

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-2473-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK CIANCIOLO,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

PER CURIAM. Mark Cianciolo appeals from a judgment of conviction for two counts of operating an auto without the owner's consent, following his guilty plea, and for one count of fleeing an officer, following his no contest plea. He also appeals from an order denying his motion for sentence modification. Cianciolo seeks sentence modification on the basis of an alleged

new factor or, alternatively, an evidentiary hearing on his mental condition. We affirm.

Cianciolo was sentenced to four years' imprisonment, receiving two-year consecutive prison terms on each of the operating-without-owner's-consent charges. A nine-month sentence was imposed and stayed on the fleeing count, with probation to run consecutively.

After sentencing, Cianciolo brought a motion seeking sentence modification, arguing that his alleged mental illness constituted a "new factor" justifying sentence modification. Cianciolo claimed that his condition led him to boast to the presentence investigator about committing twenty car thefts, retail fraud offenses, and selling drugs. After he received a longer sentence than he expected to receive, Cianciolo argued that he may not have committed those crimes after all. Cianciolo also claimed that the trial court unfairly sentenced him on the basis of his admissions to the presentence investigator.

The trial court, which was also the sentencing court, denied Cianciolo's motion without a hearing. In a thorough and well-reasoned written decision, the trial court concluded that Cianciolo's alleged mental illness was not a "new factor," and, alternatively, that Cianciolo's alleged mental illness did not justify sentence modification even if it qualified as a "new factor." Cianciolo appeals.

A defendant seeking sentence modification must demonstrate by clear and convincing evidence the existence of a "new factor." *State v. Michels*, 150 Wis.2d 94, 96-97, 441 N.W.2d 278, 279 (Ct. App. 1989). A new factor has been defined as "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." *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Whether a new factor exists is a question of law to be reviewed *de novo*. *Michels*, 150 Wis.2d at 97, 441 N.W.2d at 279.

The existence of a new factor alone, however, does not justify sentence modification. A new factor justifies sentence modification only if it "frustrates the purpose of the original sentence." *Id.* at 99, 441 N.W.2d at 280.

The determination of whether the new factor justifies sentence modification rests within the discretion of the trial court. *State v. Hegwood*, 113 Wis.2d 544, 546, 335 N.W.2d 399, 401 (1983). We review the trial court's decision under the erroneous exercise of discretion standard. See *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989).

The trial court correctly determined that Cianciolo's alleged mental illness did not constitute a new factor justifying sentence modification. At several points in proceedings before the trial court, Cianciolo denied being mentally ill or having a history of mental illness. Although he told the trial court he was taking Thorazine to be able to sleep, he denied that he had any history of mental illness. The presentence investigation report, however, detailed Cianciolo's mental history.

In support of his "new factor" claim, Cianciolo submitted a psychiatric report by Dr. Donald Feinsilver. Dr. Feinsilver's report chronicles Cianciolo's history of mental illness and treatment. It also notes Cianciolo's cocaine and alcohol abuse. The report diagnoses Cianciolo as being "mentally ill," with a bipolar disorder, and cocaine and alcohol abuse. Dr. Feinsilver's report also stated that Cianciolo explained having made allegedly inaccurate representations to the presentence investigator about the exact number of cars he had stolen:

Although he said he was uncertain as to why he said that, he then said "I was 'clowning' ... I knew for sure I was going to get probation."

Dr. Feinsilver's report further stated:

I, of course, do not know what crimes Mr. Cianciolo may or may not have committed. Perhaps he did previously steal cars. I do not know. But it may well be that his statements were more-indicative of underlying mental illness than those statements typically made by skillful car thieves. Whether true or false, the statements certainly give psychiatric information

about his affective state at the time and about his judgement. It may well have been that because of mania Mr. Cianciolo simply could not stop talking, and spoke in a gradios [sic] manner.

Dr. Feinsilver's report is not significantly different from the information in the presentence report. The presentence report contained much of the same information about Cianciolo's mental health history, his addictions and past treatment efforts. Thus, the trial court was aware of Cianciolo's history of mental and emotional problems at the time it sentenced him. The trial court correctly determined that no new factor exists.¹

As part of a due process claim that he was sentenced on allegedly inaccurate information, Cianciolo argues that the trial court should have granted his request for an evidentiary hearing. We disagree. Nothing in Cianciolo's postconviction submissions demonstrates the existence of facts that, if accepted, would entitle him to an evidentiary hearing. See *Nelson v. State*, 54 Wis.2d 489, 497-498, 195 N.W.2d 629, 633 (1972). Dr. Feinsilver's report states that Cianciolo may have committed the crimes, but that there was no way for Dr. Feinsilver to know. Additionally, Cianciolo has never retracted the statements he made to the presentence investigator. In short, Cianciolo has not met the burden to demonstrate the need for an evidentiary hearing.

Moreover, the record demonstrates no prejudice to Cianciolo even assuming the alleged inaccuracy of Cianciolo's remarks to the presentence writer. See *State v. Littrup*, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991) (defendant alleging due process sentence violation must show inaccurate evidence used at sentencing was prejudicial). The trial court clearly explained its decision regarding the length of Cianciolo's sentences. The trial court focused on the severity of each of the three crimes to which Cianciolo pled, Cianciolo's character and his potential for rehabilitation, and the interests of the community. The trial court also noted that: 1) Cianciolo's parents installed a

¹ Because the trial court correctly determined that Cianciolo's alleged mental illness did not constitute a new factor, we need not address whether it would have justified sentence modification. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

burglar alarm and numerous locks in their house to prevent him from breaking in; 2) despite Cianciolo's claims that he had no outstanding bills, Cianciolo's father showed the presentence writer numerous bills and collection letters that had been sent to his parents' house; and 3) Cianciolo had unsuccessfully been through drug treatment. The trial court further stated, "I think I agree with your father's characterization of you, which is that you are a con artist." Cianciolo has shown no prejudice as a result of his statements to the presentence investigator.²

In conclusion, the trial court properly denied Cianciolo's motions for sentence modification and an evidentiary hearing.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² Cianciolo also offers a rather confused "erroneous exercise of sentencing discretion" argument. For the same reasons set forth in our analysis of Cianciolo's due process claim, we conclude that the trial court did not erroneously exercise its sentencing discretion. See *State v. Littrup*, 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991) (reviewing court will uphold sentence absent an erroneous exercise of discretion).