

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 30, 2004**

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.

**Appeal No. 03-1894-CR**

**Cir. Ct. No. 98CF000367**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL R. NELSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Winnebago County:  
BRUCE SCHMIDT, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Michael Nelson, pro se, appeals from the circuit court's order denying his motion to modify his sentence. Nelson argues that his sentence should have been reduced because: (1) he will not be provided a sex offender treatment program while in prison; (2) he has contracted Hepatitis C; and (3) his disabled fiancé and parents need his support. We affirm.

¶2 “A defendant seeking [sentence] modification based on a new factor must show that (1) the new factor exists and (2) it justifies modification of the sentence.” *State v. Torres*, 2003 WI App 199, ¶5, 267 Wis. 2d 213, 670 N.W.2d 400. “A ‘new factor’ is ‘a fact or set of facts highly relevant to the imposition of the 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 ... it was unknowingly overlooked.’” *Id.* (citation omitted). “A new factor must be a development that frustrates the purpose of the original sentence, and must be proved by clear and convincing evidence.” *Id.* “Whether something constitutes a new factor is a question of law we review de novo, without deference to the trial court.” *Id.*, ¶6. “However, the existence of a new factor does not automatically entitle the defendant to relief.” *Id.* “Whether a new factor, if there is one, warrants sentence modification is left to the trial court’s discretion.” *Id.*

¶3 Nelson is not entitled to sentence modification because the circumstances to which he points are not “developments that frustrate[] the purpose of the original sentence,” and thus are not “new factors” entitling Nelson to resentencing. *Torres*, 267 Wis. 2d 213, ¶6. Although the circuit court discussed Nelson’s need for sex offender treatment in prison, and fashioned its sentence to allow for treatment, treatment was not the primary purpose of the sentence. The court’s comments make clear that its main sentencing objective was the protection of the public, and that, as aptly explained by the State “[r]equiring sex offender treatment while in prison was simply a way of effectuating that goal.” Similarly, the fact that Nelson has contracted Hepatitis C, while regrettable, does

not obviate the need to protect the public, which was the court’s primary concern.<sup>1</sup> Finally, the circumstances surrounding Nelson’s disabled fiancé and parents do not constitute a “new factor” entitling Nelson to resentencing because, once again, the difficulties faced by Nelson’s family have no bearing on the court’s primary purpose in sentencing Nelson, which was to protect the public from further victimization by Nelson.

*By the Court.*—Order affirmed.

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

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<sup>1</sup> Nelson claims his rights under the Eighth and Fourteenth Amendments to the United States Constitution have been violated because he has not received adequate medical treatment. These claims are not a basis for sentence modification.

