

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2007

David R. Schanker
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. 2006AP472-CR

Cir. Ct. No. 2002CF2739

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THEODORE G. REESE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Theodore G. Reese appeals from a postconviction order denying his sentence modification motion. The issues are whether Reese raised new factors warranting sentence modification about his inability to participate in the Challenge Incarceration Program, and his emotional problems

(his suicide attempt and his mental problems), and whether he was denied due process of law because the trial court refused to allow him to timely review his presentence investigation report. We conclude that the record belies his new factor claims, and that he waived his due process claim. Therefore, we affirm.

¶2 In 2002, Reese pled guilty to armed robbery with the use of force while concealing his identity. The trial court imposed a fifteen-year sentence, to run consecutive to any other sentence, comprised of ten- and five-year respective periods of initial confinement and extended supervision.

¶3 In 2004, Reese moved for sentence modification seeking a restructuring of his sentence to accommodate his placement in the Challenge Incarceration Program. The trial court denied the motion, ruling that only a new factor would warrant sentence modification.

¶4 In 2005, Reese moved for a declaration of his eligibility for the Earned Release Program. The trial court denied the motion because Reese had failed to comply with WIS. STAT. § 302.05(3)(e) (2005-06), the prerequisite requiring departmental approval prior to filing the motion.¹

¶5 Reese's current sentence modification motion raises two claimed new factors, his problematic eligibility for the Challenge Incarceration Program, and his emotional problems. The trial court denied the motion because none of these factors were "new." Reese did not raise his due process claim in the trial court.

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

¶6 The defendant must clearly and convincingly prove the existence of a new factor warranting sentence modification. See *State v. Franklin*, 148 Wis. 2d 1, 8-10, 434 N.W.2d 609 (1989). 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.”

Id. at 8 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that “‘new factor’ ... frustrates the purpose of the original sentence.” *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). *Michels* further explains that “[t]here 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.” *Id.* “Whether a set of facts is a ‘new factor’ is a question of law which we review without deference to the trial court. Whether a new factor warrants a modification of sentence rests within the trial court’s discretion.” *Id.* at 97 (citation omitted).

¶7 At sentencing, the trial court declared Reese eligible for the Challenge Incarceration Program; however, the structure of the initial term of confinement effectively rendered him ineligible because of his age. Reese claims that he is entitled to sentence modification because, by declaring him eligible for the program, the trial court expected he would serve a shorter term of initial confinement and be released after he successfully completed the program. In its postconviction order denying the motion, the trial court disagreed, explaining that:

A finding of eligibility for CIP [Challenge Incarceration Program] is merely a statement to the Department of Corrections that the court does not object to placing the defendant in the program. The record shows that the court

did not base the length of the initial confinement term upon a belief that the defendant would be released to the program. Consequently, the defendant's inability to enter the program does not frustrate the purpose and intent of the original sentence, which was punishment, deterrence, and the need for community protection.

¶8 The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). The trial court's explanation, supported by the sentencing transcript, demonstrates that whether Reese participated in the Challenge Incarceration Program, and was thus entitled to early release from confinement, was not "highly relevant" to the imposition of sentence. We will not disturb that determination.

¶9 Reese's second claimed new factors are his suicide attempt and his mental problems. These factors were known to the trial court when it imposed sentence and thus, are not new. Reese's suicide attempt and his mental problems were addressed in the presentence investigation report, which the trial court acknowledged it had read. Reese's trial counsel emphasized his suicide attempt and mental problems, adding that Reese had shown the presentence investigator the resulting scar around his neck. Consequently, Reese's suicide attempt and his mental problems were considered by the trial court and thus, are not new factors.

¶10 On appeal, Reese also claims that the trial court refused to allow him to timely review his presentence investigation report because he was represented by counsel. Reese waived that issue by failing to raise it in his postconviction motion. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d

727 (“It is a fundamental principle of appellate review that issues must be preserved at the [trial] court.”).²

By the Court.—Order affirmed.

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

² Nevertheless, the sentencing transcript belies this claim. Reese’s trial counsel told the trial court at sentencing that Reese had reviewed the report. Trial counsel then proceeded to dispute a quotation in the report attributed to Reese and told the trial court that “[Reese] never said he shot somebody dead, and he wanted the Court to know that.”

