

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2004AP3106-CR
2004AP3107-CR**

STATE OF WISCONSIN

**Cir. Ct. Nos. 2000CM994
2001CM18**

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANTE R. VOSS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County:
EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Dante Voss appeals the order denying his motion for sentence modification. We conclude the circuit court correctly concluded there was no new factor. We therefore affirm.²

BACKGROUND

¶2 Voss was sentenced on January 11, 2001, after entering a plea of no contest in three cases to these charges: in case no. 2000CM831, disorderly conduct and resisting/obstructing an officer, both enhanced for habitual criminality under WIS. STAT. § 939.62; in case no. 2000CM994, the same charges, both enhanced under § 939.62, and bail jumping, also enhanced; and in case no. 2001CM18, disorderly conduct and criminal damage to property, both enhanced under § 939.62. In each of the three cases, the court sentenced Voss to two years in prison on each count, concurrent to the other counts in that case, but consecutive to the terms in each of the other two. However, the court stayed those sentences and placed Voss on four-years' probation for each count in each case, concurrent to the other counts in that case and to the other two cases. The court imposed the following conditions of probation on Voss: (1) counseling as necessary; (2) absolute sobriety; (3) take medications as prescribed; (4) obey all jail rules; and (5) remain in an alcohol program.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Voss also argues that the revocation of his probation and imposition of his stayed prison sentence violate the constitutional prohibition against double jeopardy and the Eighth Amendment prohibition against cruel and unusual punishment. We do not address these arguments because he did not raise them in the circuit court.

¶3 Voss's probation was revoked in case no. 20000CM831 after the Department of Corrections (DOC) determined that Voss had violated a number of rules of probation. Voss was then incarcerated until August 13, 2002, his mandatory release date. However, very soon after his release his probation was again revoked (in case no. 2000CM831) because of drug and alcohol use and disorderly conduct. He was released from prison on April 25, 2003, when the prison term in 2000CM831 expired, and he began serving probation in the other two cases. Probation was revoked in both those cases by order dated November 6, 2003, based on findings of consumption of alcohol and other violations of the rules of his probation.³

¶4 Just before the order revoking probation was entered, but after the hearing, Voss filed a motion for sentence modification. In an accompanying affidavit he averred that his probation agent had prevented him from getting the help he needed for his alcohol addiction and mental illness, and, had she allowed him to get help, he would not have violated the rules of his probation.⁴ The circuit court denied the motion without a hearing, concluding that the motion and affidavit did not show grounds upon which the court could modify Voss's sentence.

³ Voss's appeal of the probation revocation orders are pending before this court.

⁴ Voss also averred that he had a daughter for whom he needed to pay child support and financial obligations related to his convictions and it was in the best interest of the community that his sentence be modified to allow him to pay these obligations. However, he makes no argument on appeal concerning these averments and we therefore do not address them.

ANALYSIS

¶5 A defendant may obtain modification of a sentence if the court determines that a new factor exists and that the new factor justifies a modification of the sentence. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor is a fact or set of facts highly relevant to the imposition of a sentence but not known to the circuit court at the time of sentencing, either because the fact was not then in existence or because it was unknowingly overlooked by all parties. *Id.* A new factor is one that frustrates the purpose of the original sentence. *State v. Crochiere*, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524. Whether a fact or set of facts constitute a new factor presents a question of law, which we review de novo; whether a new factor warrants a sentence modification is committed to the circuit court's discretion, subject to our deferential standard of review for discretionary decisions. *Id.*, ¶10.

¶6 This appeal implicates the first inquiry: whether there is a new factor. Voss argues that his agent's refusal to let him obtain the help he needed to stay sober is a new factor that frustrated the purpose of the original sentence. He asserts that, when the circuit court sentenced him, the court took into account a report on his drug and alcohol abuse and mental health problems, and the court's purpose in staying the prison sentence and imposing the probation conditions recited in paragraph 2 was to allow Voss to get help with his problems and to have his probation agent help him get the help he needed. This purpose was thwarted, Voss contends, because his probation agent put him on electronic monitoring and did not allow him to go to any treatment programs or give him money for his medications.

¶7 We will accept Voss’s assertions that one of the court’s purposes in staying the prison sentences and ordering probation on the terms it did was to give Voss the opportunity to obtain help in the community for his substance abuse and mental health problems.⁵ However, there is nothing in the record that shows the circuit court intended that the condition that Voss maintain complete sobriety was dependent upon having any particular assistance from his probation agent, or that the circuit court intended that the probation agent, rather than Voss, had the responsibility to get the treatment and the medication he needed. Indeed, in the court’s order denying Voss’s request for relief by certiorari from the November 2003 order revoking his probation, the court expressly stated its view that “Voss himself has the responsibility to get the requested treatment and medication.”

¶8 We also observe that the transcript of the probation revocation hearing to which Voss cites does not support his assertion that his probation agent denied him the opportunity to obtain his medications or to obtain treatment. There is nothing in the record suggesting that anyone deprived him of medication he needed or that a lack of medication was related to his consumption of alcohol or the other behaviors that led to his revocation. Voss’s agent testified that every time she supervised him in the community she would refer him to treatment for Alcohol and Other Drug Abuse issues, but he would do something that led to

⁵ A complete transcript of the sentencing is not in the record of these two consolidated appeals, nor in the record shared with 2004AP1466 and 2004AP1467; the transcript stops at page 16, during the plea colloquy. Voss did bring a motion to add a transcript of a hearing held on July 23, 2003, on an earlier motion to modify his sentence. We denied that motion on the ground that Voss had already submitted a statement saying no transcripts were necessary for this appeal and that he had not adequately explained why a transcript from a hearing on an earlier sentence modification motion was necessary for this appeal. In Voss’s motion for the transcript, he asserted that at that hearing the court stated its reasons for the sentence it imposed and the court’s statements support his argument that the court granted him probation to “help rehabilitate him for his mental health issues and AODA problems.”

revocation before that could be followed through with. She also testified that he repeatedly denied that he was consuming alcohol, and that in response to his alcohol violations she tightened his restrictions when he was in the community, including placing him on electronic monitoring and a “sobrieter unit.” In addition, the transcript shows that Voss was seeing a psychotherapist in group meetings and individually for sexual offender treatment. Finally, Voss’s own testimony was that in the past he did not want to stop drinking and did not understand the twelve steps of AA, but now he wanted to change. He also testified that he wanted to go to AA meetings but could not go because he was on electronic monitoring. On cross-examination he acknowledged that his agent talked to him about AODA treatment and that he did not remember ever asking for a list of AA places and being told he could not go. What the record shows, then, is that Voss was on electronic monitoring because of his own behavior, he did not want AODA treatment in the past; and more recently he wanted it but could not get there because of the electronic monitoring. Accepting Voss’s testimony as true, it does not support a basis for concluding that he made efforts to obtain medication or treatment that his agent thwarted.

¶9 Our de novo review leads us to conclude that there is no new factor for purposes of sentence modification. Accordingly, the circuit court correctly denied Voss’s motion.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

