

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2008

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 No. 2006AP2942-CR

Cir. Ct. No. 2005CM429

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT W. KLEIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Reversed and cause remanded with directions.*

¶1 HIGGINBOTHAM, P.J.¹ Robert W. Klein appeals an order denying his motion for resentencing. A judgment of conviction was entered

¹ This case was assigned to one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

against Klein after he pleaded no contest to six misdemeanor offenses stemming from his belligerent conduct at a neighborhood gathering. Klein was sentenced to three years' probation and 120 days in jail as a condition of probation. Klein challenges his sentence on grounds that the circuit court was unaware at sentencing that (1) a drug prescribed to him at the time, Methylprednisolone,² was known to cause psychotic episodes; and (2) serving more than thirty consecutive days in jail would result in a suspension of Klein's Social Security benefits. He submits that these circumstances are new factors justifying resentencing in his case.

¶2 We conclude that the circuit court was unaware that its sentence would cause Klein to lose his Social Security benefits, that this fact constitutes a new factor and that a loss of benefits would thwart an express purpose of Klein's sentence. We further conclude that Klein's use of Methylprednisolone is not a new factor. Therefore, we reverse the circuit court's order denying Klein's post-conviction motion to modify sentence and remand for the court to determine whether the suspension of Social Security benefits justifies modification of the sentence.

BACKGROUND

¶3 The following facts are taken from the record. On August 6, 2005, Police Officers Adams Grosz and Mark Stashek were dispatched to a Town of Rome residence to investigate a 911 call warning that Robert Klein was agitated,

² Methylprednisolone is a drug prescribed for dermatological diseases and other conditions.

and had carried a firearm with him to a neighbor's house, where a local gathering was underway.

¶4 Officers learned that Klein, upon arriving at the neighbor's house, had struck the neighbor with the butt of the firearm, causing injury. He pointed the firearm at the neighbor and another man, threatening to kill both of them. The confrontation lasted for about ten minutes until another man convinced Klein to drop his weapon and leave.

¶5 The State charged Klein with six misdemeanor offenses, including: disorderly conduct, WIS. STAT. § 947.01, and battery, WIS. STAT. § 940.19(1), both with the use of a dangerous weapon, 939.63(1)(a); possession of a firearm while intoxicated, WIS. STAT. § 941.20(1)(b); negligent handling of a weapon, § 941.20(1)(a); and two counts of pointing a firearm at another, § 941.20(1)(b) and (c). Klein pleaded no-contest to the six charges and the court entered judgment accordingly. Klein was given a withheld sentence and placed on probation for a period of three years. As a condition of that probation, he was ordered to serve 120 days in jail.

¶6 Klein brought a post-conviction motion to modify his sentence, asserting that new factors not known to the circuit court at the time of sentencing justified resentencing. The circuit court denied the motion. Klein appeals.

DISCUSSION

¶7 Klein seeks resentencing based on the emergence of new factors not known to the court at sentencing. Sentence modification for a new factor involves a two-step process. First, the defendant must demonstrate that an event or a development is a new factor justifying a motion to modify a sentence. *See State v.*

Hegwood, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). A new factor, as defined in *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), 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 in existence, it was unknowingly overlooked by all of the parties.” Then, the defendant must show that the event or development is one that frustrates the purpose of the original sentence. *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Some connection must exist between the event or development and the sentence ordered for the event or development to be a new factor. *Id.* Whether a new factor exists is a question of law subject to independent review. *State v. Hegwood*, 113 Wis. 2d at 547.

¶8 Klein argues that two circumstances not known to the circuit court at sentencing constitute new factors that warrant resentencing. We first consider Klein’s assertion that the circuit court was unaware that a drug prescribed to Klein at the time of the incident, Methylprednisolone, has psychotic side effects because no expert testimony was presented at sentencing to establish this fact. We conclude on the present record that this circumstance is not a new factor.

¶9 The State correctly notes that Klein’s counsel informed the circuit court about Klein’s use of this medication at the sentencing hearing, and specifically apprised the circuit court that Methylprednisolone is known to cause psychic side effects, including frank psychotic manifestations. Thus, while no expert testimony was presented at sentencing about the known side effects of the drug, the information was presented to the circuit court at sentencing and therefore cannot be considered a new factor that might warrant resentencing.

¶10 We turn now to Klein's claim that the circuit court was unaware at sentencing that the condition of probation requiring Klein to serve 120 consecutive days in jail would cause suspension of his Social Security benefits by operation of federal benefit rules. The State does not dispute Klein's assertion that his Social Security benefits will be suspended after he serves more than thirty consecutive days in jail,³ but counters that this fact does not constitute a new factor because Klein has failed to demonstrate that the circuit court was unaware that Klein's sentence would result in suspension of benefits. The State also argues that even if Klein can demonstrate that the circuit court was unaware of this fact, suspension of benefits does not constitute a new factor because this fact does not thwart the stated purposes of the court's sentence.

¶11 We conclude on the record before us that the circuit court was unaware that a sentence that included a probation condition of 120 consecutive days in jail would result in suspension of Klein's Social Security benefits, and we further conclude that this fact constitutes a new factor. At no time during the sentencing hearing was the circuit court informed that Klein would lose his Social Security benefits by operation of federal benefit rules if he served more than thirty consecutive days in jail.⁴

³ The parties appear to agree that Social Security benefit rules provide for suspension of benefits after a beneficiary has served more than thirty consecutive days in jail. For purposes of our analysis, we assume that this is a correct statement of the law. However, we have not examined the applicable federal statutes or regulations to determine if this is, in fact, the case.

⁴ We note that the parties discussed in general terms the possibility that Klein might lose his Social Security benefits as a result of a jail sentence. However, the circuit court was not made aware of the apparent fact that Klein's benefits would be suspended after serving thirty consecutive days in jail.

¶12 Furthermore, our review of the transcript of the sentencing hearing persuades us that a loss of Social Security benefits would thwart an express purpose of Klein's sentence. Among the numerous purposes of the sentence expressed by the circuit court was to avoid interfering with continuing treatment of the medical conditions of Klein and his wife. Klein stated at the sentencing hearing that his wife had been diagnosed with breast cancer, and that he had recently broken his hip. Suspension of Social Security benefits could deny the Kleins the resources they may need to receive medical treatment for these conditions. We therefore conclude that suspension of Social Security benefits would thwart at least one purpose of the sentence, and therefore this circumstance constitutes a new factor that may justify resentencing.

¶13 The State argues that this case is analogous to *Michaels*, where we rejected the defendant's argument that his deteriorating health constituted a new factor that warranted resentencing. *Michaels*, 150 Wis. 2d at 100. *Michaels* is readily distinguishable from the present case, however. In *Michaels*, we concluded that the circuit court had taken into account the defendant's medical condition at sentencing, and thus his worsening condition did not thwart a purpose of the sentence. *Id.* at 99-100. Here, among the stated purposes of the sentence was to avoid jeopardizing continued medical treatment for Klein and his wife. Suspension of Social Security benefits would be contrary to this sentencing purpose because it could deny the Kleins the necessary resources to properly treat their medical conditions.

¶14 Having concluded that the suspension of Social Security benefits is, in fact, a new factor, we remand for the circuit court to determine, within its discretion, whether it is a factor that warrants resentencing. See *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (whether a new factor actually warrants

resentencing is an issue addressed to the circuit court's discretion). We note that the record indicates that the State twice stated at the sentencing hearing that it had no objection to splitting up the jail time to avoid suspension of Klein's Social Security benefits.

By the Court.—Order reversed and cause remanded with directions.

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

