

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2014

Diane M. Fremgen
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. 2013AP1156-CR

Cir. Ct. No. 1993CF934339

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS LLOYD RICHARDSON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Dennis Lloyd Richardson appeals an order denying his motion to modify his sentence. He argues that his sentence should be modified because: (1) he is not receiving adequate medical care in the Wisconsin prison system for his Post-Traumatic Stress Disorder (PTSD); and (2) the

Department of Corrections has deprived him of an opportunity to be released on parole by failing to timely offer him treatment programs required for his release. We affirm.

¶2 Richardson was convicted of five counts of second-degree sexual assault of a child and one count of false imprisonment in 1994. He was sentenced to an aggregate term of thirty years in prison, and a consecutive stayed sentence of twenty-two years in prison. On appeal, we affirmed the judgment of conviction. In 2001, Richardson moved to modify his sentence, arguing that he was suffering from post-traumatic stress disorder when he committed the crimes and the circuit court did not consider that information in sentencing him. The circuit court denied the motion and we affirmed on appeal. In 2013, Richardson filed the current motion to modify his sentence. The circuit court denied the motion.

¶3 Richardson first argues that his sentence should be modified to time served because he is not receiving adequate medical treatment in prison for his PTSD. He requests release to the Veterans Administration Hospital, where treatment for PTSD is available to him. In support of his motion, Richardson has submitted letters from Dr. Peter S. Rahko, M.D., Professor of Cardiovascular Medicine, University of Wisconsin School of Medicine, and Dr. Burton J. Fredenthal, Ph.D., a licensed psychologist.¹

¹ The Assistant Attorney General completely overlooks Dr. Rahko's letter documenting Richardson's condition in her respondent's brief, stating that Richardson's claim is based only on the letter of Dr. Fredenthal. While we have no reason to believe the oversight was intentional, we direct counsel to more thoroughly review the record in the future to prevent making inaccurate factual assertions to this court.

¶4 Dr. Rahko states that Richardson is 100% disabled due to his heart disease. Dr. Rahko states that Richardson's premature coronary disease, which has caused a heart attack, cardiac arrest, heart failure and other cardiac problems, was likely caused by his exposure to an herbicide during his military service in Vietnam. With regard to Richardson's PTSD, Dr. Rahko states:

You also suffer from post-traumatic stress disorder, which has been a very difficult problem for you for many years, and also clearly is related to your prior military service. My feeling is, and as I have expressed in writing in the past, that your PTSD has contributed to increasing levels of stress, which has most likely led to further progression of your heart disease. Constant stressful stimulation is detrimental to a person with your type of heart disease. It continues to be my feeling, as it has been for the last several years, that you would be best served by continuing vigorous treatment for the PTSD. Better control of PTSD, I think would also help the overall long-term treatment of your heart disease.

¶5 Dr. Fredenthal states that he conducted a psychological evaluation of Richardson to determine what, if any, effects the lack of appropriate treatment for Richardson's PTSD has had on his emotional, psychological and physical well-being. In addition to his own evaluation, Dr. Fredenthal states that he reviewed trial transcripts, psychiatric and psychological reports, Richardson's military records and current literature on the treatment of PTSD in veterans. Dr. Fredenthal states:

Mr. Richardson had aged considerably since I last saw him twelve years ago....

The current evaluation, combined with the voluminous data described above leaves little doubt that the lack of appropriate treatment for Mr. Richardson's PTSD has caused extreme pain and suffering, physical, emotional and/or psychological. He still suffers from night terrors that are sometimes violent, chronic depression and panic attacks. He currently has developed Meniere's disease with nausea, dizziness and vertigo and migraine headaches....

It is important to note that Mr. Richardson is currently taking some thirteen or fourteen prescribed medications, both for physical and psychological disorders. There is no way of knowing what the synergistic effects of these drug interactions have on his health and well-being. [This is] [a]nother reason placement at the VA would help stabilize him.

¶6 The letters from Dr. Rahko and Dr. Fredenthal provide a solid factual basis for Richardson’s claim that he is being harmed by inadequate treatment for his PTSD—a basis solid enough to warrant a hearing on the question—but the legal basis for Richardson’s argument that he is entitled to *sentence modification* based on these factual assertions is lacking. In his postconviction motion, Richardson primarily argued the prison’s inadequate medical treatment is a “new factor,” but briefly argued that his rights under the Eighth Amendment were also being violated. On appeal, Richardson focuses on his Eighth Amendment claim. We will address both arguments.

¶7 A defendant is entitled to sentence modification if he or she shows the existence of a “‘new factor.’” *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). 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.*, 333 Wis. 2d 53, ¶40 (citation omitted).

¶8 Assuming that Richardson’s allegations that the Department is not adequately treating his PTSD are true, this failure and Richardson’s medical condition are not “new factors” entitling Richardson to sentence modification because Richardson’s health condition was not highly relevant to the imposition of his sentence. Although the sentencing court was informed that Richardson had

some health problems, nothing in the court’s explanation of the reasons for its sentence suggests that Richardson’s health had any bearing on the sentence it imposed. Therefore, Richardson has not shown that he is entitled to sentence modification based on a new factor.

¶9 Turning to Richardson’s Eighth Amendment claim, “[i]n order to prevail, an inmate must establish that a serious medical need was ignored, and that the prison officials were deliberately indifferent to the prisoner’s condition.” *Cody v. Dane Cnty.*, 2001 WI App 60, ¶10, 242 Wis. 2d 173, 625 N.W.2d 630. “A ‘serious medical need’ means that the illness or injury is sufficiently serious or painful to make the refusal of assistance uncivilized.” *Id.*

¶10 The problem with Richardson’s Eighth Amendment claim is that even if he were to establish, after a hearing, that the prison system does not treat PTSD and its failure to do so has had severe detrimental effects on his health, Richardson would not be entitled to *sentence modification* as a remedy for this problem, which is the relief he seeks. He would be entitled “only to corrective measures directed to changing the conditions of confinement.” *State v. Krieger*, 163 Wis. 2d 241, 259, 471 N.W.2d 599 (Ct. App. 1991). Prisoners are entitled to challenge the conditions of their confinement by writ or a cause of action pursuant to 42 U.S.C. § 1983 for deprivation of a constitutional right, but they are not entitled to sentence modification based on adverse conditions of confinement. *Krieger*, 163 Wis. 2d at 259-60. As explained in *Krieger*, “[t]he enforcement of the eighth amendment’s prohibition is not accomplished by a sentence modification because that would do nothing to improve the conditions of confinement to insure the physical and mental well-being of the inmates.” *Id.* at

260. Richardson is not entitled to sentence modification based on his assertion that he is not receiving adequate treatment for his PTSD.²

¶11 Richardson next argues that his sentence should be modified to time served because the Department failed to offer him sex offender treatment until eleven months prior to his mandatory release date. Richardson contends that this effectively deprived him of an opportunity to be released on parole when he became eligible because the Parole Commission would not allow his release until he completed treatment and other recommended programming. “An issue is moot when its resolution will have no practical effect on the underlying controversy.” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis.2d 685, 608 N.W.2d 425. According to Richardson’s brief, he enrolled in the sex offender treatment program on June 28, 2012, and the program takes eleven months to complete. Based on Richardson’s representations, he should have completed the program nearly a year ago. Therefore, the Department’s failure to provide him access to the program is moot.

By the Court.—Order affirmed.

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

² The Department should meaningfully provide for Richardson’s medical needs. Prisoners are entitled to challenge the conditions of their confinement by writ or cause of action pursuant 42 U.S.C. § 1983 for deprivation of a constitutional right if they are not receiving necessary medical treatment.

