

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1181-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK W. JAKUBIEC,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kewaunee County:
DENNIS J. MLEZIVA, Judge. *Affirmed.*

Before Cane, P.J., Myse and Carlson, JJ.

PER CURIAM. Frank Jakubiec appeals an order denying his motion to modify his sentence based on a "new factor." Because Jakubiec failed to establish a new factor, we affirm the order.

Jakubiec entered no contest pleas to four crimes: attempted first-degree intentional homicide, felon in possession of a firearm, burglary and forgery. He was sentenced to ten years in prison followed by five years' probation. In his motion to modify his sentence based on new factors, he contends that recent discovery of a mental illness, bi-polar disorder, and his psychiatrist's testimony that this disorder is effectively treated with lithium and that his prognosis is excellent constitutes a new factor justifying a reduction in his sentence.

The burden is on Jakubiec to demonstrate the existence of a new factor by clear and convincing evidence. *State v. Franklin*, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611 (1989). This court reviews the set of facts presented by Jakubiec without deference to the trial court to determine whether he has established a new factor. See *State v. Hegwood*, 113 Wis.2d 544, 546-47, 335 N.W.2d 399, 400 (1983).

A "new factor" is a fact or set of facts highly relevant to the imposition of sentence, but unknown to the trial judge at the time of the 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.* at 547, 335 N.W.2d at 401. To qualify as a new factor, Jakubiec's undiagnosed mental illness must be an event or development that frustrates the purpose of the original sentence. *State v. Michels*, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). There must be some connection between the factor and the sentence--something that strikes at the very purpose for the sentence selected by the trial court. *Id.*

Jakubiec's undiagnosed mental illness does not constitute a new factor. The sentence was based in part on Jakubiec's need for rehabilitation services. The trial court expected that his problems would be diagnosed and treated in the prison. The diagnosis of his mental illness and the treatment fulfill, not frustrate, the trial court's sentencing expectations. In addition, Jakubiec failed to prove any connection between his mental illness and the crimes he committed. As the trial court noted, it is hard to attribute the widely divergent types of crimes Jakubiec committed with his mental illness. In the absence of a clear nexus between the crimes and the illness, the diagnosis of the mental illness does not constitute a new factor.

Finally, Jakubiec challenges the trial court's statement that the assaultive nature of the attempted murder precluded intensive sanctions. The trial court made that statement in its memorandum decision following the postconviction hearing as it generally summarized its attitude at the time of sentencing. The statement does not relate to the trial court's decision to deny the motion based on new factors, but relates to its initial sentencing decision. The initial sentencing decision is not before this court on an appeal from an order denying a motion to modify the sentence based on new factors. To obtain review of alleged sentencing errors, Jakubiec had to file motions and appeal under RULE 809.30, STATS. See *State v. Scherreiks*, 153 Wis.2d 510, 516, 451 N.W.2d 759, 761 (Ct. App. 1989).

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.