COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2914

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. KRAUSE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. James D. Krause appeals pro se from an order denying his postconviction motions for sentence modification and for a restitution hearing. Krause argues that the trial court failed to articulate adequate grounds for denying the motions without a hearing. We agree and reverse the order and remand for further proceedings.

¶2 In August 1998, upon conviction for causing injury by intoxicated use of a motor vehicle, Krause was sentenced to five years in prison. He was also sentenced to a consecutive three-year term of probation for hit and run. A condition of probation was that he pay restitution in the amount of "$35,465 and ongoing."

¶3 On June 12, 2000, Krause filed a pro se motion for sentence modification. The motion indicated that it was brought under WIS. STAT. § 974.06 (1999-2000).[1] Krause claimed that in imposing its sentence, the sentencing court assumed that Krause would not serve very much time in prison. Krause cited the court's comment, "I don't think the defendant will spend very much time in prison. I think he must spend enough time there to address his alcoholism finally." Krause explained that he had not been paroled at his first eligibility date in October 1999, that after a twelve-month deferment for parole consideration he will have served twenty-eight months of his sentence and be less than one year from his mandatory release date, and that he was not going to be placed in an alcohol treatment program until after October 2000. He claimed that these facts presented either a new factor to warrant sentence modification or demonstrated that the trial court's sentence was an erroneous exercise of discretion.

¶4 On August 14, 2000, Krause filed a pro se motion seeking a restitution hearing. He sought clarification of the amount of restitution and alleged that the hearing required by WIS. STAT. § 973.20(13) and (14) had never been held.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 Krause's motion for sentence modification was referred to Judge John R. Race, the original sentencing judge. Judge Race made a handwritten notation on Krause's cover letter, "I'm not a super parole board. My sentence remains." On the cover letter which accompanied Krause's motion for a restitution hearing, Judge James L. Carlson wrote, "Mr. Krause—Your motion will not be heard. Judge Race heard and decided restitution on the date of sentencing—your motion is not timely." Judge Carlson entered the order Krause drafted to memorialize these rulings and denying the motions.

¶6 At the outset we reject the State's attempt to derail this appeal by procedural blocks.[2] The motion for sentence modification asserts a new factor and may be brought after regulatory time limits have expired. *See* ***Kutchera v. State***, 69 Wis. 2d 534, 553, 230 N.W.2d 750 (1975). The judgment of conviction does not fix the final amount of restitution and no time limit exists on Krause's attempt to seek clarification of the amount.

¶7 A motion seeking sentence modification based on a new factor requires the trial court to exercise its discretion in determining whether a new factor exists and whether it justifies modification of the sentence. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). The trial court's stated reason for refusing to hear Krause's motion does not address the issue Krause raises. Krause was not challenging the parole board's decision to defer his parole or asking the court to substitute its judgment. Rather, Krause was asking the court

[2] The State argues that Krause's motions were untimely as not brought within ninety days of the receipt of the last transcript under WIS. STAT. RULE 809.30(2)(h), as made applicable by WIS. STAT. § 973.19(1)(b). It also argues that the motions cannot be brought under WIS. STAT. § 974.06 because they have no constitutional underpinnings.

to consider its own expressed belief that he would not spend much time in prison against the reality of Krause's experience to determine if the purpose of the court's sentence was frustrated. We recognize that a change in parole eligibility is not a new factor warranting sentence modification in all cases. *See* ***id.*** at 14; ***State v. Scaccio***, 2000 WI App 265, ¶16, 240 Wis. 2d 95, 622 N.W.2d 449. While it is a fine line between an allegation that parole did not come when anticipated and an allegation that parole eligibility was a specific factor in the sentence, Krause is entitled to an examination of the issue raised. This is particularly true here because Krause also alleges that he will not receive the treatment the court referenced until well into his sentence.

¶8 The trial court's reference to not being a "super parole board" does nothing to tell Krause why the issue he raises fails to justify sentence modification. A decision which requires an exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an erroneous exercise of discretion. ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). While this court may examine the record to determine whether facts exist which support the trial court's decision, ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982), we cannot do so in this case. No hearing was conducted to develop the facts necessary to resolve Krause's motion. While Krause may not ultimately be successful on the asserted grounds for sentence modification, further proceedings are necessary to make that determination.

¶9 The trial court's reasoning for refusing to conduct a restitution hearing is also inadequate. The trial court indicated that restitution had been

determined at sentencing, but that is not true. The judgment of conviction listed restitution as "$35,465 and ongoing." No fixed and determinable amount was set.[3] Moreover, the record does not show that restitution was stipulated to[4] or that the trial court selected one of the four separate, alternative procedures to be used by courts in cases where the amount of restitution is, for whatever reason, unable to be determined at the sentencing hearing. *See* ***State v. Evans***, 2000 WI App 178, ¶14, 238 Wis. 2d 411, 617 N.W.2d 220; WIS. STAT. § 973.20(13)(c). Section 973.20(13)(c) "*requires* a postsentence restitution hearing unless the defendant stipulates to the restitution." ***State v. Rodriguez***, 205 Wis. 2d 620, 630, 556 N.W.2d 140 (Ct. App. 1996). To find Krause's request untimely is unjust in the absence of any explanation of why restitution was held open beyond the ninety-day maximum hold-open period for entry of restitution after a sentence is imposed. *See* ***State v. Simonetto***, 2000 WI App 17, ¶10, 232 Wis. 2d 315, 606 N.W.2d 275.

¶10 We conclude that it was error to deny Krause's motion for a restitution hearing by deferring to the determination made at sentencing and on timeliness grounds. Krause has the right to know the amount of restitution to be paid. The issue has never been addressed in accordance with WIS. STAT. § 973.20(13) and (14). The court must afford Krause that opportunity.

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[3] We reject the State's characterization that the July 28, 1999 filing of the Department of Corrections' form entitled "Restitution Ordered" constitutes the trial court's final determination of the issue. Judge Race's signature on that document is predicated with the words, "As stated on Judgment dated 8/27/98." The judgment indicated restitution was "ongoing."

[4] The discussion of restitution at sentencing was minimal and we would be hard pressed to conclude that by his silence Krause constructively stipulated to an unlimited amount of restitution. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126. In ***State v. Rodriguez***, 205 Wis. 2d 620, 631, 556 N.W.2d 140 (Ct. App. 1996), it was observed that the defendant could not contest or stipulate to a restitution order which was still to be determined.

By the Court.—Order reversed and cause remanded.

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