

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 98-3481-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KATHLEEN WAGNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Judge. *Affirmed.*

CURLEY, J.¹ Kathleen Wagner appeals from the judgment entered after she pled guilty to the charge of operating while under the influence of an intoxicant, second offense. She claims that the trial court erred in finding that her attempted suicide, which occurred after her sentencing, did not constitute a “new

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

factor.” We affirm. The appellant’s most recent suicide attempt is not a new factor permitting the trial court to review her sentence because Wagner’s severe mental health problems, including earlier attempts at taking her life, were well known to the trial court at the time of sentencing.

I. BACKGROUND.

On February 14, 1998, Wagner was arrested by the Cudahy police for operating while under the influence of an intoxicant, second offense. The blood test conducted after her arrest yielded a blood alcohol concentration of .208. Ten days before this arrest, Wagner had been convicted of the identical offense. On June 19, 1998, after being formally charged, Wagner pled guilty to the new charge. The State recommended that Wagner receive a sentence of ninety days’ imprisonment, a \$300 fine and eighteen months revocation of her driver’s license. Wagner urged the trial court to consider electronic surveillance and/or inpatient treatment in a psychiatric hospital in lieu of a jail sentence because she had been recently diagnosed as suffering from bipolar depression and had attempted suicide. She also presented a letter from her doctor claiming that she was at great risk for committing suicide if she were to be incarcerated. The trial court sentenced her to forty-five days in jail, a \$300 fine and an eighteen-month revocation of her driver’s license.

On July 15, 1998, the trial court stayed the sentence in this matter pending appeal. On October 22, 1998, Wagner moved for a modification of her sentence, claiming a new factor existed. She premised her motion on the fact that she had again attempted to commit suicide after her sentencing. The trial court heard and denied the motion on November 17, 1998.

II. ANALYSIS.

Wagner contends that the trial court erred in failing to find that she presented a new factor which would have allowed the trial court to consider a sentence modification. Whether a fact or set of facts constitutes a new factor is a question of law that we review *de novo*. *See State v. Hegwood*, 113 Wis.2d 544, 547, 335 N.W.2d 399, 401 (1983).

“Sentence modification involves a two-step process in Wisconsin. First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence.” *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). “If a defendant has demonstrated the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence.” *Id.* The seminal case defining a new factor is *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). “[T]he phrase ‘new factor’ refers to 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, the event, although it was in existence, [] was unknowingly overlooked by all of the parties.” *Id.* at 287, 234 N.W.2d at 73.

The burden is upon an appellant to demonstrate a new factor by clear and convincing evidence. *See Franklin*, 148 Wis.2d at 9, 434 N.W.2d at 611. Once the appellant has met its burden of proof, the trial court must then exercise its discretion and determine whether the new factor justifies modification. *See State v. Michels*, 150 Wis.2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989).

Wagner argues that the trial court erred in not considering that the “depression has been intensified as a result of her sentence in the matter” as a new

factor. The State submits that Wagner's suicide attempt, which took place after her sentencing, did not constitute a new factor. The State argues that to be a new factor, the fact must not have been known to the sentencing judge or known and overlooked by the parties. Further, the State cites case law which has held that "a 'new factor' must be an event or development which frustrates the purpose of the original sentence." *Michels*, 150 Wis.2d at 99, 441 N.W.2d at 280. We agree. There is no indication in the record that the most recent suicide attempt frustrated the trial court's sentence.

The trial court was made aware of the following facts at sentencing: (1) Wagner had been diagnosed as suffering from bipolar depression and had been hospitalized for treatment in a mental ward; (2) Wagner had recently attempted suicide; (3) Wagner's treating physicians believed she posed a high risk for another suicide attempt, especially if her sentence included a period of incarceration. In light of this information, it cannot be said that the trial court was unaware of Wagner's serious mental health problems. Further, the trial court was specifically told that a jail sentence might trigger another attempt by Wagner to take her life. The fact that after receiving a jail sentence Wagner followed through on her threat to attempt to take her life simply does not constitute a new factor as that term is defined in *Rosado*. Thus, Wagner failed to prove that her suicide attempt is a new factor. Accordingly, the trial court's decision is affirmed.

By the Court.—Judgment affirmed.

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

