

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 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 No. 04-0390-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99CF003945

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATIAS LEON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and RICHARD J. SANKOVITZ, Judges.¹ *Affirmed.*

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

¹ The Honorable Mel Flanagan presided at the trial and entered the judgment of conviction. The Honorable Richard J. Sankovitz heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Matias Leon appeals from a judgment convicting him of one count of armed robbery, one count of attempted armed robbery, and one count of first-degree recklessly endangering safety. Leon also appeals from the circuit court's order denying his motion for sentence modification. Because the circuit court properly concluded that a deportation order issued by the Immigration and Naturalization Service is not a new factor justifying sentence modification, we affirm the judgment and order.

¶2 Leon entered guilty pleas to the charges. At his sentencing hearing, the court and parties discussed the impact of a deportation order on Leon in the event the court imposed a consecutive term of probation. Following the discussion, the trial court declined to impose probation, concluding that Leon would be subject to deportation as soon as he was physically released from custody irrespective of whether a probation order was issued by the court. The circuit court imposed consecutive sentences totaling thirty-five years of imprisonment. On May 5, 2000, the Immigration and Naturalization Service issued a "Final Administrative Order" authorizing Leon's deportation. Leon moved the trial court for sentence modification, claiming the deportation order constituted a new factor. The circuit court denied the motion and this appeal followed.

¶3 A defendant may request modification of his sentence if he shows the existence of a new factor. *State v. Scaccio*, 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. 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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Moreover, to justify sentence modification, the new factor must be something that frustrates the purpose of the original sentence imposed. *State v. Johnson*, 158 Wis. 2d 458, 466, 463 N.W.2d 352 (Ct. App. 1990). Leon bears the burden of establishing the existence of a new factor by clear and convincing evidence. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). Whether a new factor exists involves a question of law, which we review independently. *Scaccio*, 240 Wis. 2d 95, ¶13. If a new factor does exist, however, the trial court exercises its discretion to determine whether the sentence should be modified. *State v. Johnson*, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997).

¶4 We agree with the circuit court’s determination that the deportation order is not a new factor within the meaning of *Rosado*. The record discloses that the parties and the court were well aware that a deportation order was not only possible but likely. Indeed, the sentencing court assumed such an order would be issued and based its sentencing on that correct assumption. Because Leon was not sentenced to probation and because the deportation order was correctly anticipated by the sentencing court, we conclude that the deportation order is not a new factor warranting sentence modification.

By the Court.—Judgment and order affirmed.

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

