COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2142-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. MUETZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

EICH, C.J.[1] Michael Muetz appeals from an order denying his motion for sentence modification.

Muetz was convicted by a jury of driving while intoxicated (sixth offense) and operating after revocation (fifth offense) on September 10, 1996. The

[1] This case is decided by a single judge pursuant to § 752.31(2)(f), STATS.

parties agreed that the trial court could proceed with sentencing immediately following the verdict. Pointing to Muetz's lengthy record—which included nine drunk-driving convictions in the past thirteen years, as well as a variety of other drug- and alcohol-related offenses— the State argued that he was "someone who's clearly out of control," and that the maximum period of incarceration was necessary to protect the public from similar conduct and also as a deterrent to Muetz himself. Muetz's counsel does not appear to have contested the length of the sentence but advised the court very generally that Muetz preferred "to serve his time in the Wisconsin Prison System" because he felt that "help for [his alcohol] problem … would be more readily available to him in the prison system," than in a county jail. The prosecutor pointed out that Muetz had been sentenced to prison in the past and continued in his illegal conduct.

The trial court noted that, in addition to the nine drunk-driving convictions, Muetz had been convicted of at least fourteen other drug- or alcohol-related offenses since 1983 and had continued in his destructive course of conduct despite "many, many, many, many, many opportunities to try to do something about [his] problem." On the basis of that record, the court said, "protecting the public from him is the primary goal of sentencing at this stage." The court continued:

> I don't know on what Mr. Muetz bases his belief that treatment would be more available in prison. I would not be very optimistic at all that treatment over and above AA would be available to him, which is also available in the [county] jail system, and, secondly, I'd be very concerned that he would be paroled in no time. I don't think the prison system is likely to take a drunk driver very seriously, so I'm going to decline the request to sentence him to the prison system.

Accordingly, the court sentenced Muetz to two years in the Dane County Jail.

After sentencing, Muetz moved to modify his sentence—presumably to have it ordered served in the state prison system—based on "new factors," specifically, a "discuss[ion]" of his "neuropsychological history" in a letter of January 16, 1997, from psychologist William A. Merrick. Muetz argued to the court that this neuropsychological history constituted a factor not in existence, and thus not considered by the court, at the time of sentencing.[2]

The trial court denied Muetz's motion, noting (among other things) that Muetz had made "no showing whatsoever that his needs would be met in the state prison system. He doesn't even allege that he has reason to so believe." On appeal, Muetz argues that the trial court improperly denied his motion. We disagree.

A "new factor" warranting resentencing 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). The 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). Stated another way, "There must ... be a nexus between the new factor and the sentence, *i.e.,* the new factor must operate to

[2] Merrick's letter discussed a battery of psychological tests administered to Muetz while he was incarcerated for another offense and recommended that he "undergo a comprehensive evaluation by a psychiatry team," that he maintain sobriety and receive treatment for his substance abuse, and that he receive "on-going psychotherapy."

frustrate the sentencing court's original intent when imposing sentence." ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994) (citing ***Michels***, 150 Wis.2d at 99, 441 N.W.2d at 280).

The State concedes that the Merrick letter sets forth information not necessarily known to the trial court at the time of the sentencing. It argues, however, that that information was not "highly relevant" to the sentence. We agree with the State and the trial court that Muetz's motion contains no supported assertions—or even any allegations—that, whatever his needs, they would be better met in the state prison system. As indicated above, the trial court considered Muetz's similarly unsupported assertion at the sentencing that placement in the prison system would better meet his needs.

And while the court briefly stated its disagreement with that assertion, it went on to state, as we noted above, that the "primary goal" of the sentence imposed was to protect the public from Muetz's dangerous and aberrant behavior. The court also noted its fear that Muetz, if sentenced to prison, might be quickly paroled and back on the streets (and highways) of the state. As the State correctly observes in its brief, the obvious and plainly stated purpose of the court's sentence "was to incarcerate Mr. Muetz so that he could not drive drunk again for a long time." And we agree with the State's conclusion that the information in

Merrick's letter did not frustrate that purpose. The trial court properly denied the motion.[3]

By the Court.–Order affirmed.

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

[3] While Muetz briefly suggests that it was somehow improper for the court to deny his motion without scheduling an evidentiary hearing, he makes no separate argument on the point, directing his brief instead to the merits of the trial court's decision. We do not see his reference to the absence of a hearing as a cognizable argument that that in itself was error. *See* ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988) (court of appeals does not consider arguments that are unexplained, undeveloped, or unsupported by citations to authority or references to the record).