

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 19, 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. 2006AP2143-CR**

**Cir. Ct. No. 2003CF128**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JUSTIN ALLEN MALM,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Justin Malm appeals a judgment that imposed concurrent sentences totaling six years' initial confinement and three years' extended supervision for escape, burglary and taking and driving a vehicle without the owner's consent. He also appeals an order denying his motion for sentence

modification. He argues that his post-sentencing behavior contradicts a psychologist's report and the sentencing court's finding that Malm was feigning mental illness. We affirm the trial court's decision denying the motion without a hearing and the judgment of conviction.

¶2 Malm's competency was questioned throughout the proceedings, resulting in multiple competency reports. A psychologist's report prepared for sentencing opined that Malm understood the proceedings and was able to meaningfully participate. The report also states that Malm's bizarre behavior and actions indicate deliberate malingering and manipulation and that he is disruptive when he does not get what he wants, which is to be sent to the Wisconsin Resource Center. At the sentencing hearing, in addition to considering the seriousness of the offenses, the effect on the victims, Malm's prior record and the need to protect the public, the court found that Malm acted in an intentional and calculated fashion, feigning mental illness in an effort to affect placement.

¶3 Malm's postconviction motion indicated that he has spent much time in segregation due to disruptive behavior in prison. He had also written unintelligible letters to his attorney, the trial court and this court.<sup>1</sup> Malm's motion alluded to "new factor" law, alleges that the court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence, and argued that the sentence was based on an erroneous finding that Malm was feigning a serious mental illness.

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<sup>1</sup> Malm's brief also refers to an unintelligible petition for a writ Malm filed in the trial court. The brief incorrectly states the petition was filed in the Court of Appeals.

¶4 The trial court denied the motion for resentencing, correctly noting that a person suffering from a mental illness is not necessarily incompetent to proceed. The court reaffirmed its competency finding. On appeal, Malm argues that the trial court misconstrued his postconviction motion. He was not seeking a redetermination of his competency to participate in the sentencing hearing, but rather a resentencing.

¶5 The State correctly argues that Malm has not established a “new factor” justifying resentencing. Whether a new factor exists is a question of law that we decide without deference to the trial court. *See State v. Scaccio*, 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. A new factor is a highly relevant fact not known to the trial judge at the time of sentencing, either because it was not then in existence or it was unknowingly overlooked by all of the parties. *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). New evidence regarding facts actually litigated is not correctly termed “new factors.” In addition, a new factor must be one that frustrates the purpose of the original sentence. *See State v. Johnson*, 158 Wis. 2d 458, 466, 463 N.W.2d 352 (Ct. App. 1990). Because the stated purposes of the sentences were not frustrated by evidence of Malm’s continued bizarre behavior, as a matter of law he did not establish a new factor.

¶6 Malm argues that the State also misconstrued his postconviction motion. Without using the terminology or citing any appropriate cases, he now appears to argue that he was sentenced on false information, a reasonable construction of his postconviction motion. A defendant claiming that he was sentenced on inaccurate information must establish that the information was incorrect and the trial court actually relied on it. *See State v. Lynch*, 2006 WI App 231, ¶23, 297 Wis. 2d 51, 724 N.W.2d 656. Malm’s motion does not allege

sufficient nonconclusory facts to entitle him to a hearing. *See State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). The finding that he feigned mental illness for manipulative purposes was supported by the report of a licensed psychologist. Malm's postconviction motion does not allege any examination or report that would contradict this expert opinion. His self-serving behavior and writings and his attorney's diagnosis do not provide an adequate factual basis for compelling a hearing.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

