COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1357-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY N. HENKEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed.*

DYKMAN, P.J.[1] Larry N. Henkel appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI), fifth offense, contrary to § 346.63(1)(a), STATS., and an order denying his postconviction motion for sentence modification. Henkel argues that the trial

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

court erred when it failed to find that a subsequent OMVWI conviction was a new factor that justified the modification of his sentence. We conclude that the trial court properly exercised its discretion in refusing to modify Henkel's sentence. Accordingly, we affirm.

BACKGROUND

On April 15, 1995, Henkel was arrested in Columbia County for OMVWI. He was charged with OMVWI, fifth offense, and pleaded no contest on February 8, 1996. The trial court entered a judgment of conviction against Henkel, sentenced him to twelve months in jail, fined him $2780.00, forfeited his vehicle, and revoked his license for thirty-three months.

On March 5, 1996, Henkel pleaded no contest to OMVWI, sixth offense, in Dodge County. That court sentenced Henkel to twelve months in jail, fined him $2780.00, and revoked his license for thirty-six months. While this offense is considered Henkel's sixth, it was really the result of an act that occurred on October 16, 1994, prior to the offense resulting in the February 8, 1996 Columbia County conviction.

On August 12, 1996, Henkel filed a notice of intent to pursue postconviction relief with the Columbia County court. On February 10, 1997, he filed a motion to modify his sentence, arguing that the Dodge County conviction was a new factor that justified sentence modification. The Columbia County court denied the motion. Henkel appeals

DISCUSSION

A trial court may, in its discretion, modify its own judgment, so long as that modification is based on a new factor. ***State v. Michels***, 150 Wis.2d 94, 96,

441 N.W.2d 278, 279 (Ct. App. 1989). 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 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." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Whether a fact or set of facts amounts to a new factor is a question of law that we review *de novo*. ***State v. Ralph***, 156 Wis.2d 433, 436, 456 N.W.2d 657, 659 (Ct. App. 1990).

Henkel argues that the circuit court erred in finding that his Dodge County OMVWI conviction was not a new factor that justified modification of his Columbia County sentence. He argues that we should, without deference to the findings of the trial court, conclude that his Dodge County conviction was a new factor. We need not do this, however, because the trial court found that the Dodge County conviction was a new factor.

At the postconviction motion hearing, Henkel argued that the Columbia County court should modify his sentence in light of the subsequent Dodge County OMVWI conviction and sentence. At the motion hearing, the Columbia County court enunciated its reasons for imposing the original sentence: the serious nature of OMVWI, fifth offense, the fact that Henkel is a problem drinker who insists on driving when he is impaired, and the need to protect the community. This action signifies that the court did find that the Dodge County conviction was a new factor. If there was no new factor to consider, the court would not have stated its reasons for imposing the sentence that it did. With knowledge of the Dodge County conviction, the trial court stated that there was no need to modify the sentence.

Whether a new factor justifies the modification of a sentence is a matter of trial court discretion. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). We conclude that the trial court did not erroneously exercise its discretion in failing to modify Henkel's sentence.

In ***State v. Paske***, 163 Wis.2d 52, 471 N.W.2d 55 (1991), the Wisconsin Supreme Court reviewed a trial court's decision to not modify a sentence in light of a new factor. At the modification hearing, the trial court that sentenced Paske, fully aware of the new factor, stated:

> I am also satisfied that in view of the information provided to the Court with respect to parole eligibility dates, I think we recognize that it was the intent of the Court to provide, first of all, a sentence that would be proportionate to the [offenses], the severity of the offenses, and the harm that Mr. Paske and his associates inflicted upon the community and given due regard for his participation in each of the offenses, but I did also recognize during the sentence process what I believed to be the role of the Parole Board in those matters.

Id. at 64-65, 471 N.W.2d at 60. Because the trial court took into account the new factor and addressed specific reasons for not modifying the sentence, the supreme court found that the trial court did not erroneously exercise its discretion in finding that the new factor did not justify modification of the sentence. ***Id.*** at 65, 471 N.W.2d at 60.

Similarly, the Columbia County court took into account Henkel's Dodge County conviction and yet refused to modify the sentence because of the serious nature of the crime, the defendant's character, and the need to protect society. We conclude that the trial court did not erroneously exercise its discretion when it refused to modify Henkel's sentence based on the new factor. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

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