. He claims the last two are inaccurate because he accepted responsibility for the crime by entering a guilty plea. The purpose of the PSI, however, is

to do more than simply compile the factual background regarding a specific defendant. The report contains a variety of areas where the PSI writer is able to make discretionary determinations. For example, the report has a section involving the ‘agent’s impressions.’ This portion of the PSI involves the writer’s subjective feelings regarding the defendant to be sentenced.

State v. Howland, 2003 WI App 104, ¶34, 264 Wis. 2d 279, 663 N.W.2d 340 (citations omitted).

¶10 We conclude that the challenged statements merely convey the author’s opinions or impressions. Further, Skenandore has not established that the circuit court relied on any of these statements when it sentenced him. Skenandore has not established that the circuit court relied on inaccurate information when it sentenced him.

¶11 Finally, Skenandore asserts that the author of the PSI was biased against him. A PSI report is supposed to be accurate, reliable, and objective. *Id.*, ¶36. It is critical to this process that the author, therefore, be neutral and independent from both the prosecution and the defense. *Id.* This does not mean, however, that the author is forbidden from expressing his or her opinions about the subject of the report. As we have shown, the author of the PSI is asked to give the court his or her “subjective feelings regarding the defendant to be sentenced.” The

statements are nothing more than that. Skenadore has not established that the author was biased against him.

¶12 For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

