COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2894-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

J.T. JONES-JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. J.T. Jones-Johnson appeals from a judgment of conviction of substantial battery and from an order denying his motion for sentence modification. We reject Jones-Johnson's contention that the trial court erroneously exercised its discretion when it imposed the original two-year sentence after Jones-Johnson rejected probation and that the victim's

postconviction testimony that she did not want Jones-Johnson to go to prison was a new factor justifying sentence modification. We affirm the judgment and the order.

After entry of a no contest plea, Jones-Johnson was convicted of substantial battery for beating and threatening a female victim. The trial court imposed but stayed a two-year prison term. It ordered Jones-Johnson to serve three years of probation with the following conditions: twelve months of jail confinement, alcohol and drug counseling and treatment, and the payment of $4595 restitution. Upon hearing the sentence and the conditions of probation, Jones-Johnson indicated that he refused probation. *See* ***State v. Migliorino***, 150 Wis.2d 513, 541, 442 N.W.2d 36, 48 (1989); ***Garski v. State***, 75 Wis.2d 62, 77, 248 N.W.2d 425, 433 (1977). The trial court responded that the two-year prison sentence would take effect.

Jones-Johnson does not argue that as originally imposed the sentence was the result of an erroneous exercise of discretion. Rather, he claims that after he refused probation, the imposition of the maximum two-year prison term was an erroneous exercise of discretion. He argues that the trial court proceeded on the erroneous belief that it had no alternative but to impose the maximum. He suggests that the trial court failed to individualize the sentence after probation was refused.

There is no requirement that once probation is refused the trial court must start the sentencing proceeding anew. The court had already determined that a two-year prison term was the appropriate sentence. It was an appropriate exercise of discretion. It was Jones-Johnson's own choice that caused the two-year sentence to take effect by refusing probation. Although the trial court

remarked at the very end of the sentencing proceeding that "we have no alternative" but to impose the two-year sentence, it was merely stating the result of Jones-Johnson's refusal of probation. The trial court indicated that as a result of Jones-Johnson's refusal of probation, "we will rescind probation." It treated the matter as if probation had been revoked and the imposed sentence was to take effect. The result would have been the same had Jones-Johnson refused probation because the conditions imposed by his agent were too onerous. *See* ***Garski***, 75 Wis.2d at 77, 248 N.W.2d at 433.

Jones-Johnson is using his refusal of probation as a means to trigger reconsideration of the sentence already imposed. The trial court heard Jones-Johnson's request that a sentence be imposed and stayed in favor of probation so that if he was revoked he would know that incarceration would result. Jones-Johnson was unhappy with the actual sentence so he refused probation. He was not entitled to be sentenced anew.

Jones-Johnson argues that because the victim did not testify at sentencing, her postconviction testimony is a new factor. "A 'new factor' is 'a fact or set of facts highly relevant to the imposition of sentence, but not known to the circuit judge at the time of original sentencing, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" ***State v. Lechner***, 217 Wis.2d 392, 423-24, 576 N.W.2d 912, 927 (1998) (quoted source omitted). The new factor must be a development that frustrates the purpose of the original sentence. *See* ***State v. Johnson***, 158 Wis.2d 458, 466, 463 N.W.2d 352, 356 (Ct. App. 1990). Whether a new factor exists is a question of law determined de novo. *See* ***Lechner***, 217 Wis.2d at 424, 576 N.W.2d at 927. The trial court's determination of whether the new factor justifies sentence modification is overturned only when the court erroneously exercised its discretion. *See* ***id.***

Information about the victim's thoughts on sentencing was presented to the trial court in the presentence report. The presentence report contained information relevant to the victim's version of the offense and the impact of the crime on her. The victim was interviewed by phone a little more than three months after the offense and just two weeks before the original sentencing date. She expressed anger toward Jones-Johnson, fear, emotional and physical pain, and a sense that her security has been violated. The victim wanted Jones-Johnson to get help for his alcohol problem and felt that a prison sentence was not appropriate.

The victim's testimony at the postconviction hearing did not present anything new. She acknowledged being angry at Jones-Johnson. She expressed her belief that the offense was totally alcohol-related and that sending Jones-Johnson to prison was not going to be helpful. This was consistent with the information in the presentence report. Although the victim indicated that she did not have notice of Jones-Johnson's rescheduled sentencing hearing, she never indicated that she would have appeared or said anything different than what was reported in the presentence report.

The only new information presented at the postconviction hearing was that the victim had maintained a relationship with Jones-Johnson after his sentencing and that she was willing to go to counseling with Jones-Johnson. The victim also expressed her ability, through her occupation as the director of a social service agency, to offer Jones-Johnson two months of housing and help in finding employment if he was released on probation. She believed he could make it with the necessary support, monitoring and counseling. This reflects nothing more than a softening of heart because of the continued relationship between the two. This

does not constitute a new factor that frustrates the original sentence. *See* ***Johnson***, 158 Wis.2d at 467, 463 N.W.2d at 356-57.

By the Court.—Judgment and order affirmed.

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