

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 24, 2001**

Cornelia G. Clark  
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.

**No. 01-0695-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**AGRIPINO BARBOSA,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

¶1 SNYDER, J.<sup>1</sup> Agripino Barbosa appeals from three judgments of conviction and an order denying him postconviction relief. Barbosa argues that the trial court relied on inaccurate information in sentencing and therefore sentence modification is warranted. While inaccurate information was presented

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

to the trial court at sentencing, the trial court did not rely on the majority of the inaccurate information in arriving at its sentencing conclusion. Furthermore, the remaining inaccurate information had only a de minimus effect on the trial court's decision. We therefore affirm the order denying sentence modification and affirm the judgments of conviction.

### FACTS

¶2 On February 2, 2000, pursuant to a plea agreement, Barbosa pled guilty to disorderly conduct, criminal trespass to a dwelling and obstructing an officer, all as a repeat offender. The State agreed to recommend probation on the disorderly conduct charge, but retained a "free hand" to argue with respect to the remaining two charges.

¶3 Barbosa's sentencing took place on February 17, 2000. The State presented a detailed sentencing argument, including the statements that: (1) Barbosa had consumed narcotics while on probation; (2) a white, rock-like substance found in a vehicle in which Barbosa was a passenger had tested positive for cocaine; and (3) Barbosa had a juvenile adjudication for armed robbery. The State recommended five years in prison for the criminal trespass to a dwelling and obstructing an officer charges, with consecutive probation for the disorderly conduct charge. The trial court sentenced Barbosa to a total of six years in prison with consecutive probation.

¶4 On January 15, 2001, Barbosa filed a motion for sentence modification. As grounds for his motion, Barbosa alleged that the trial court relied on erroneous information in sentencing him. Specifically, Barbosa alleged that: (1) he had *not* consumed narcotics while on probation but had only admitted using marijuana; (2) the white, rock-like substance found in a vehicle in which he was a

passenger had *not* tested positive for cocaine; and (3) he did not have a juvenile adjudication for *armed* robbery but for robbery.

¶5 A hearing was held on this motion for sentence modification on March 2, 2001. The trial court held that even if the reference to narcotics consumption and an armed robbery versus a robbery was inaccurate, the court did not rely on this information in sentencing Barbosa. The court acknowledged that the statement about the substance found in the car where Barbosa was a passenger testing positive for cocaine was inaccurate, but found that taken in the context of the remainder of the court's sentencing, the statement did not prejudice Barbosa. The court denied Barbosa's motion for sentence modification. Barbosa appeals this order and his judgments of conviction.

### DISCUSSION

¶6 To obtain sentence modification, a defendant must establish that (1) a new factor exists, and (2) the new factor justifies sentence modification. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a fact or set of facts constitutes a new factor presents a legal issue which we decide de novo. *Id.* Whether a new factor justifies sentence modification, however, presents an issue for the trial court's discretionary determination, subject to our review under the erroneous exercise of discretion standard. *Id.*

¶7 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 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. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Further, a new factor is "an event or development which frustrates the purpose of the original sentence." *State v.*

*Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Erroneous or inaccurate information used at sentencing may constitute a “new factor” if it was highly relevant to the imposed sentence and was relied upon by the trial court. *State v. Smet*, 186 Wis. 2d 24, 34, 519 N.W.2d 697 (Ct. App. 1994). A defendant bears the burden of proving the existence of a new factor, i.e., that the information was inaccurate and the information was actually relied on by the trial court at sentencing, by clear and convincing evidence. *Franklin*, 148 Wis. 2d at 8-9; *see also State v. Littrup*, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991).

¶8 We will conclude for the purposes of this appeal that the information in question was, in fact, inaccurate. The only question then is whether the inaccurate information was relied upon by the trial court and highly relevant to the imposed sentence.

¶9 The inaccurate information presented at sentencing was as follows: (1) Barbosa had consumed narcotics while on probation; (2) Barbosa had a juvenile adjudication for armed robbery; and (3) a packaged white, rock-like substance found in a vehicle in which Barbosa was a passenger had tested positive for cocaine. Barbosa denied consuming narcotics, but maintained that he had only used marijuana. He further denied that he had a juvenile adjudication for *armed* robbery, but claimed that the adjudication was simply for robbery. Finally, the white, rock-like substance had not tested positive for cocaine, but had turned out to be soap.

¶10 At the sentence modification hearing, the trial court denied that it had relied on the first two pieces of misinformation. As the trial court correctly noted, at sentencing the court underscored Barbosa’s admitted drug use and did not highlight or even mention narcotics consumption. Also, the trial court had

emphasized the robbery adjudication, making no mention of armed robbery. There is no evidence that the trial court relied on these two pieces of misinformation when arriving at its sentencing decision.

¶11 The final piece of misinformation, that Barbosa had been found in a car with a packaged white, rock-like substance that had tested positive for cocaine, was mentioned by the trial court when sentencing Barbosa: “[Y]ou are apparently with individuals in vehicles in the past that have controlled substances in the vehicles.” As the trial court acknowledged at the sentence modification hearing, “[t]here’s no question that that is for the first prong ‘inaccurate information’ because it was clearly tested and it was not cocaine.”

¶12 First, when this misinformation was mentioned at sentencing, Barbosa did not object. Failure to make a timely objection usually precludes a party from subsequently raising the point on appeal. *Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 187, 203 N.W.2d 655 (1973). However, waiver is a rule of judicial administration and we have the discretion to make exceptions. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). We will make an exception in this instance.

¶13 At the sentence modification hearing, the trial court stated that this piece of misinformation had not been highly relevant to its sentencing decision, but had only a minimal effect:

[If] you look at the sentencing transcript where I alluded to that .... [i]t’s in this context:

While on probation, continues to use drugs and alcohol, had police contacts, failed to pay supervision fees, court obligations, or restitution. You were offered apparently some placement at the Columbus House to deal with a drug-alcohol problem which you turned down apparently

because you didn't believe you had a need yet. As [defense counsel] says, you are apparently with individuals in vehicles in the past that have controlled substances in the vehicles. You apparently cut off your electronic monitoring bracelet and indicated you smoked apparently approximately a pound of marijuana while on absconder status.

That sentence is in that context and basically it's in a context of you hanging around with unsavory individuals. Whether it was cocaine or not, it was packaged in such a way that they were unsavory individuals [who] were going to sell soap as cocaine. That's the whole point of the matter. It's a very small reference; so even if it is inaccurate, which I find it is, it was not meeting the second prong as being considered by the Court to have a prejudice.

So I do not find under the case law that that brief reference to a small portion of inaccurate information where I didn't consider it really material in my sentencing but just basically referenced you with unsavory individuals-- that's basically what it boils down to-- in that context is sufficient to warrant or be found to be a new factor warranting a new sentencing.

¶14 While the trial court did mention this inaccurate information when sentencing Barbosa, when read in the context of the remainder of the trial court's sentencing remarks, it is clear that this misinformation, that the white substance had tested positive for cocaine, was not highly relevant to the imposed sentence. The trial court mentioned this piece of information to highlight Barbosa's poor adjustment while on probation. The trial court mentioned it not to emphasize that Barbosa was involved with narcotics, but to demonstrate that after several criminal convictions and juvenile delinquency adjudications and being given numerous opportunities to rehabilitate himself, Barbosa continued to hang around questionable persons he should not have been associating with, and continued doing things he should not have been doing. The positive test result information was de minimus and Barbosa has not established by clear and convincing evidence that this misinformation was highly relevant to the imposed sentence.

¶15 Furthermore, we have no authority to grant Barbosa’s requested relief. Barbosa asks that we declare his sentence too harsh and sentence him to three years in prison on both counts, to be served concurrently, or, in the alternative, to follow the State’s recommendation at sentencing, giving him a total of five years in prison. However, sentencing is a function of the trial court, not an appellate court; our review is limited to whether the trial court erroneously exercised its discretion in sentencing Barbosa. *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). Barbosa was sentenced to a total of six years in prison in this matter; we cannot say that six years for two separate charges, criminal trespass to a dwelling and obstructing an officer, both as a repeat offender, is so excessive, unusual and disproportionate to the offense committed so as to shock public sentiment. See *Hanson v. State*, 48 Wis. 2d 203, 206, 179 N.W.2d 909, 911 (1970).

¶16 Barbosa also argues that because the trial court makes “only passing reference” to the seriousness of the offense and protection of the public, the trial court did not consider those factors. We disagree. The primary factors the court is to consider in sentencing are: (1) the gravity and nature of the offense; (2) the offender’s character and rehabilitative needs; and (3) the public’s need for protection. *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The trial court mentioned both of the factors Barbosa claims were not considered. (“[Y]ou are a danger to the community. These incidents I consider extremely serious …”) Contrary to Barbosa’s contentions, the trial court referred to and considered all of the necessary sentencing factors, and we reject his arguments.

## CONCLUSION

¶17 While inaccurate information was presented to the trial court at Barbosa’s sentencing, the trial court did not rely on the majority of the inaccurate

information in arriving at its sentencing conclusion. Furthermore, the remaining inaccurate information had only a de minimus effect on the trial court's decision. We therefore affirm the order and the judgments of conviction.

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.



