

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2008

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. 2007AP2434-CR

Cir. Ct. No. 2004CF4650

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CALVIN ELEBY, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Calvin Eleby, Jr., appeals from an order summarily denying his motion for sentence modification. We conclude that Eleby's status on extended supervision, which renders him ineligible for certification as a teacher in the Illinois public school system which, he claims, would facilitate his payment of

restitution, does not constitute a new factor warranting sentence modification. Therefore, we affirm.

¶2 Eleby, a former lawyer, pled guilty to two counts of theft in a business setting, in violation of WIS. STAT. § 943.20(1)(b) (2001-02), for misappropriating clients' funds for his own use. The trial court imposed two four-year concurrent sentences, comprised of one- and three-year respective concurrent periods of initial confinement and extended supervision. After being released from prison to extended supervision, Eleby sought certification as a teacher in the Illinois public school system; however, a convicted felon is ineligible to teach in that school system until one year after completing service of his or her sentence. Two weeks into his extended supervision term, Eleby moved for sentence modification, contending that his status on extended supervision, imposed partially to afford him the time to pay the entire amount of the \$41,514.95 restitution ordered, was rendering him ineligible to obtain his teaching certification and employment, which were hindering his ability to pay the restitution ordered. The trial court summarily denied the motion. Eleby appeals.

¶3 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.”

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (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). We use a two-part standard of review.

Whether a new factor exists is a question of law, which we review de novo. The existence of a new factor does not, however, automatically entitle the defendant to relief. The question of whether the sentence warrants modification is left to the discretion of the [trial] court.

State v. Trujillo, 2005 WI 45, ¶11, 279 Wis. 2d 712, 694 N.W.2d 933 (quotation marks and citations omitted).

¶4 Eleby contends that his status on extended supervision is a prohibitive factor in his obtaining the employment necessary to pay the restitution ordered. As such, Eleby contends that his extended supervision is frustrating the purpose of the original sentence, which was restitution. Incident to that contention, Eleby reminded the trial court that he had been teaching in the Michigan public school system while studying to obtain his teaching degree. Having received his degree, he had been seeking employment in Illinois as a teacher, however, at the time of sentencing he did not know that Illinois precludes a convicted felon who is still serving his or her sentence to wait one year from the completion of his or her sentence to become eligible for certification as a teacher. He consequently contends that had the trial court realized that circumstance, it would not have imposed such a lengthy term of extended supervision that was structured to facilitate his full payment of restitution.

¶5 The trial court disagreed, ruling that the purposes of the original sentence were “punishment and deterrence. The defendant’s inability to obtain employment as a substitute teacher does not frustrate th[at] purpose ... and thus, he has not set forth a new factor. Further, the court perceives no reason why the defendant cannot obtain employment in some other field.”

¶6 Although the trial court was mindful that it was imposing approximately \$41,000 in restitution to be paid during a four-year sentence, the purposes of the sentence were punishment and deterrence. The term of extended supervision was three times the length of the term of initial confinement because the trial court recognized that Eleby was “a high character guy in spite of what he did.” The trial court was concerned with how Eleby “disgrace[d]” himself, his family, his friends, and the legal profession; however, it was mindful that he was a man of “strong character,” who “has taken steps to right a wrong or a number of wrongs,” and who would likely become “a very big asset to the community in the future.” At the conclusion of the hearing, the trial court merely mentioned that Eleby would have four years to pay restitution. The transcript of the trial court’s sentencing remarks does not support his contention that the principal purpose of the sentence structure was to allow the payment of restitution.

¶7 We recognize that Eleby’s employment and correlative plans to pay restitution have not developed as he had expected. Reducing his sentence however, to comply with Illinois’ eligibility requirements for a teaching certificate, is not “highly relevant” to the sentence imposed, nor does that claimed new factor “frustrate[] the purpose of the original sentence.” *Michels*, 150 Wis. 2d at 96, 99. It is Eleby’s conviction for theft that is obstructing his employment efforts, not his status on extended supervision per se. Although it is expected that Eleby will have paid the full amount of restitution by the time he completes his sentence, if circumstances have changed and he has been unable to meet his restitution obligation, he may seek modification. See *State v. Dugan*, 193 Wis. 2d 610, 625, 534 N.W.2d 897 (Ct. App. 1995). Additionally, if he has not satisfied

his restitution obligation and modification is not warranted, the remaining amount is enforceable as civil judgment against him. WIS. STAT. § 973.20(1r) (2005-06).¹

By the Court.—Order affirmed.

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

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

