

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2001

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.

No. 01-0806-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICK E. NOREM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
RAYMOND THUMS, Judge. *Reversed and cause remanded with directions.*

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

¶1 CANE, C.J. Rick Norem appeals from an order denying his motion for sentence modification. Norem argues that the circuit court erred when it concluded that Norem failed to demonstrate the existence of a new factor that would allow the court to consider whether sentence modification is justified. At sentencing, the trial court explicitly indicated that it was sentencing Norem to ten

years in prison so that it could maximize Norem's chances of being selected to participate in an intensive, three-year sex offender treatment program. We conclude that Norem's actual sex offender treatment needs and his corresponding ability to complete treatment in a shorter period of time than that contemplated by the trial court constitute a new factor. We reverse the order and remand so the trial court can determine whether this new factor justifies modification of Norem's sentence.

BACKGROUND

¶2 A jury found Norem guilty of first-degree sexual assault of a child. Throughout the trial, Norem continued to maintain his innocence. Sentencing was set for September 8, 1997.

¶3 On September 8, Norem's counsel indicated that he planned to call an expert to address the possibility of treatment options in the community, as opposed to treatment options in prison, for individuals convicted of similar offenses. The trial court indicated that it was concerned that the presentence investigation report, which recommended prison, had not addressed whether treatment in the community was a viable option. The State noted that the Department of Corrections' position is generally that defendants who are in denial about their offenses cannot be effectively treated in the community.

¶4 The trial court agreed that is generally the case, but expressed concern that the presentence investigation report had not addressed the issue. The court said that if Norem was going to have an expert testify that he should be placed in the community, perhaps the State should have an expert explain why placement in the community is not recommended by the department. The parties

agreed to continue the sentencing hearing so that the State could arrange for expert testimony.

¶5 At the continued sentencing hearing on September 12, the State presented testimony from Lloyd Sinclair, a therapist who trains other professionals in evaluating and treating persons with sexual disorders and those who engage in criminal sexual behavior. Although Sinclair had never met or treated Norem, he answered the State's questions based on general information provided about Norem's crime.

¶6 Sinclair testified that convicted sex offenders who deny their offenses are more likely to admit their offenses in a prison setting than through treatment in the community. He said that the prison treatment is to first place the offender in a program for those in denial. Once the offender completes deniers programming, the offender can receive treatment through an intensive, two- to three-year program called the Wisconsin Sex Offender Treatment Program (SOTP).

¶7 Sinclair testified that participation in the SOTP is generally only available to offenders who have mandatory release dates longer than three years because that insures that the offender will be available to complete the entire treatment program. Sinclair agreed that a sentence of eight to twelve years, combined with a notation in the judgment of conviction that the court is recommending that the offender participate in the program, may help get the offender accepted into the SOTP.

¶8 The State relied on this testimony in support of its argument for a prison sentence:

Your Honor, the State is asking the Court to impose a sentence in the Wisconsin State Prisons today of 14 years. We're asking that that sentence be imposed to afford the maximum possibility that [Norem] will be placed in the Sex Offender Treatment Program.

I will indicate one more time, Judge, that I understand the range to be best qualified for that program is that range of 8 to 14 years. And the sentence I would ask the Court to fashion is a sentence which maximizes his opportunity to be placed in that program, including the Court specifically recommending that he be placed in that Sex Offender Treatment Program.

....

We have the opportunity to give Mr. Norem, in a sentence that the Court fashions, an opportunity to get the best, the Cadillac treatment for what he has done. Not one and a half hours in some group where every other message he gets from his family and the community will keep on denying, but a group of people where he finally will have an atmosphere where his secrets can finally come out.

¶9 In pronouncing sentence, the trial court considered the relevant factors. The trial court's discussion of Norem's treatment and rehabilitation needs composed seven pages of the transcript. The court concluded:

[I]f there is going to be sexual offender treatment, probation is not available in the community, I have to sentence him to prison. Therefore, I have to sentence him long enough to get the sexual offender treatment, and that in my opinion is ten years.

The court also specifically recommended that Norem be placed in the SOTP.

¶10 In February 2001, Norem filed a motion for sentence modification. He alleged: (1) his sentence to ten years' incarceration was intended, in part, to provide an opportunity for him to receive deniers programming and participate in the SOTP; (2) the trial court based this sentence on the recommendation of the State's witness, Sinclair, who recommended a sentence in the eight- to twelve-year range because it would be "a long enough sentence so that [Norem would] not get

to his mandatory release date before he completes treatment, but not so long that he would have to be returned to the prison community outside of the Sex Offender Treatment Program for a lengthy period of time”; (3) although the department agreed that Norem required deniers programming, it concluded that Norem did not need three years in the SOTP, but instead needed a shorter program; (4) Norem completed both deniers programming and a one-year treatment program; and (5) because Norem’s only remaining programming requirement is continuing sex offender treatment in the community, he will remain incarcerated, exposed to the prison community and without continued treatment for an extensive period of time.

¶11 Norem argued that the new factor justifying his request for sentence modification is the actual programming requirements assessed by the department. Norem explained:

This factor is highly relevant to the imposition of sentence because the level of treatment needed was a determinative basis for the length of the sentence imposed. ... [I]t was the Court’s opinion that in order for Mr. Norem to receive the [SOTP] treatment it must impose a sentence of 10 years. ... The new factor frustrates the purpose of the original sentence because now that Mr. Norem has completed all of his programming requirements, he will be exposed to the prison community for a lengthy period of time with no possible means of obtaining further treatment until he is released from prison.

¶12 The trial court rejected Norem’s motion without a hearing, concluding that Norem had not established a new factor. The court reasoned that although it had recommended that Norem receive treatment in the SOTP, it did not condition its sentence on Norem’s placement in the program, and had no authority to do so. This appeal followed.

LEGAL STANDARDS

¶13 Sentence modification involves a two-step process in Wisconsin. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. *Id.* If the defendant demonstrates the existence of a new factor, then the circuit court must undertake the second step in the modification and determine whether the new factor justifies modification of the sentence.

¶14 A new factor, as defined in *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), 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.” *Franklin*, 148 Wis. 2d at 8. “There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court.” *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶15 The defendant has the burden of proving the existence of a new factor by clear and convincing evidence. *See Franklin*, 148 Wis. 2d at 9. Whether a fact or set of facts constitutes a new factor is a question of law that we review de novo. *Id.* at 8.

DISCUSSION

¶16 At issue is whether Norem’s actual sex offender treatment needs and his corresponding ability to complete treatment in a shorter period of time constitute a new factor justifying his motion for sentence modification. We

conclude that, although this factor would not necessarily constitute a new factor in every case, it is a new factor here where the trial court relied predominately on the State's expert's testimony and the State's argument that a significant prison sentence was necessary to maximize the opportunities for treatment.

¶17 We have reviewed the transcript and are convinced that the trial court relied greatly on Sinclair's testimony and the State's argument that to maximize Norem's treatment opportunities, Norem needed a prison sentence of at least eight years. Especially compelling is the following statement from the court at sentencing: "Therefore, I have to sentence him long enough to get the sexual offender treatment, and that in my opinion is ten years." This statement illustrates that there was a "connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." *Michels*, 150 Wis. 2d at 99.

¶18 The State argues that Norem's assertion of a new factor is unpersuasive because (1) sentencing courts lack the authority to impose specific treatment on defendants; and (2) the sentencing court in this case was well aware of that limitation. We agree with Norem that although it is true that the trial court knew it lacked authority to order the department to allow Norem to participate in the SOTP, the court nonetheless specifically selected a sentence that would maximize Norem's chances to participate in the program.

¶19 Based on these facts, we conclude that Norem has established clear and convincing evidence that his actual sex offender treatment needs and his corresponding ability to complete treatment in a shorter period of time than that contemplated at sentencing constitute a new factor justifying his motion for sentence modification. On remand, the trial court will undertake the second step

in the modification process and determine whether this new factor justifies modification of the sentence. *See Franklin*, 148 Wis. 2d at 8.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

