

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 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. 99-1040-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY A. KNIGHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Taylor County:
GARY CARLSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Timothy Knight appeals an order denying his sentence modification motion.¹ Knight contends that the termination of the intensive sanctions program on September 4, 1997, constitutes a new factor authorizing sentence modification because the presentence report discussed intensive sanctions, and the sentencing court commented that Knight would probably not be incarcerated over the entire sentence. Our review of the record discloses that during sentencing, the circuit court did not refer to the intensive sanctions program at all, much less sentence Knight to intensive sanctions under § 973.032, STATS. The court instead focused on the need for deterrence, punishment and public protection. Because the court did not consider the intensive sanctions program at sentencing, its abolition is not a new factor justifying modification of Knight's sentence. We therefore affirm the court's order.

¶2 For a court to consider whether a sentence should be modified, the movant must first demonstrate by clear and convincing evidence that there is a new factor justifying the motion to modify. *State v. Franklin*, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611 (1989). In general, a "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. *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). For the termination of the intensive sanctions program to constitute a new factor, the program and what it had to offer must have been a highly relevant sentencing consideration. The circuit court, however, never once

¹ Knight was convicted of one count of party to the crime of burglary while concealing identity and as a habitual criminal upon his no contest plea. Fifteen counts of burglary and two counts of theft were read in at the sentencing hearing. The court sentenced Knight to 21 years, the maximum possible.

referred to intensive sanctions in pronouncing sentence. *See Franklin*, 148 Wis.2d at 14, 434 N.W.2d at 613. Knight has thus failed to demonstrate a new factor and is not entitled to sentence modification.

¶3 Knight nonetheless claims that a comment by the court reflects its consideration of intensive sanctions as a relevant factor in the original sentencing. At sentencing, the court noted that “It is unlikely that he would spend even all of the time a court imposes in a prison setting or in a secure setting. A good share of this time would be spent probably in either medium or even minimum security at some point in time.”

¶4 This remark is inadequate to clearly and convincingly establish that the court considered the availability of the intensive sanctions program. Knight ignores the context of the court’s statement as well as its rationale for the sentence imposed. The court’s comment came during its reflection on Knight’s need for rehabilitation. The court merely observed that Knight would at some point be outside of a secure setting and whether he obeyed the law at that point was up to him.

¶5 The court’s sentencing rationale is inconsistent with Knight’s assertion that the court considered intensive sanctions at sentencing. Its goal was to deter others, punish Knight and protect the public. The court noted that Knight was essentially a career criminal, who received a beneficial plea bargain and would have received more time but for that plea bargain.² The court stated: “What Mr. Knight needs is he needs bars. He needs walls. He needs razor wire

² The court indicated that it was likely Knight would have been sentenced to a longer period of time had he been convicted of the counts that the State dismissed and had read in.

around him so he is in a place where he can't get out and go and burgle other people.”

¶6 It is apparent that the sentencing court did not consider intensive sanctions. Because the availability of intensive sanctions was not considered at Knight's sentencing, its abolition is not a new factor justifying sentence modification.³ See *id.* at 14, 434 N.W.2d at 613.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

³ We agree with the trial court's observation that in a different case the end of the intensive sanctions program may, under appropriate circumstances, constitute a new factor.

