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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-0103-CR &
95-1112-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. VISNAW,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded.*

FINE, J. Jeffrey L. Visnaw pled guilty to operating a motor vehicle while under the influence of an intoxicant, as a second offense. *See* §§ 346.63(1)(a) & 346.65(2), STATS. He appeals from the judgment of conviction and the trial court's order denying his motions for post-conviction relief. He claims that the trial court improperly declined to consider whether the new factors he presented were sufficient to warrant a modification of his sentence. We reverse.

I.

The trial court sentenced Visnaw to serve fifty days at the Milwaukee House of Correction, with work-release privileges. On the sentencing date, the trial court denied Visnaw's request to be also released from the House of Correction for his "child care" responsibilities. The trial court explained that Visnaw and his family would have to make other arrangements. Visnaw subsequently sought modification of the sentence, and argued to the trial court that he and his wife could not make other child-care arrangements, and that the trial court's refusal to grant child-care release would force his wife to quit her job because they had no money for purchased day care. Visnaw's counsel suggested in-house monitoring for the periods of child-care release. The trial court, however, refused to consider the suggestion: "Well here is the deal. I don't give in-house or bracelet or that kind of thing to people who have an OWI conviction. I don't intend to start it here now." After the State objected to modification of the sentence, the trial court further explained its position: "Well-- and I will be honest. I have been very consistent on this. I just don't do it."

II.

Sentencing is within the trial court's discretion and will only be overturned if there is an erroneous exercise of discretion or if discretion is not exercised. ***Ocanas v. State***, 70 Wis.2d 179, 183–184, 233 N.W.2d 457, 460 (1975).

> The exercise of discretion contemplates a process of reasoning based on facts that are of record or that are reasonably derived by inference from the record, and a conclusion based on a logical rationale founded upon proper legal standards.

Id., 70 Wis.2d at 185, 233 N.W.2d at 461. The trial court's decision to initially deny child-care release was well within its discretion, and Visnaw does not argue otherwise. In denying child-care release, however, the trial court told Visnaw that he and his family should make other plans. Subsequently, Visnaw sought modification of his sentence because, he argued, making those other plans would economically destroy his family.

A trial court may modify a sentence to reflect consideration of a new factor. ***State v. Macemon***, 113 Wis.2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a fact that is highly relevant to the imposition of sentence but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it. ***Id.*** There must also be a nexus between the new factor and the sentence, *i.e.*, the new factor must operate to frustrate the sentencing court's original intent when imposing sentence. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether a new factor exists presents a question of law that this court reviews *de novo*. ***Id.***, 150 Wis.2d at 97, 441 N.W.2d at 279. If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification. ***Id.***

As the State concedes, the inability of Visnaw's family to accommodate the trial court's sentencing plan that Visnaw not be released from the House of Correction to accommodate his child-care responsibilities is a

"new factor," which, if true, would warrant exercise of the trial court's discretion to modify Visnaw's sentence. The trial court, however, did not exercise its discretion; rather, it applied its inflexible rule not to "give in-house or bracelet or that kind of thing to people who have an OWI conviction." As the State also concedes, this was error. *See* ***State v. Martin***, 100 Wis.2d 326, 302 N.W.2d 58 (Ct. App. 1981) (trial court misuses its discretion when it "uniformly refuses" to consider a lawful sentencing alternative.). Accordingly, we reverse and remand to the trial court to consider on the merits Visnaw's claim that the failure to grant child-care release would frustrate the appropriate goals of sentencing.

By the Court.—Judgment and order reversed, and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.