COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 1998

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.

Nos. 97-1301
97-1302

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

97-1301
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT W. GANLEY,

DEFENDANT-APPELLANT.

97-1302
STATE OF WISCONSIN EX REL. ROBERT W. GANLEY,

PLAINTIFF-APPELLANT,

v.

DEPARTMENT OF CORRECTIONS, MICHAEL SULLIVAN, SECRETARY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Robert Ganley was convicted of two counts of first-degree sexual assault. The charges grew out of two incidents, one in October 1989, and one in December 1989, involving the same child. On March 15, 1993, the court imposed a combined term of twelve-years' imprisonment, stayed the prison term and placed Ganley on probation for ten years with various conditions. The subject of this appeal is the Department of Corrections' decision on May 13, 1996, to revoke Ganley's probation. Ganley challenged the decision by filing a petition for review by certiorari and a petition for a writ of habeas corpus.[1] Ganley

[1] Review of the decision to revoke probation is by writ of certiorari. *See* ***State ex rel. Johnson v. Cady***, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1970). In a certiorari action, the review is of the record of the agency proceedings. *See* Judicial Council Committee Note, 1981, § 781.03(2), STATS. However, on certain types of challenges to a probation revocation, it is necessary to present evidence to the court, and then a habeas corpus is the proper vehicle. *See* ***State ex rel Vanderbake v. Endicott***, 210 Wis.2d 503, 563 N.W.2d 883, 890-91 (1997). Apparently both counsel and the trial court believed it was proper to take additional evidence both for the challenge to the revocation decision as arbitrary and capricious and for the due process claim, although the prosecutor emphasized that the court would not be making a de novo review of the revocation decision and defense counsel appeared to agree. We agree that additional evidence was needed on the claim that Ganley's right to due process was violated, but we disagree that additional evidence was needed on the challenge to the revocation decision as arbitrary and capricious. However, since no party objected to that procedure before the trial court, and since the State on appeal, while not conceding that such a procedure is proper, expressly does not object to our consideration of all the evidence presented at the hearing, we will consider all the evidence presented to the trial court as well as the record of the agency's proceedings for both the challenge to the revocation decision as arbitrary and capricious and the due process challenge. However, we maintain the proper distinction between the standard of review appropriate for each, as we explain in our opinion.

appeals the trial court's order denying the two petitions, as well as the order denying his motion for a modification of sentence based on new factors.[2]

On appeal, Ganley argues that the trial court erred in deciding that: (1) the Department's decision to pursue revocation and its decision to revoke were not arbitrary and capricious; (2) the Department did not violate Ganley's right to due process by failing to afford him legal counsel in the revocation proceedings and by accepting the waiver of his right to a revocation hearing; and (3) his payment to the victim of the sexual assault and the diagnosis of the extent of his mental illness were not new factors entitling him to modification of his sentence. We conclude that the trial court did not err on any of these points, and we therefore affirm.

REVOCATION DECISION

Background

The record of the probation revocation proceedings, as amplified by the evidence presented to the court, shows the following. The trial took place on February 4, 1993, and the sentencing occurred on March 15, 1993. In May and June 1992, after a suicide attempt, Ganley was diagnosed as suffering from anxiety/depression and alcoholism and various medications were prescribed. Between that time and the time of sentencing, there were other suicide threats or attempts related to alcohol use; residential treatment for alcoholism was

[2] Ganley filed the petitions for writs of certiorari and habeas corpus on November 12, 1996, and the evidentiary hearing took place on February 7, 1997. After the trial court entered an order denying relief on those petitions, Ganley filed a motion for modification of sentence, and a hearing took place on that motion on April 16, 1997. We consolidated the appeal from the court's order on the petition and the appeal from the court's order denying a modification of sentence.

recommended; and Ganley was receiving outpatient treatment for mental illness. Among the conditions of Ganley's probation were that he refrain from using alcohol, participate in sex offender treatment and drug and alcohol assessment, pay $10,000 to DARE and Family Advocates, and pay up to $2,000 per year for future counseling for the victim and for counseling already received. Ganley was also to serve one year in the county jail as a condition of probation, which he did.

On October 26, 1994, Ganley was admitted to a mental health hospital for an attempted overdose while drinking. His diagnosis was major depressive disorder and severe alcohol dependence. He continued to take medications for his depression and to see Dr. Houlihan, a psychiatrist, who was monitoring the medications. Beginning in late June 1995, there were other suicide attempts and hospitalizations. While Ganley was hospitalized in early July 1995, Edward Ross, Ganley's probation agent, discussed Ganley's condition with Dr. Houlihan. Dr. Houlihan stated that Ganley became despondent over the civil suit filed against him by the victim and the amount of money she wanted in settlement. He said Ganley's condition could be controlled with medication. He felt the outlook for Ganley was good if he could overcome the obstacle of the civil suit. Dr. Houlihan did not feel commitment was appropriate because Ganley made progress during the recent hospitalization. Ross decided he would meet with Ganley daily to try to stabilize his situation, and Ganley was to see Dr. Houlihan every other week.

Eight days after being released from the hospital, Ganley was intoxicated when he appeared for a visit with Ross. Ross called Dr. Houlihan. Dr. Houlihan's opinion, as reported by his nurse, was that Ganley should not be placed back in the psychiatric unit at the hospital as he felt Ganley was trying to "manipulate the system" and Ganley should feel "the consequences of the legal

system." Ross reviewed the options with his supervisor, Richard Streich. They considered several treatment facilities and decided placement in the Pine Crest Residential Treatment Program for Alcoholism was most appropriate. They recognized there was a violation of the court order, but, since Ganley admitted the violation, they thought this treatment facility was appropriate. A couple weeks after Ganley was admitted to the facility, the staff notified Ross that Ganley had been drinking. Ganley asked to remain at the facility. Ross discussed the matter with Streich, and they decided that he should not remain there because of his disregard for the conditions of his probation. Ganley was placed in Grant County jail, where he attempted suicide, and was then taken to a hospital psychiatric unit.

Commitment proceedings were commenced but not completed because Ganley agreed to another alternative. Ross decided that revocation was appropriate because Ganley presented a danger to the community, but that he would first place Ganley in another residential treatment facility for alcoholism, Wisconsin Resource Center. If Ganley did not respond to that program or refused treatment, he would initiate revocation proceedings. Ganley was in this facility until December 18, 1995. After his release, Ganley was referred for outpatient counseling services and was required to attend weekly AA meetings and continue to see his psychiatrist.

On April 30, 1996, Ganley was arrested for driving while intoxicated. The arresting officer reported that Ganley was passing vehicles in a no passing zone, and when the officer activated his emergency lights, Ganley continued driving, crossing the centerline three times. A breathalyzer test showed a blood alcohol concentration of .23. Ganley was taken to jail, where he attempted suicide by slashing his throat. He was then taken to Lancaster Hospital. On May 1, 1997, he was committed pursuant to § 51.15, STATS., to Boscobel

Psychiatric Hospital. Ross met with Ganley on May 1, 1997, before he was transported to Boscobel Psychiatric Hospital. In a statement signed that day, Ganley admitted that he violated conditions of his probation by drinking, driving while intoxicated, and having a blood alcohol concentration of .23.

On May 2, 1997, Ganley was released from the psychiatric hospital to jail. On that day, Ross gave Ganley a notice of violation, which notified Ganley that revocation proceedings had been initiated and the grounds for revocation. On May 3, 1997, Ross again met with Ganley, and Ganley signed a waiver of the right to a revocation hearing.

Ross, in consultation with Streich, decided to request revocation for these reasons. Ross considered the arrest for driving while intoxicated demonstrated that Ganley was a danger to the community and that a correctional setting was the appropriate setting for meeting Ganley's treatment needs. He considered that the various alternatives already attempted, including two residential treatment programs, outpatient counseling, AA, and monitoring by a psychiatrist of his medications, had not stopped Ganley from drinking, jail was not an option because Ganley had already served one year as a condition for probation—the maximum possible. Electronic monitoring was not a viable alternative because that could not monitor alcohol use. Ross did not consider a commitment because Ganley was released from the Boscobel Psychiatric Unit to jail on May 3. Based on his experience, Ross believed that meant the doctor's opinion was that commitment was no longer required. Ross determined that Ganley's need for treatment for his alcoholism and psychiatric problems could be met in prison. The Department's regional supervisor signed the order of revocation on May 13, 1996.

The trial court determined that the decision to revoke probation was not arbitrary and capricious. It noted the various alternatives that had been attempted without success; the danger that Ganley presented to the community because of his driving while intoxicated and the sexual assault, which involved his use of alcohol; and the availability of treatment programs in prison to meet his needs.

Discussion

We review the Department's decision, not that of the trial court. Our review on certiorari is limited to four inquiries: (1) whether the tribunal stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the evidence that it did. ***Van Ermen v. DHSS,*** 84 Wis.2d 57, 63, 267 N.W.2d 17, 20 (1978).

An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion. ***Von Arx v. Schwarz,*** 185 Wis.2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994). In ***State ex rel. Plotkin v. DHSS,*** 63 Wis.2d 535, 217 N.W.2d 641 (1974), the court held that these ABA guidelines "properly set forth the duty of … [an] administrative body in exercising its discretion in regard to the possibility of probation revocation:

> 5.1 **Grounds for and alternatives to probation revocation**.
>
> (a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of

> the original offense and the intervening conduct of the offender that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.
>
> (b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:
>
> (i) a review of the conditions, followed by changes where necessary or desirable;
>
> (ii) a formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions;
>
> (iii) a formal or informal warning that further violations could result in revocation." American Bar Association, *Standards Relating to Probation*, pp. 15, 16, 56, 57.

Plotkin, 63 Wis.2d at 544-45, 217 N.W.2d at 645-46.

In ***Van Ermen***, a later case, the court considered the argument that the ***Plotkin*** standards required that the Department of Health and Social Services consider alternatives to revocation and stated:[3]

> This does not mean that revocation cannot occur unless alternatives are tried, but it does mean that the Department must exercise its discretion by at least considering whether alternatives are available and feasible.

Van Ermen, 84 Wis.2d at 67, 267 N.W.2d at 21-22. We consider this to be the proper formulation of the State's duty with respect to alternatives to probation revocation.

Although the Department has the burden of proving the alleged probation violation by a preponderance of the evidence at a revocation hearing, on an appeal challenging the decision to revoke, the probationer has the burden of proving the decision was arbitrary and capricious, that is, that the Department did not properly exercise its discretion. *See* ***Von Arx***, 185 Wis.2d at 655, 517 N.W.2d at 544. A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical explanation founded upon a proper legal standard. ***Id***. We may not substitute our judgment for that of the Department; we inquire only whether substantial evidence supports its decision. If it does, we must affirm even though there is evidence that may support a contrary determination. ***Id***. at 656, 517 N.W.2d at 544. Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact-finder could base a conclusion. ***Id.***

[3] Although ***Van Ermen*** was a certiorari review of a parole revocation, it discussed and applied the ***Plotkin*** standards because the Department of Health and Social Services relied on them in ordering parole revocation. ***Van Ermen,*** 84 Wis.2d 57, 65-67, 267 N.W.2d 17, 21-22 (1978).

Ganley argues that the decision to pursue revocation and the decision to revoke were arbitrary and capricious on a number of grounds: the probation violations were the result of alcoholism and mental illness; the condition that he not drink is unreasonable because he cannot control his drinking due to the disease; the probation violations were not crimes; the probation violations did not relate to the crime for which he was convicted; the alternative treatment for mental illness rather than alcoholism was not tried prior to revocation; and treatment for Ganley's mental illness can be more effectively provided by a mental health institution than in prison. Ganley presented the testimony of a clinical psychotherapist, Michael Filippiak, who reviewed Ganley's records, administered tests to Ganley, and interviewed Ganley. Filippiak opined that Ganley needed to be in a mental hospital where he would be confined and would receive treatment for both mental illness and alcohol dependency, and that in prison he is receiving only treatment for alcohol and drug addiction[4] but not for the underlying mental illness.

We conclude that the decision to pursue revocation and to revoke Ganley's probation was not arbitrary and capricious. First, we reject Ganley's arguments that the probation condition that he not drink was unreasonable and that his probation could not be revoked for violating that condition because the drinking resulted from alcoholism and mental illness.

In ***State ex rel. Jacobus v. State***, 208 Wis.2d 39, 559 N.W.2d 900 (1997), the supreme court reversed a decision by this court and held that prosecution for bail jumping because of a violation of a condition of a release

[4] Filippiak testified that he believed that in addition to alcohol dependency, Ganley was also abusing prescription medications.

bond that the defendant consume no alcohol did not violate § 51.45(1), STATS. The statute provides that it is "the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but should rather be afforded a continuum of treatment…." The supreme court concluded that the prohibition against consuming alcohol was a permissible purpose of the release bond and that prosecution for that violation did not violate § 51.45(1). In our decision, although we found prosecution for bail jumping violated § 51.45(1), we also noted that the statute did not prohibit alcohol consumption as a condition of bail, probation or parole, and a revocation of that status for a violation. ***State ex rel. Jacobus v. State***, 198 Wis.2d 783, 790, 544 N.W.2d 234, 236 (Ct. App. 1995). This portion of our decision was not reversed and remains binding precedent. *See* ***Spencer v. Brown County***, ___ Wis.2d ___, 573 N.W.2d 222, 226 (Ct. App. 1997).

Ganley recognizes this portion of our holding in ***Jacobus*** but argues that he is being imprisoned for twelve years for drinking, and that is a disproportionate punishment. The twelve-year term of imprisonment is not for drinking; it is for conviction on two counts of first-degree sexual assault and is not a disproportionate punishment for those convictions. Ganley was fortunate to have that term stayed and to be granted probation, but that does not mean that imposition of the stayed sentence is an unfair punishment if a condition of probation is violated. At sentencing, the court clearly stated that if Ganley consumed alcohol while on probation he would have to serve the prison term.

Ganley also argues that this is an unreasonable condition of probation because he cannot control his drinking. Ganley relies on ***Sweeney v. United States***, 353 F.2d 10, 11 (7th Cir. 1965), which held that if expert testimony established that a defendant's alcoholism had destroyed his power of volition and

prevented his compliance with a probation condition forbidding alcohol, that would be an unreasonable condition because compliance would be impossible. Ganley does not explain why ***Sweeney*** is binding on this court, but, assuming that it is, Ganley does not point to any testimony that establishes that Ganley's alcoholism destroyed his power of volition. Indeed, Dr. Houlihan's statement conveyed to Ross—that Ganley was "manipulating the system" and should feel "the consequences of the legal system"—indicates that Ganley did have the ability to control his drinking. Also, Ganley did not object to this condition when it was imposed at sentencing.

Ganley provides no authority for the position that revocation is reasonable only if the condition violated is a criminal act, either a repeat of the convicted crime or another crime. The correct criteria is whether, considering the original offense and the intervening conduct, confinement is necessary to protect the public from further criminal activity by the offender; or the offender is in need of correctional treatment that can be most effectively provided if he is confined; or it would unduly depreciate the seriousness of the violation if probation were not revoked. ***Plotkin***, 63 Wis.2d at 544-45, 217 N.W.2d at 645.

Ganley violated this condition of probation on at least four separate occasions.[5] The Department's conclusions that revocation was necessary to protect the public from further criminal activity by Ganley, and that correctional treatment could be most effectively provided if he were confined, are reasonable

[5] The hospital admission notes for October 26, 1994, show that he stated he consumed alcohol the day prior to that admission; the July 10, 1995 hospital admission notes show that he stated he consumed alcohol in connection with the incident giving rise to that hospital admission; he appeared at Ross' office intoxicated later in July 1995; and he consumed alcohol while at Pine Crest.

and based on substantial evidence. Ganley does not dispute that the sexual assault involved alcohol use. While the drunk driving charge was a first offense and therefore not a criminal one, that offense showed the potential for serious injury to others due to Ganley's lack of control of his drinking. Based on the ineffectiveness of the options that had already been tried to treat Ganley's mental illness and his alcoholism, the Department could reasonably conclude that, absent confinement, Ganley was going to continue drinking and was not going to control his behavior after drinking.

There is also substantial evidence that the Department met its duty to consider alternatives prior to revocation. Rather than initiating revocation for previous violations, the Department tried two different placements in residential facilities for alcoholism. It also provided Ganley with services while he was in the community. At one point, Ross met with Ganley daily. Ganley saw a psychiatrist regularly, received outpatient counseling and attended AA meetings. The decision that revocation was the only alternative to prevent Ganley from continuously violating the condition that he not drink was a reasonable one. Outpatient treatment was not working, jail was not a legal option, and electronic monitoring could not monitor alcohol consumption.

Although Ganley argues that Ross should have attempted commitment rather than revocation, the record shows that Ross considered commitment—once in July 1995 when Dr. Houlihan's advice was that it not be pursued, and again in August 1996 when they settled on another alternative. Ross' explanation for not considering commitment as an alternative on May 3, 1996, was a reasonable one: based on his experience, release by the psychiatric unit to jail meant that there were no longer grounds for commitment. The medical record from Ganley's discharge shows this assumption was correct.

The fact that there may have been an alternative to prison that would better meet Ganley's mental health needs, as Filippiak testified, does not mean the revocation decision was unreasonable. Ross considered Ganley's needs for mental health treatment and stated that was available in prison. Not every alternative must be tried in order to consider a revocation decision reasonable. *See* ***Van Ermen***, 84 Wis.2d at 67, 267 N.W.2d at 622. Moreover, if there is substantial evidence to support the agency's decision as reasonable, we affirm it even if some of the evidence might support a different decision. ***Von Arx***, 185 Wis.2d at 656, 517 N.W.2d at 544. We therefore conclude that substantial evidence supported the Department's decision and that the Department properly exercised its discretion in deciding to revoke Ganley's probation.

VIOLATION OF DUE PROCESS—COUNSEL AND COMPETENCY

Ganley asserts that his right to due process was violated because he did not have legal counsel when he waived his right to a revocation hearing and he was incompetent at the time. Because this claim depends in part on facts not contained in the Department's record of the probation revocation, it was appropriate for the court to take testimony on this. On this claim, the court was not reviewing a decision by the Department, but was sitting as a decisionmaker itself, finding facts and coming to legal conclusions on whether Ganley's right to due process was violated. Insofar as the trial court was sitting as a fact-finder, we will not reverse any findings of historical fact unless they are clearly erroneous. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). However, whether the historical facts as found by the trial court meet the constitutional standard presents a question of law, which we review de novo. *See* ***Johnson***, 153 Wis.2d at 128, 449 N.W.2d at 848.

Attorney James B. Halferty testified that Ganley called him and asked him to come to the jail because he was facing a probation revocation. He did not recall the date, but he knew it was in early May, after Ganley's suicide attempt. Halferty told Ganley that he would not represent him, that he did not feel competent to do so because it was not his field. He talked to Ganley for about fifteen or twenty minutes. He gave Ganley no advice on the probation revocation. Halferty talked to Ganley's probation officer once or twice about revocation but did not think he ever represented Ganley; he had no record of charging Ganley a fee or consulting with him. Ganley did not appear to have trouble understanding him and he, Halferty, did not have trouble understanding Ganley. Halferty represented Ganley in some civil matters and knew him well. Halferty did some criminal defense work over the years and was a district attorney for thirteen years. He was aware that the issue of competency can come up; however, he did not think the issue of Ganley's competency specifically crossed his mind during the interview. Halferty was aware that Ganley was depressed and nervous; Ganley's face was twitching and he was in tears several times during the interview, and that concerned Halferty. Halferty, however, did not feel competent to weigh the impact of depression on Ganley's condition. Ganley did know who he was, what day it was, who Halferty was, and could discuss the situation.

Ross testified that on May 1, when he took the statement from Ganley admitting the probation violations, he knew that Ganley attempted suicide the day before and that he was being released from the hospital to a psychiatric unit. When he gave Ganley the notice of violation that day, he discussed the process of the revocation proceedings with Ganley. Ganley signed the notice, indicating that he was given the "Outline of Revocation Procedures," and Ross gave this to him at the time. Ganley received that outline previously, in 1995,

when Ross initiated revocation proceedings but did not continue them because Ross tried an alternative to revocation. The Outline of Revocation Procedures explains the right to a preliminary and final hearing, the right to have counsel, to present evidence, cross-examine witnesses, and other rights. It also states that if the hearing is waived, the original sentence imposed must be served.

When Ganley signed the document waiving his right to a hearing on May 3, Ross had not read the discharge summary from the psychiatric unit, but he knew that Ganley had been released from the unit because he no longer required commitment. The hospital also informed him that Ganley was to be placed in a secure setting, with no razor blades available. He knew Ganley was a suicide risk. Ross knew Ganley was on medication because Ganley took medications continuously while he was on probation, but he did not know the exact medication. Ross believed that Ganley signed the waiver knowingly, voluntarily and willingly. Ganley did not appear to have any trouble understanding him. Ganley questioned Ross about whether he would be able to win a final revocation hearing and Ross told him he had no comment and that it was inappropriate for him to comment. They discussed the consequences of a waiver, that it would mean serving the prison term, and what Ganley's mandatory release date would be. Ganley may have been crying and trembling when they met on May 2 and 3.

Ross had the impression that Ganley had legal counsel when he decided to waive the hearing. Prior to taking the waiver, Halferty called Ross and told him that Ganley was ready to sign the waiver form and that he should go see Ganley. Ross had a lengthy discussion with Halferty about Ganley's history and previous attempts to curtail alcohol consumption. Ross had taken waivers of revocation hearings before, and when he had a question about a person's mental condition, he contacted that person's attorney to discuss that issue. He spoke to

Ganley within a few days of previous suicide attempts and was able to carry on normal conversations with Ganley at those times.

Ganley's medical records show that on May 1, 1996, he was prescribed Klonopin, with the common side effects of clumsiness, unsteadiness; Ambien, with the common side effects of drowsiness; and Effexor, with the common side effects of anxiety and nervousness. The same documents also state that many users experience little or no side effects from these drugs. The discharge records from May 2 show that the recommendation was that Ganley be transported back to the jail, strip searched and placed in a secure cell in a closed facility that would prevent him from harming himself. There is no mention of further hospitalization. The physician's notes state that there is no evidence of abnormal thought process or cognitive dysfunction or psychosis.

Ganley testified that he did call an attorney on May 1 or 2 but it was about his wife, not about potential revocation, because he did not know then that the State was going to revoke his parole. He believed he saw Halferty twice. Ganley recalled Halferty telling him that he was unable to advise him on the probation revocation because he was not that kind of attorney, but that is the only discussion on probation revocation with Halferty that he could remember. He did not recall particulars of his discussion with Ross about probation revocation. He recalled signing the waiver on May 3, but he did not recall "what all was involved." The medication he was prescribed at the hospital on May 1 was not new. He was taking the same medication on May 3 as that which he was taking on April 30 when he drove to and from Dubuque. The medication he was taking on April 30, before he was arrested, did not prevent him from driving alone to Dubuque or doing anything in Dubuque. However, Ganley did not remember that

he was also prescribed Demerol and Darvocet at the hospital on April 30, and Darvocet on May 2.

Filippiak opined that Ganley was mentally incompetent when he signed the waiver on May 3. Based on Ganley's record, Filippiak stated that Ganley had been suffering from mental illness since at least 1992, and the use of alcohol and the suicide attempt on April 30 represented an expression of frustration, terror and panic for Ganley. Filippiak would not expect the effects of that to have subsided by May 3. In his opinion, someone asking Ganley to make a significant decision on that date should have contacted his mental health providers.

In its decision, the court noted the conflicting testimony on the nature of Halferty's discussions with Ganley, and that Halferty was not called to rebut Ross' testimony about his telephone conversation with Halferty. The court found that Ganley knew he had the right to counsel because he had been informed of that right. The court found that the more credible evidence was that although Halferty did not charge Ganley for legal advice, he gave Ganley legal advice and notified the Department that Ganley had decided to waive the right to a hearing. The court found Ganley did have counsel and there was therefore no violation of due process in that regard.

Concerning the waiver, the court found that Ganley was mentally competent to sign the waiver. The court stated that Filippiak's opinion that Ganley was incompetent on May 3 was based largely on his diagnosis of Ganley's mental illness. The court found that Ganley did have the diagnosis Filippiak testified to but that did not answer the question of his competency on May 3. The court did not see the medications Ganley was taking as negatively affecting his competency, because there was no evidence of the side effects Ganley was

experiencing. The court took note of the crying and trembling as possible side effects, but also found that Halferty did not notice any type of thought disorder.

The court then considered whether Ross should have contacted the psychiatric unit before Ganley signed the waiver. The court stated that that would probably have been the better procedure; however, the court also stated that Ross was acting on his twenty years' experience as a probation officer. The court found that the discharge records showed Ganley was not having a formal thought disorder. It also found that Ganley's call to Halferty, his questions of Ross, and his concern (as reflected in the medical record) that he was going to prison, all show a normal thought process. The court found the doctor's assessments of Ganley at the time he was discharged on May 2 to be more credible than Filippiak's assessment, because Filippiak first saw Ganley the week of the evidentiary hearing. The court found no evidence that Ross influenced or pressured Ganley.

The court also found the signing of the waiver was voluntary, pointing to the evidence that it relied on for the finding of mental competency and also finding that the most credible sequence of events was that Ganley decided to waive the hearing, conveyed this to Halferty, who contacted Ross, and Ross then went to see Ganley.

Ganley argues that the explanatory note to WIS. ADM. CODE § DOC 331.06, which sets forth the procedure for taking revocation hearing waivers "encourage[s the department] to ask a client to have the assistance of legal counsel

before accepting such waivers."[6] Ganley contends that Ross did not do this, and therefore failed to follow the Department's own rules. However, the trial court found that Ganley had counsel, and credited Ross' testimony that Ross believed Ganley had counsel. These findings are supported by the evidence and are not clearly erroneous. We therefore will not set them aside. The assessment of the credibility of the witnesses, the weight to be given evidence, and the reasonable inference from the evidence are for the finder-of-fact to decide—in this case, the trial court—not this court. *See* ***Milbauer v. Transport Employes' Mut. Benefit Soc'y***, 56 Wis.2d 860, 865, 203 N.W.2d 135, 138 (1973).

For the same reason, we reject Ganley's challenge to the trial court's finding that Ganley was competent when he signed the waiver.[7] The trial court's finding is supported by the evidence and is not clearly erroneous. The trial court could properly weigh Filippiak's opinion against the opinion of the discharging doctor and give more weight to the latter. Given Ganley's inconsistent testimony and his ability to recall some points but not others, the trial court could credit the descriptions of others concerning Ganley's interactions with them rather than Ganley's brief and vague testimony that he did "not recall all that was involved."

MODIFICATION OF SENTENCE—NEW FACTORS

---

[6] The other authority Ganley cites for the proposition that he was entitled to counsel relates to a probation revocation hearing, not to a waiver of a hearing. However, even if we were to read Ganley's brief as arguing that Ganley's right to due process involved the right to counsel for the waiver, we need not address that argument because, as we explain above, there are no grounds on which to reverse the trial court's finding that Ganley had counsel to advise him on the waiver.

[7] In his reply brief, Ganley contends that the trial court found that the waiver was voluntary but did not find Ganley was competent when he signed it. Ganley is mistaken. The trial court expressly considered whether Ganley was "mentally capable" of signing the waiver, reviewed the pertinent evidence, and found that he was mentally capable before going on to find that the waiver was voluntary.

Ganley argues that the trial court erred in determining that there were no new factors justifying a modification of sentencing. Ganley contends that his payment to the victim of $75,000, which occurred in late April 1996, and new information about the extent of Ganley's mental illness and alcoholism, are new factors that require a modification of the sentence.

A trial court may, in its discretion, modify a defendant's sentence when a new factor is presented. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). Whether a fact or set of facts constitutes a new factor is a question of law we review de novo. ***Id.*** A new factor 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 the 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 the parties." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor "must be an event or development which frustrates the purpose of the original sentence. There 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, 280 (Ct. App. 1989).

The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. ***Michels***, 150 Wis.2d at 97, 441 N.W.2d at 279. Once the trial court determines a new factor exists, its decision to modify a sentence rests with its sound discretion. ***Id.*** We recognize the strong public policy against interfering with a trial court's sentencing decision. ***Rosado***, 70 Wis.2d at 289, 234 N.W.2d at 73.

We conclude that the trial court correctly determined that neither the payment to the victim nor information about the extent of Ganley's mental illness were new factors. We are therefore not presented with the question whether the trial court properly exercised its discretion in not modifying the sentence in light of those factors.

The trial court determined that payment to the victim was not a new factor because it was not a fact the court should have known about at the time of sentencing, since it had not yet occurred. After being convicted and sentenced, Ganley was sued in a civil action by the victim, and paid $75,000 in settlement of that suit. The court observed that had money been paid before sentencing, the court could have considered it as a sign of remorse or taking responsibility; but, since it occurred after sentencing, in response to a lawsuit, it simply demonstrated good economic sense for Ganley—saving the stress of trial and attorney fees. The court pointed out that Ganley had continuously maintained he did not commit the acts he was convicted of and had not shown remorse.

In addition to the court's reasoning, we add that at sentencing the court expressly stated that one of its goals in sentencing was to have Ganley pay for counseling for the victim and her family, and as a condition of Ganley's probation, the court ordered that he pay up to $2,000 per year for future counseling, as well as expenses already incurred. Thus, when the court imposed a sentence of twelve years' imprisonment, stayed that, and imposed probation with various conditions, the court contemplated that Ganley would make restitution to the victim. The fact that Ganley did so, after being sued, does not frustrate the purpose of the original sentence.

The trial court also determined that Ganley's need for alcoholism treatment had been taken into account when he sentenced Ganley. The court stated that it was aware at sentencing that Ganley had problems with alcohol and that alcohol had been a factor in one of the assaults. One reason the court placed him on probation, the court explained, was that it agreed with the report of Dr. Paul that it would be better to treat Ganley outside of prison. The court determined that Ganley's condition had been properly diagnosed at the time of sentencing, but that stresses since then—marital problems, having to sell his business, the civil suit—had caused his problems with alcohol to escalate.

Our review of the record of the sentencing hearing shows that the court considered the report of Dr. Paul, who diagnosed Ganley as having a personality disorder, as well as a problem with alcohol, for which he needed treatment. The court expressly recognized that Ganley needed psychiatric counseling, as well as treatment for his alcohol use. The fact that Ganley's psychiatric problems may have worsened after sentencing, leading to greater abuse of alcohol, does not show that the court's original purpose in sentencing was frustrated and is not a new factor for purposes of sentencing modification.

In summary, we conclude that the court correctly determined that the decision to revoke probation was not arbitrary and capricious; there were no violations of Ganley's right to due process; and there are no new factors for purposes of sentencing modification.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.