

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2009

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 Nos. 2009AP11-CR
2009AP12-CR**

**Cir. Ct. Nos. 2008CF1860
2008CF2608**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEDRICK B. SALLIS,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: WILLIAM SOSNAY and MARTIN J. DONALD, Judges.
Affirmed.

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

¶1 PER CURIAM. Dedrick B. Sallis appeals from two judgments of conviction for two counts of robbery and two counts of assault by a prisoner, and

from orders denying his related motions for sentence modification and reconsideration.¹ The issues are whether sentence modification is warranted for the trial court's alleged failures to consider Sallis's extensive mental health problems, and to order a presentence investigation report. We conclude that, insofar as the trial court did not consider every aspect of Sallis's mental health problems, Sallis has not clearly and convincingly demonstrated how any of the material not considered constituted a new sentencing factor, and that the trial court properly exercised its discretion in proceeding to sentencing as requested immediately after Sallis entered his guilty pleas. Therefore, we affirm.

¶2 Sallis pled guilty to two counts of armed robbery with the use of force, in violation of WIS. STAT. § 943.32(2) (2007-08), and to two counts of assault by a prisoner (for throwing urine at two correctional officials), in violation of WIS. STAT. § 946.43(2m)(a) (2007-08).² For the robberies, the trial court imposed twenty- and twenty-two-year concurrent sentences divided into ten- and eleven-year concurrent periods of initial confinement and extended supervision. Both sentences were imposed to run concurrent to each other, but consecutive to any other sentence. For the assaults, the trial court imposed consecutive sentences of two and three years, each including a one-year period of initial confinement.

¶3 Sallis moved for sentence modification, contending that his mental state was "insufficiently determined" at the time he committed these offenses, and

¹ These cases were consolidated for trial court proceedings. The Honorable William Sosnay accepted Sallis's guilty pleas and imposed sentence in both cases. The Honorable M. Joseph Donald denied the consolidated motions for sentence modification and for reconsideration.

² All references to the Wisconsin Statutes are to the 2007-08 version.

that a presentence investigation report would have revealed more of his mental state to the trial court before it imposed sentence. The trial court denied the motion. Sallis moved for reconsideration, attaching medical and psychological records and reports. The trial court denied reconsideration, ruling that none of the additional materials demonstrated a connection between Sallis's mental health problems and the offenses that he committed. Sallis appeals.³

¶4 Sallis seeks sentence modification on the basis of a new factor, namely that the trial court did not fully consider his mental health when it imposed sentence. 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.

³ These appeals have been consolidated for briefing and dispositional purposes.

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

¶5 Sallis contends that the trial court erroneously exercised its discretion by failing to fully consider his mental health problems and their effect on his mental state when he committed these crimes, resulting in the imposition of an unduly harsh and excessive sentence. He also contends that his psychological records and reports constitute a new sentencing factor warranting sentence modification. We disagree; the trial court was aware of Sallis’s mental health problems as evidenced by its sentencing remarks. The trial court’s reasoning dissuades us that its sentences were unduly harsh or excessive. Sallis has also failed to demonstrate, much less clearly and convincingly, that the specific records or reports constitute a new sentencing factor.

¶6 Preliminarily, the trial court conducted the plea and sentencing hearings together because Sallis told the trial court that he preferred to be sentenced immediately after he entered his guilty pleas. The trial court knew, from reviewing Sallis’s guilty plea questionnaire and waiver of rights forms, that he was “currently receiving treatment for a mental illness or disorder” and that he had taken Haldol and Cogentin within the last twenty-four hours. The trial court asked why Sallis was taking those medications, and Sallis responded that he was “[b]ipolar.” The trial court then asked Sallis directly if that medication “in any way affect[s his] ability to understand what [the trial court has] said to [him],” and if he “[clearly] understood everything that [the trial court had] said”; Sallis confirmed that he had. The trial court then commented that based on its

own personal observations of [Sallis], he is very alert, he is very responsive, he’s very calm, direct, and is understanding, and had there not been an entry or a note here that he was taking medication, [the trial court] would

have never suspected it, which reinforces the court's observations that the defendant does understand these proceedings.

¶7 The trial court also asked Sallis's counsel whether he also believed that Sallis understood the proceedings, and agreed that the medication Sallis was taking did not interfere or adversely affect Sallis's understanding of the proceedings. Sallis's counsel responded:

Yes, I agree. He is on medication, he's been clear and lucid when I've talked to him, he's understood the facts of the case, the law, his options, and his competency has not been a question for me at all. And I've represented him since the initial appearance in the armed robbery case.

Sallis's trial counsel also told the trial court in his sentencing presentation that Sallis had attempted suicide, and had been diagnosed as suffering from bipolar disorder and attention deficit disorder, and that he had been taking "a number of medications at Mendota [Mental Health Institute], [including] Abilify, Risperdal, Trazodone and Remeron," and had continued with psychotropic medications.

¶8 Sallis's mother addressed the trial court, explaining the need for Sallis to continue his medication; she questioned whether he had been taking his medications as prescribed when he committed the assaults against the correctional officers. When questioned by the trial court, the officers were unaware of whether Sallis had been taking his medication at the time of the assaults.

¶9 The trial court also engaged Sallis in a specific discussion of the facts of the offenses, to which Sallis responded in detail, demonstrating an understanding of the factual bases for the offenses, and the extent of and motives for his participation in these offenses. In fact, Sallis explained why he threw urine at the correctional officials (assault by a prisoner):

Because I – I wanted to get to the county jail because I didn't feel me bein' in the House of Correction would benefit me any – any more than I already was. I knew people that I was getting along with, and if they got into trouble I already knew I was going to get in trouble right along with them, so I went about asking the CO's and the correction managers to – to send me back to the county jail for about three weeks, and they wouldn't, so I did the next thing.

The trial court explicitly confirmed with Sallis that Sallis threw cups of urine at two correctional officers because, as Sallis told the trial court, “it gives you an opportunity to get to the county jail, regardless.” Sallis also told the trial court that he committed the robberies because he wanted money for cocaine.

¶10 The trial court began its sentencing remarks by commenting that all that was said was “very informative” and “put[] in context a lot of what happened.” The trial court expressly acknowledged Sallis's mental health needs, stating that “obviously if you suffer from a bipolar disorder you need to take medication, and it should be medication that should be monitored.” It also ordered an evaluation by the mental health unit to diagnose and treat Sallis's mental disorder(s) including prescribing and dispensing the proper medication and monitoring Sallis.

¶11 The trial court was mindful of and considered Sallis's mental health problems. However, trial counsel did not, nor does appellate counsel, show any relationship between Sallis's mental health problems and the offenses he committed. The trial court properly considered Sallis's mental health concerns incident to his character and to his rehabilitative needs; it did not erroneously exercise its discretion.

¶12 A sentence is unduly harsh when it is “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and

violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). “A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); see *State v. Owen*, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996).

¶13 The robberies each carry a maximum potential sentence of forty years. See WIS. STAT. §§ 943.32(2); 939.50(3)(c). The assaults by a prisoner each carry a maximum potential sentence of three years, six months. See WIS. STAT. §§ 946.43(2m)(a); 939.50(3)(i). An aggregate total sentence of twenty-seven years, thirteen years of which Sallis will serve in initial confinement for robbing two people and stealing their car, and throwing urine at correctional officials (two different officials on consecutive days) for the express purpose of obtaining a transfer to a different correctional facility “is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” See *Daniels*, 117 Wis. 2d at 22. We reject Sallis’s claim that his sentences were unduly harsh and excessive.

¶14 Sallis moved for sentence modification on the basis of a new factor, namely the full extent of his mental condition. For the previously mentioned reasons, we independently conclude that Sallis has not clearly and convincingly shown that his mental condition is a new factor. First, the trial court was aware of his condition; it was not overlooked. Second, postconviction counsel did not explain how any of Sallis’s mental health problems caused him to commit these

crimes. Stated otherwise, Sallis has not clearly and convincingly shown how his mental condition was “highly relevant to the imposition of sentence.” *Franklin*, 148 Wis. 2d at 8. We reject Sallis’s new factor contention.

¶15 On reconsideration, Sallis proffered medical records and a report to demonstrate the severity of his mental health problems and the issues that they have caused for many years. The trial court denied Sallis’s motion because the trial court that sentenced Sallis “accepted that [he] had mental health issues, including bipolar disorder but found that the defendant’s actions were ‘just deplorable’ and that there was ‘no excuse for it or any justification, whatever the reason.’” The additional materials provided by the defendant do not link his mental health problems to his mental state at the time he committed the offenses.” Sallis has not shown, much less clearly and convincingly, that the trial court was unaware of his mental health when it imposed sentence, or that there was any connection between his condition and the commission of these crimes.

¶16 Sallis moves to supplement the records while these appeals are pending with additional medical records and reports to document, among other things, his recent suicide attempt. We deny the motion. We cannot consider materials in the appellate record that were not in the trial court record. *See State v. Aderhold*, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979).

¶17 Sallis’s remaining challenge is to the trial court’s failure to order a presentence investigation report. Ordering such a report is discretionary. *See Weatherall v. State*, 73 Wis. 2d 22, 33, 242 N.W.2d 220 (1976). According to Sallis’s trial counsel, Sallis sought to proceed immediately with sentencing. Despite the potential advantages of the trial court first obtaining a presentence

investigation report, Sallis rejected that option. As trial counsel told the trial court:

Again, the kind of person he is, number one, is that he wanted to plead guilty at an early date, get these matters resolved. We discussed a presentence investigation. That may be helpful to him or what have you, [but] he said, no, I want to plead guilty and I want to be sentenced and get it done with because of what I've done. So I think he's to be – he should be given some credit for that as well in terms of early resolving these matters.

¶18 Sentence modification is not warranted for the trial court's failure to order a presentence investigation report. The trial court proceeded as Sallis wanted. Sallis sought to receive credit at sentencing for his desire to resolve these cases quickly. He now seeks sentence modification for the trial court's failure to order a presentence investigation report. He cannot have it both ways.⁴ Sentence modification is not warranted for the failure to obtain a presentence investigation report.

By the Court.—Judgments and orders affirmed.

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

⁴ Sallis also blames his trial counsel for failing to request a presentence investigation report. According to Sallis's counsel, he did not request a report because Sallis rejected that option and wanted to proceed directly to sentencing. Sallis's counsel cannot be blamed for following Sallis's instructions.

