

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 97-3650-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. BARNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Robert J. Barnes has appealed from a judgment which convicted him upon a guilty plea of first-degree sexual assault of a child and sentenced him to twenty years in prison. He has also appealed from an order denying his motion for sentence modification. We affirm the judgment and the order.

Barnes sought modification of his sentence based upon an alleged new factor. He relied upon a reassessment of his risk of reoffending made by Joseph Henger, a counselor specializing in sex offender treatment and evaluation. The presentence report set forth Henger's initial conclusion that Barnes' risk of reoffending was high. Based upon a postsentencing evaluation, Henger reduced his assessment of the risk posed by Barnes to moderate.

Motions for sentence modification involve a two-step process. *See State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). First, the defendant must demonstrate the existence of a new factor. *See id.* If he or she does so, then the trial court must determine whether the new factor justifies modification of the sentence. *See id.*

A defendant must establish the existence of a new factor by clear and convincing evidence. *See State v. Michels*, 150 Wis.2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). The issue of whether a set of facts constitutes a "new factor" for sentencing purposes presents a question of law which we review without deference to the trial court. *See 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 sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *See id.* at 96, 441 N.W.2d at 279. In addition, it must be an event or development which frustrates the purpose of the original sentence. *See id.* at 99, 441 N.W.2d at 280. There must be some connection between the factor and the sentencing which strikes at the very purpose of the sentence selected by the trial court. *See id.*

The trial court denied Barnes' motion for sentence modification on the grounds that the facts set forth in his motion did not constitute a new factor. Barnes contends that a new factor was presented, and that the matter must be remanded to the trial court to determine whether his sentence should be modified based upon that new factor.

Initially, the parties dispute the propriety of the trial court's determination that Henger's reassessment was not a new factor because it was based upon Barnes' greater cooperation at the postsentencing evaluation. In his initial assessment, Henger stated that Barnes had been very guarded in discussing his offenses in a preconviction treatment group and was at high risk of reoffending because he had not immersed himself in treatment. In reducing his risk assessment to a moderate risk, Henger stated that he believed Barnes had been afraid to open up and discuss his offenses before sentencing for fear of getting into more trouble, and that his communication style made him appear deceptive. This was in accord with a statement made by counsel at the postconviction hearing indicating that Barnes, who has limited intelligence, believed his trial counsel had advised him not to participate or admit anything in the preconviction treatment program.

Based upon the record in this case, we do not dispute that Barnes' failure to more fully cooperate and accept responsibility during preconviction treatment may have been due to his borderline intelligence. We therefore reject the State's argument that his failure to immerse himself more fully in the initial treatment prevents his postsentencing evaluation from being considered a new factor. Nevertheless, we affirm the trial court's denial of sentence modification because we agree that the change in Henger's assessment was not a development

which frustrated the purpose of the original sentence or struck at the very purpose for that sentence.

The trial court acknowledged at the postconviction hearing that its concern at sentencing was the high risk posed to the community by Barnes, and that its view of that risk “in part was supported by Mr. Henger.” However, the trial court further stated that its reasoning in imposing the sentence was not based solely on Henger’s assessment. It stated that its conclusions concerning the risk posed by Barnes were also based on the nature of the conduct, the fact that there was more than one incident, and the fact that Barnes also had a prior felony theft conviction. The court stated that these factors all entered into its perception of the risk created if Barnes remained in the community.

The trial court’s description of its reasoning and the factors considered by it is clearly supported by the transcript of the sentencing hearing. At that hearing, Barnes was being sentenced for two counts of first-degree sexual assault, involving two different victims.¹ In sentencing Barnes, the trial court emphasized the seriousness of the offenses and the effect they had on the victims and the people around them. It considered the seriousness of the offenses as reflected in the penalties established by the legislature. It considered the brief period of incarceration recommended in the presentence report and concluded that such a sentence would fail to fulfill both the court’s obligation to protect the public and Barnes’ rehabilitative needs. It concluded that confinement was necessary to protect the public from future criminal activity, and that the period of confinement had to be sufficient to ensure that there was accountability and that Barnes had

¹ Barnes has not appealed the conviction or sentence in the second case. In that case he was placed on a term of probation consecutive to the twenty-year sentence in this case.

counseling which was thoroughly conducted. It further concluded that concepts of right and wrong transcended Barnes' intellectual and social limitations, and that those limitations could not be used to excuse his offenses.

While the trial court was plainly considering the risk posed by Barnes to the public in sentencing him, it never even referred to Henger's evaluation in its sentencing decision. Rather, its conclusions concerning the risk posed by Barnes and the concomitant need to protect the public from him were based on the nature, number and impact of these offenses. It also assessed the impact of any future offenses by Barnes, essentially concluding that the consequences of these types of crimes were so serious as to necessitate lengthy incarceration to protect the public. Based upon its reasoning, Henger's reduction of his assessment from high to moderate was not an event or development which frustrated the purpose of the original sentence or struck at the very purpose for the sentence selected by the trial court. Consequently, it was not a new factor warranting sentence modification. *See Franklin*, 148 Wis.2d at 13-14, 434 N.W.2d at 613.

In affirming the trial court's decision, we also express our concern that defendants like Barnes are simply being warehoused in state prisons without meaningful opportunities and prospects for rehabilitation, to the detriment of both the defendants and our society. It appears undisputed from the sentencing record that Barnes is a person of limited intellectual ability and impaired social development who could benefit from intensive and secure rehabilitative treatment. Such treatment could in turn reduce the risk he presents to society in the future. If the state incarcerates persons who have rehabilitative needs, then the state should provide treatment and services to address those needs.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

