

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 15, 2001

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-0865-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHARLES JASPER, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Charles M. Jasper, Jr. appeals from a judgment of conviction entered after he pled guilty to two counts of armed robbery, contrary

to WIS. STAT. § 943.32(2) (1997-98, 1999-2000).<sup>1</sup> He also appeals from an order denying his postconviction motion seeking resentencing, or alternatively, the modification of his sentence. Jasper claims that the trial court erred by: (1) determining that trial counsel effectively represented him at sentencing; (2) denying his postconviction motion without holding an evidentiary hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (1979); and (3) determining that his mental illness and drug abuse issues, which were diagnosed subsequent to sentencing, were not new factors warranting sentence modification. We affirm.

## I. BACKGROUND

¶2 Jasper was charged with three counts of armed robbery for holding up a video store and two grocery stores. When questioned by the police, Jasper admitted that he committed the crimes, explaining to the police that he wanted a “quick fix” to his financial problems. The case was eventually plea-bargained. For a guilty plea to two of the counts, the State recommended dismissal of the third count.<sup>2</sup>

¶3 Prior to sentencing, Jasper did not reveal to anyone, including his lawyer, that he had a drug addiction or mental health problem. At sentencing, Jasper’s lawyer characterized him as a remorseful young man who had made some serious mistakes because “[h]e ran into some problems that he did not deal with

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<sup>1</sup> Jasper was charged with three counts of armed robbery. The crime alleged in count one was committed on November 18, 1998. This count was eventually dismissed. The crimes alleged in the two remaining counts, to which Jasper pled guilty, were committed on March 5, 1999, and March 8, 1999.

<sup>2</sup> Although the court dismissed the third count of armed robbery, it was read in for purposes of sentencing.

appropriately.” In addition, Jasper’s lawyer hired a “Sentencing and Dispositional Specialist,” who provided the court with a presentence memorandum, including sixteen letters of support from Jasper’s friends and family. The trial court sentenced Jasper to a total of 30 years in prison.

¶4 While in prison Jasper was diagnosed with a mental illness “made worse by substance abuse.”<sup>3</sup> He filed a postconviction motion alleging that trial counsel’s failure to recognize that he was both “mentally ill” and a “raging drug addict” deprived Jasper of the effective assistance of counsel. Jasper also alleged that his recently diagnosed mental illness constituted a new factor warranting sentence modification. The trial court denied the motion without a hearing, finding that counsel’s performance was neither deficient nor prejudicial, noting that “there is not a reasonable probability that the court would have sentenced the defendant any differently had [the mental illness] been presented at sentencing.” In addition, the trial court concluded that Jasper’s mental illness and drug abuse issues did not constitute new factors because they did not “frustrate the purpose of this sentence – punishment, deterrence, and community protection.”

## II. DISCUSSION

### A. *Ineffective assistance of counsel.*

¶5 Jasper argues that the trial court erred by concluding, without holding a *Machner* hearing, that his trial lawyer provided effective assistance at sentencing. If a defendant files a postconviction motion and alleges facts that, if

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<sup>3</sup> Jasper was diagnosed with Schizoaffective Disorder, described by Dr. R. Bronson Levin, a forensic psychologist who evaluated Jasper after sentencing, as a “debilitating, chronic mental disease with elements of both thought disorder ... and mood instability.”

true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *Id.*

“[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.”

*Id.*, 201 Wis. 2d at 309-310, 548 N.W.2d at 53 (citation omitted). We will reverse the trial court’s discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *Id.*, 201 Wis. 2d at 311, 548 N.W.2d at 53.

¶6 In order to establish that he did not receive effective assistance of counsel, Jasper must establish: (1) that his lawyer’s performance was deficient; and (2) that “the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A lawyer’s performance is not deficient unless he or she “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* To establish prejudice, Jasper must show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69, 76 (1996) (citation omitted). The issues of performance and prejudice present mixed questions of law and fact. *Id.* Findings of historical fact will not be upset unless they are clearly erroneous. *Id.* Whether counsel’s performance was deficient or prejudicial, however, are legal questions that we review *de novo*. *Id.*, 201 Wis. 2d at 236-237, 548 N.W.2d at 76.

¶7 Jasper contends that trial counsel’s inability to recognize that Jasper was a mentally-ill drug addict, to have him evaluated for these problems, and to present this information to the sentencing court, amounted to ineffective assistance of counsel. We disagree and conclude that the trial court appropriately denied the motion without a hearing. Before he was sentenced, Jasper did not tell anyone – his lawyer, the sentencing specialist hired by his lawyer, the presentence investigation report writer, the police, his friends, or his family members – about his alleged mental illness or drug addiction. Instead, Jasper explained that his crimes were motivated by financial problems. Indeed, it was only after sentencing that Jasper discussed his health and addiction problems with a psychologist.

¶8 At sentencing, Jasper informed the trial court: “I was just thinking of myself and how I could get some quick money.” Jasper told the sentencing specialist that he “did not want to beg his parents for money, so instead, he listened to his friends, who told him the robberies would be an easy way to obtain money.” In addition, he told the sentencing specialist that he only drank alcohol five times in his life and “denie[d] any problems with alcohol or drug abuse.”

¶9 Jasper’s friends and family members, some of whom spoke on his behalf at sentencing, also corroborated Jasper’s “quick money” explanation for these robberies. Family friend, Verbie Swanigan, told the court:

I asked him why [he committed the crimes]....He stated to me, Your Honor, that he was not thinking clearly, that he didn’t want to go back to his mother and father to ask for help. He was a man. He felt he should be able to take care of himself, and he explained also that he realized then that was a mistake.

Jasper’s mother also spoke at sentencing and indicated: “He could have come to any of us and he knows that, but his pride wouldn’t let him.”

¶10 As the record reveals, and as Jasper concedes in his postconviction motion, “Up and through his sentencing date, not a person in the entire court knew *the reason why* [he committed these crimes].” (emphasis in original). Nevertheless, Jasper asserts that trial counsel’s performance was deficient because counsel “missed the signs.” It does not follow, however, that somehow trial counsel should have been able to see that which no one else did. *See Strickland*, 466 U.S. at 691 (“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.”).

¶11 Moreover, Jasper has not shown that he was prejudiced. Jasper’s motion did not allege that mental illness or drug addiction caused him to commit the crimes, nor did it allege that he was not responsible for the crimes because of a mental disease or defect. *See* WIS. STAT. § 971.15 (1999-2000). The motion also failed to allege facts that, if true, established that Jasper would have received a lesser sentence had trial counsel presented Jasper’s mental health and drug addiction issues to the trial court. While the trial court questioned Jasper’s real motives at sentencing, it noted that the primary purposes behind Jasper’s sentence were “punishment, deterrence, and community protection.”<sup>4</sup> Jasper has not demonstrated that had the trial court known about these additional issues, it would have sentenced Jasper any differently; the trial court opined that “the current information strongly reinforces the perception that [Jasper] poses a grave danger to the community because his psychological disorder and drug usage are now

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<sup>4</sup> The trial court stated, “I’m not sure I understand what your motive is. Maybe there was no – no motive. And I think the fact – that fact makes you a greater danger to this community.”

known to cause his delusional thinking and lapses in judgment.” Accordingly, the trial court correctly determined that Jasper’s lawyer provided effective assistance.

*B. New Factor/Sentence Modification.*

¶12 Jasper also claims that his drug addiction and mental illness, revealed after sentencing, constitute new factors that warrant sentence modification. The trial court denied the motion, concluding that these issues were not new factors. We agree.

¶13 The trial court has the discretion to modify a sentence if the defendant presents a new factor. *State v. Macemon*, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). 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 original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

*State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468, 470 (1997) (footnote omitted). A new factor must be an event or development that frustrates the purpose of the original sentence. *State v. Johnson*, 210 Wis. 2d 196, 204, 565 N.W.2d 191, 195 (Ct. App. 1997). The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. *State v. Michels*, 150 Wis. 2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). Whether a set of facts constitutes a new factor is a question of law that we review *de novo*. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609, 611 (1989).

¶14 Jasper’s mental illness and drug abuse issues are not new factors. Here, the trial court anticipated possible mental health and addiction problems at sentencing when it remarked that there might be other reasons for Jasper’s

behavior. The trial court even recommended that “maybe there should be a mental health evaluation done to explore much more in depth what motivated you on these dates, also to explore any drug and alcohol issues that are unknown.” The information contained in the postconviction motion merely confirms that the trial court’s concerns were valid. Moreover, these issues do not frustrate the purpose of the original sentence. As already noted, the “new” information was not a matter that would have affected the sentence. Accordingly, we affirm the decision of the trial court.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5(1999-2000).



