COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1615-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN KARL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and DOMINIC S. AMATO, Judges.[1]

Affirmed.

[1] The Honorable Timothy G. Dugan entered the judgments of conviction and sentenced Karl. The Honorable Dominic S. Amato denied Karl's postconviction motion to modify his sentence.

CURLEY, J.[2] John Karl appeals from the judgments of conviction entered after he pleaded no contest and guilty, respectively, to a third and fourth offense of operating while intoxicated, contrary to § 346.63(1), STATS. He also appeals from an order denying his postconviction motion to modify his sentence based upon his successful post-sentence rehabilitation. Karl claims that the trial court erred in failing to find his participation in alcoholic treatment to be a new factor and that the trial court erroneously exercised its discretion when it refused to change the original sentence. Because rehabilitation, including a period of sobriety following sentencing, does not constitute a "new factor," this court affirms.

I. BACKGROUND.

Karl pleaded no contest to the charge of operating while intoxicated, third offense, on April 24, 1996. The trial court convicted Karl and postponed sentencing. On May 11, 1996, Karl was charged with operating while intoxicated, fourth offense. He pleaded guilty to that charge on July 30, 1996, and the trial court sentenced him to the House of Correction for twelve months on both charges, to be served consecutively.

Karl filed a postconviction motion to modify his sentence and, on May 12, 1997, the trial court held a hearing on the motion. Karl urged the court to modify his sentence to both reduce the amount of time he would have to serve and to give him Huber privileges based on the fact that he had now addressed his alcohol problem and was in treatment. At sentencing, Karl had done nothing to abate his alcohol abuse. Karl presented evidence at the motion hearing that he

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

now had twelve months of sobriety, weekly negative urine tests, attended six Alcoholics Anonymous meetings a week, was in counseling, and was taking antabuse. Karl contended that his rehabilitation was a "new factor" that the trial court could consider. The trial court refused to modify the sentence,[3] and Karl now appeals.

Standard of Review

A trial court cannot modify a sentence based solely upon "reconsideration and reflection and a deliberate change of mind." A sentence modification must be based upon new factors. *See* ***State v. Kaster***, 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989). Whether a set of facts is a new factor is a question of law which this court reviews *de novo*. ***State v. Kluck***, 210 Wis.2d 1, 6, 563 N.W.2d 468, 470 (1997).

Analysis

While awaiting sentencing on a third offense of operating while intoxicated, Karl was arrested on a fourth offense of operating while intoxicated. He subsequently pleaded guilty to the new charge and was sentenced on both charges on the same day. At sentencing, the trial court was apprised that Karl was not in substance abuse treatment and had not seriously addressed his alcohol problem. He was, however, under the care of a psychiatrist and a therapist for depression and a stuttering problem. Given this troubling combination of facts,

[3] As noted previously, although the Honorable Timothy G. Dugan entered the judgments of conviction and sentenced Karl, the Honorable Dominic S. Amato presided over the postconviction motion hearing as a result of judicial rotation. Judge Amato gave Karl an opportunity to seek a modification from Judge Dugan, but Judge Dugan declined to hear the matter, reasoning that the case was no longer assigned to him. These facts do not affect the analysis of the issue presented by this case.

the trial court, in addressing the appropriate sentencing factors, correctly noted that: "This court has chose [sic] to describe anyone who voluntarily gets behind the wheel of a car in a state of intoxication as being a silent bullet. In other words, you're death waiting for everyone else who is out on the highway."

As a result of the trial court's concerns about Karl's apparent lack of understanding of the serious nature of his offenses, the trial court's sentences exceeded those requested by the district attorney. The trial court also refused to allow Karl to serve any of his sentence under the Huber law. The trial court did, however, comment that "the court will at this point not grant a Huber privilege, but under current case law, rehabilitation is a factor that the court can consider and after a period of one year, I would entertain a request for a Huber privilege if there is an outstanding record while at the House of Corrections, that the defendant has participated in treatment programs at least at the House of Corrections." Relying on the sentencing trial court's statements, Karl argues that his rehabilitation qualifies as a "new factor" and that the successor trial court erred when it refused to find that his post-sentencing conduct was a new factor. Further, he claims that the trial court erroneously exercised its discretion by not modifying his sentence.

A new factor was defined in ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975), as "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." On March 12, 1996, the court of appeals released ***State v. Kluck***, 200 Wis.2d 837, 548 N.W.2d 97 (Ct. App. 1996), in which the definition of "new factor" was expanded to include a defendant's rehabilitation following sentencing. *See* ***id***. Thus, on July 30, 1996, the date of sentencing, the trial court accurately stated that

"rehabilitation is a factor the court can consider." On June 6, 1997, however, the supreme court reversed ***Kluck***, holding that a petitioner's four-month period of sobriety while out on bail pending appeal of his misdemeanor conviction was not a "new factor" authorizing circuit courts to modify county jail sentences. ***Kluck***, 210 Wis.2d at 3, 563 N.W.2d at 469.

Karl concedes the supreme court's holding in ***Kluck***, but attempts to distinguish the facts of this case by claiming that his successful alcohol treatment is a new factor because "the public is no longer at risk from an untreated drunk driver." Although the strides which Karl has taken to control his alcohol abuse are admirable, he has done nothing more than repackage the argument presented and rejected in ***Kluck***. There, the supreme court reviewed the historical prohibition of modifying prison sentences based upon an offender's rehabilitation and noted that the rehabilitation of an offender is more properly considered by the parole system. *See, e.g.,* ***Jones (Hollis) v. State***, 70 Wis.2d 62, 72, 233 N.W.2d 441, 447 (1975) (defendant's progress in the rehabilitation system more properly considered by DHSS), and ***State v. Wuensch***, 69 Wis.2d 467, 478, 230 N.W.2d 665, 671 (1975) (favorable consideration of defendant's rehabilitation lies solely within the province of DHSS).

In addressing the fact that a misdemeanant would not be within the purview of the parole system, the supreme court stated: "The purpose of sentence modification is to correct 'unjust sentences.' This court has flatly rejected the practice of using sentence modification as a method to encourage rehabilitation." ***Kluck***, 210 Wis.2d at 8-9, 563 N.W.2d at 471 (internal citation omitted). Thus, the trial court correctly refused to find that Karl's treatment for alcoholism was a new factor entitling him to a change in his sentence. The trial court had no basis

for entertaining a modification of the sentence; therefore, the trial court properly exercised its discretion in denying Karl's request for a sentence modification.

By the Court.—Judgments and order affirmed.

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