COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0586-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS L. RICHARDSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 FINE, J. Dennis L. Richardson appeals from an order denying his postconviction motion to modify his sentence. We affirm.

I.

¶2 In March of 1994, a jury found Richardson guilty of five counts of second-degree sexual assault of a child—a fourteen-year-old girl who was babysitting for Richardson's two sons, and one count of false imprisonment of the baby sitter. At the time, Richardson claimed that the baby sitter was lying and had concocted the story in league with Richardson's estranged wife, against whom Richardson had obtained a court order preventing her from seeing the boys. We reversed in an unreported summary disposition because, in our view, the trial court had improperly excluded evidence in support of that defense. The supreme court reversed. ***State v. Richardson***, 210 Wis. 2d 694, 563 N.W.2d 899 (1997). It determined on its own review of the evidence pertinent to Richardson's proffered defense that the "slight" probative value of that evidence was "substantially outweighed" by the potential that the evidence would confuse the jury and distract "from the central issue of Richardson's guilt or innocence." ***Id.***, 210 Wis. 2d at 708–709, 563 N.W.2d at 904–905. Accordingly, it held that the evidence was excludable by virtue of WIS. STAT. RULE 904.03. ***Richardson***, 210 Wis. 2d at 709, 563 N.W.2d at 905.[1]

¶3 On remand, we considered Richardson's alternative argument that the trial court's imposition of three consecutive ten-year sentences of incarceration

[1] Whether to admit or exclude evidence is vested in the trial court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983). Thus, application of the balancing factors in WIS. STAT. RULE 904.03 appears to conflict with ***State v. Franklin***, 148 Wis. 2d 1, 7 n.3, 434 N.W.2d 609, 611 n.3 (1989), which warned: "An appellate court must not exercise the trial court's discretion."

was excessive.[2] In an unreported summary disposition issued in December of 1997, we upheld the sentence as an appropriate exercise of the trial court's discretion.

¶4 In January of 2001, two years after we affirmed the propriety of the three consecutive ten-year sentences, Richardson asked the trial court to modify his sentence. His motion claimed that Richardson had served in Vietnam from 1969 to 1971, had seen significant violent combat, and suffers from Post Traumatic Stress Disorder as a result of his combat service. He contends that his Post Traumatic Stress Disorder was first formally diagnosed in 1996. In support of his motion, Richardson submitted government documents substantiating Richardson's army experiences and verifying that the Veterans Administration had diagnosed him as suffering from Post Traumatic Stress Disorder, an affidavit from his former wife (the woman whom he had claimed at trial and on his earlier appeal had conspired to frame him for the sexual assaults) that Richardson had suffered Stress-Disorder symptoms before the sexual assaults, a letter from a Milwaukee psychologist, and various commendations he received in prison for his participation in alcohol and drug programs.

¶5 Although Richardson's motion before the trial court asserted that Richardson's Stress-Disorder symptoms "was a causative factor in the commission of the crime," the only supporting reference to that contention is the opinion from the psychologist. We quote from the entirety of that portion of the psychologist's

[2] The trial court sentenced Richardson to prison but stayed those sentences in connection with two of the sexual-assault counts, and also imposed but stayed a two-year sentence in connection with the false-imprisonment count. The trial court also placed Richardson on probation for ten years in connection with the imposed but stayed sentences.

opinion that mentions a possible cause-and-effect between Richardson's Post Traumatic Stress Disorder and Richardson's sexual assaults of a fourteen-year-old girl:

> In essence, the data leave little doubt that Mr. Richardson's [Post Traumatic Stress Disorder] contributed to the criminal behavior for which he is incarcerated. The heavy use of alcohol, which is a symptom of [Post Traumatic Stress Disorder], caused diminished capacity to the extent that it is highly probable that he was not aware of his behavior and does not remember it. It is even possible that Mr. Richardson felt he was back in Viet Nam [sic] where sex with girls this age was very common.

Richardson claims that the 1996 diagnosis of his Post Traumatic Stress Disorder is a "new factor" that warrants re-sentencing because "effective treatment for this disorder exists at Veteran's Administration treatment centers" and not in prison. The trial court disagreed. So do we.

II.

¶6 A sentence may be modified 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. ***Ibid.*** Failure to bring to the trial court's attention a matter known by the defendant does not make that matter a new factor. ***Rosado v. State***, 70 Wis. 2d 280, 288–289, 234 N.W.2d 69, 73 (1975). There must also be a nexus between the new factor and the sentence—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).

¶7 Whether there is a new factor is a question of law that we review *de novo*. ***Michels***, 150 Wis. 2d at 97, 441 N.W.2d at 279. A defendant has the burden of proof, and must prove that there is a new factor by clear and convincing evidence. ***State v. Franklin***, 148 Wis. 2d 1, 8–10, 434 N.W.2d 609, 611–612 (1989). If the defendant proves that there is a new factor, the trial court has the discretion to modify the defendant's sentence. ***Michels***, 150 Wis. 2d at 97, 441 N.W.2d at 279.

¶8 As seen, whether something is a new factor is a two-stage inquiry. First, it must be something about which the defendant either did not know or, if he or she did know about it, something that he or she unknowingly overlooked. Second, the matter must be highly relevant to the trial court's exercise of sentencing discretion. We discuss these two elements in turn.

A. *Knowledge*.

¶9 Prior to sentencing, Richardson knew that he was a combat soldier in Vietnam and saw severe stress-causing battle action. He also knew that he suffered from Stress-Disorder symptoms. The affidavit submitted by Richardson's former wife indicates that she met him in July of 1986, and that he suffered various episodes of what Richardson's brief on this appeal calls "classic symptoms" of Post Traumatic Stress Disorder. Thus, she recounts that he once "woke from a sound sleep, turned to me, called me a 'gook', and proceeded to choke me." Other times, he "would wake up after being asleep and talked [sic] about being in the front lines." That there were also times when Richardson:

> would get up from a sound sleep with a glazed look in his eyes. He looked like he was in a trance. When he got this look in his eyes, he would usually mention something about Vietnam. Often the odd look in his eyes would be accompanied by heavy breathing and sweating.

These episodes were accompanied by his mention of Vietnam and would occur "one to two times per month."

¶10 Richardson also knew before sentencing that in 1993, when he was a truck driver, he drank heavily. In her affidavit, Richardson's former wife averred that the incidents were accompanied by "a glazed look in his eyes," and he would "mention something to do with the war in Vietnam." The incidents "began to reoccur at the rate of one or two times per month." She also asserted that the "last trance like episode" during which Richardson referred to Vietnam "occurred several months prior to December 4, 1993, the day on which he committed the sexual assault[s]."

¶11 Richardson never mentioned during his trial testimony that he had blacked out the night and early morning of the sexual assaults. Indeed, he testified that he only spent "roughly about fifteen minutes, ten to fifteen" alone with the baby sitter before leaving on a tavern run. According to his trial testimony, he later took a taxi home because he was intoxicated. He said that he had called for the taxi at either 12:30 or 1:00 a.m. He told the jury that when he arrived home he "went upstairs and woke up [the baby sitter], asked her if she wanted to go home, she was more than welcome to." In response, she "just shook her head." He testified that he then went downstairs and fell asleep. Significantly, he told the writer of the pre-sentence report that "he was drunk but not in an alcoholic blackout," and that he also "stated he has had a blackout on one occasion and knows what they are."

¶12 Although, of course, it is possible, as Richardson surmises on appeal, that he testified the way he did and told the writer of the pre-sentence report that he did not black out that night because he had in fact blacked out but

did not remember doing so, the basic flaw in Richardson's tacit claim that he did not know before sentencing that he suffered from Post Traumatic Stress Disorder despite the plethora of Stress-Disorder symptoms that he admittedly suffered before he was sentenced, is that there was *substantial physical* evidence at trial that not only was the baby sitter assaulted, but that *he* committed those assaults. As ***Richardson*** recounts:

> Richardson's bed-sheets, the victim's shirt, her bicycle shorts and a vaginal swab were all positive for semen. The semen was tested and the blood and enzyme markers were found to be consistent with those of Richardson. Hairs that were consistent with [the baby sitter]'s hair and other hairs that were consistent with the defendant's hair were found in the bed-sheets.

Richardson, 210 Wis. 2d at 703, 563 N.W.2d at 902. Simply put, Richardson's ejaculate was all over—including in the victim. If his protestation of innocence at trial was because he had, in fact, blacked out and not only did not remember assaulting the baby sitter but also did not remember blacking out, then the physical evidence *had to* point to a black out, and the cause of that black out was evident: what was later formally diagnosed as Post Traumatic Stress Disorder. Stated another way, he is *either* lying now about having blacked out when he assaulted the baby sitter, *or* the cause of that black out, if true, was clear. There is no other possibility. Thus, he has not satisfied by the requisite clear-and-convincing-evidence standard that he unknowingly overlooked what he now claims to be a new factor.

B. *Relevance to sentencing decision.*

¶13 As noted, before a matter can be a new factor it must be highly relevant to the sentencing court's sentencing rationale. Underlying Richardson's assertion that his Post Traumatic Stress Disorder is a new factor is his contention

that, as phrased in his motion before the trial court, "effective treatment for this disorder exists at Veteran's Administration treatment centers." But the trial court never mentioned possible "treatment" or rehabilitation as a sentencing consideration.

¶14 In sentencing Richardson, the trial court considered the following factors:

- the seriousness of the crimes;
- the impact on the victim;
- Richardson's work history; and
- the effect on Richardson of his then pending divorce.

A matter is "not a relevant factor unless the [trial] court *expressly* relies" on it at sentencing. ***Franklin***, 148 Wis. 2d at 15, 434 N.W.2d at 614. (Emphasis added.) Thus, Richardson's alleged new factor fails the second test as well.[3]

By the Court.—Order affirmed.[4]

Publication in the official reports is not recommended.

[3] We therefore do not consider whether the psychologist's bizarre *ipse dixit* opinion, wholly unsupported by *any* reference to *any* learning in the field, that Vietnam-related Post Traumatic Stress Disorder "contributed" to the rape of a fourteen-year-old girl is sufficient to trigger an evidentiary hearing on that issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

[4] Richardson's in-prison commendations do not, of course, constitute a new factor. ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468, 471 (1997) ("rehabilitation is not a 'new factor' for purposes of sentence modification").

¶15 SCHUDSON, J. (*dissenting*). As the majority acknowledges, a new factor that may merit sentence modification is one 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." Majority at ¶6. Here, Richardson's motion for sentence modification clearly and specifically alleged a new factor that, in two ways, was highly relevant to his sentence.

¶16 Richardson was sentenced in 1994 but, according to his postconviction motion, was not diagnosed as suffering from post-traumatic stress disorder (PTSD) until 1996. The psychologist's report submitted in support of Richardson's motion stated that "the data leave little doubt" that Richardson's PTSD "contributed to the criminal behavior for which he is incarcerated" and, further, that "it is highly probable that he was not aware of his behavior and does not remember it."

¶17 At the 1994 sentencing, however, although information about Richardson's alcohol abuse and other behavior was presented, that information was not connected to his yet-to-be-diagnosed PTSD. In fact, PTSD was never even mentioned.

¶18 At sentencing, the court emphasized that Richardson was "being totally unrepentive, not accepting any responsibility" for his crimes. The trial court sentenced him to thirty years in prison followed by additional stayed sentences and ten years' probation.

¶19 Richardson accurately argues that his PTSD diagnosis was highly relevant to two factors that apparently were critical to the sentencing court: 1) his acceptance of responsibility for his crimes; and 2) the need for community protection. Richardson's acceptance of responsibility depended, at least in part, on his ability to realize that he committed them. The community's protection depended, at least in part, on whether he suffered from a treatable condition that may have contributed to his commission of the crimes.

¶20 Denying the Richardson's motion, the postconviction court, not the sentencing court, wrote:

> The primary purpose of the sentence here was community protection due to the extreme seriousness of the offense. This purpose is not frustrated by a 30% PTSD disability rating or a licensed psychologist's opinion that the defendant's heavy use of alcohol—which is a symptom of PTSD—probably caused him not to remember the sexual assault incident.

Additionally, the postconviction court emphasized that Richardson had denied the offense and had mentioned nothing about a blackout. The State emphasizes that the postconviction court "indicated the purpose of the sentence was 'unequivocally the need for community protection from a dangerous individual.'" Both the postconviction court and the State simply miss the point.

¶21 First, if Richardson could prove what he represented in his motion—that he suffered from PTSD and may have suffered a PTSD-blackout when he committed the crimes—he would be able to establish that he could have had no realization of his crimes. Thus, he would be able to establish that what appeared to the sentencing court as his refusal to accept responsibility could well have been the result of PTSD and that, obviously, would have influenced the way the sentencing court considered his "being totally unrepentive."

¶22 Second, if Richardson could prove what he represented in his motion—that his PTSD is a treatable condition—he would be able to establish that treatment could be an appropriate and effective component of his sentence. Thus, he would be able to establish that community protection might well depend on treatment, which, in turn, would influence the length of imprisonment and probation the sentencing court would conclude was necessary.

¶23 The majority's answer to these rather clear propositions makes little sense. The majority writes:

> Although, of course, it is possible, as Richardson surmises on appeal, that he testified the way he did [at trial, never mentioning that he had blacked-out] and told the writer of the pre-sentence report that he did not black out that night because he had in fact blacked out but did not remember doing so, the basic flaw in Richardson's tacit claim that he did not know before sentencing that he suffered from Post Traumatic Stress Disorder despite the plethora of Stress-Disorder symptoms that he admittedly suffered before he was sentenced, is that there was *substantial physical* evidence at trial that not only was the baby sitter assaulted, but that *he* committed those assaults.

Majority at ¶12. The majority then quotes the supreme court's summary of the evidence, and concludes:

> Simply put, Richardson's ejaculate was all over—including in the victim. If his protestation of innocence at trial was because he had, in fact, blacked out and not only did not remember assaulting the baby sitter but also did not remember blacking out, then the physical evidence *had to* point to a black out, and the cause of that black out was evident: what was later formally diagnosed as Post Traumatic Stress Disorder. Stated another way, he is *either* lying now about having blacked out when he assaulted the baby sitter, *or* the cause of that black out, if true, was clear. There is no other possibility. Thus, he has not satisfied by the requisite clear-and-convincing-evidence standard that he unknowingly overlooked what he now claims to be a new factor.

Id.

¶24 The majority's reasoning is difficult to follow; indeed, it reads more like a sufficiency-of-evidence analysis than an evaluation of whether Richardson's postconviction motion for sentence modification merited an evidentiary hearing. How does the substantial evidence of Richardson's commission of the crimes, summarized by the majority, establish what the majority terms "the basic flaw in Richardson's tacit claim that he did not know before sentencing that he suffered from Post Traumatic Stress Disorder"? *See* ***id.*** One has nothing to do with the other.

¶25 It is undisputed that Richardson did not know that he suffered from PTSD, and had been suffering from PTSD at the time of his crimes, until he was diagnosed in 1996. Only the majority suggests otherwise. The fact that Richardson, prior to sentencing, had shown symptoms subsequently associated with PTSD—a fact of apparent importance to the majority, *see* majority at ¶¶9-10—is irrelevant to the issue on appeal (except, perhaps, that it establishes the plausibility of Richardson's premise that, in fact, he *was* suffering from PTSD when he committed the crimes).

¶26 Richardson's postconviction motion was very specific, accompanied by documentation of critical information including: (1) his extensive and traumatic service in Vietnam; (2) his Veteran's Administration rating of thirty percent disability resulting from his "service[-]connected post traumatic stress disorder"; (3) evidence of his PTSD-like symptoms during the time he committed the crimes; and (4) information about PTSD, its symptoms, and its amenability to treatment. Never have I seen a postconviction motion for sentence modification that so

precisely and completely establishes the legal bases for the requested evidentiary hearing.

¶27 Richardson is serving thirty years in prison for crimes he says he does not remember committing, and did not remember at the time of sentencing. The majority, however, says Richardson "is either lying now about having blacked out when he assaulted the baby sitter, or the cause of the black out, if true, was clear." Majority at ¶12. The majority's credibility determination is beyond this court's proper scope of review; its certainty is unsupported by law or logic.

¶28 Is Richardson lying? I do not know. But, unquestionably, Richardson has established the basis for an evidentiary hearing so that the trial court can find out. And is sentence modification warranted? I do not know that, either. But the trial court, following an evidentiary hearing, will find the facts and, then and only then, can attempt to reach a proper conclusion. Because the majority would deny the trial court the chance to properly evaluate Richardson's motion by conducting an evidentiary hearing, I respectfully dissent.