COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3196-CR **Cir. Ct. No. 2005CF34**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLIFFORD D. DANSBY,

DEFENDANT-APPELLANT.

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

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

¶1 CURLEY, P.J. Clifford D. Dansby appeals the judgment convicting him of second-degree sexual assault, contrary to WIS. STAT.

§ 940.225(2)(a) (2001-02).[1] He also appeals from the order denying his motion for a new hearing. He argues that the trial court erroneously exercised its discretion at sentencing when it relied on unadjudicated juvenile contacts and because it failed to explain why he was given a consecutive sentence. Further, he argues that the trial court erred in denying his postconviction motion for sentence modification based on new factors, without holding a hearing. Because Dansby failed to raise before the trial court the issue of the trial court's consideration of juvenile contacts and failed to object to the trial court's imposition of a consecutive sentence, we decline to address those issues. *See, e.g.*, ***State v. Walker***, 2006 WI 82, ¶7, 292 Wis. 2d 326, 716 N.W.2d 498 ("We conclude that when a defendant seeks modification of the sentence imposed at resentencing, Wis. Stat. (Rule) § 809.30 and Wis. Stat. § 973.19 require the defendant to file a postconviction motion with the circuit court before taking an appeal…."). The purpose behind the rule is to allow the trial court an opportunity to first address the issue and correct any error. ***State v. Gomez***, 179 Wis. 2d 400, 407, 507 N.W.2d 378 (Ct. App. 1993).[2] As to Dansby's claim that new factors require a

[1] As amended effective February 1, 2003, by 2001 Wis. Act 109. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Moreover, were we to consider these issues, we note that the trial court is permitted to consider juvenile contacts at sentencing. *See, e.g.*, ***State v. Harris***, 119 Wis. 2d 612, 624, 350 N.W.2d 633 (1984) ("The factors considered by the trial court [including juvenile contacts] prior to the imposition of sentence were proper."). Further, here there is no claim that the contacts never occurred or that they were inaccurate.

As to the consecutive sentence, discussions were had about the propriety of a consecutive sentence. The presentence investigation report recommended a consecutive sentence, and the State left the issue to the trial court's discretion. The defense specifically requested a concurrent sentence. Considering the recommendation for a consecutive sentence and noting that Dansby was serving a sentence at the time of his sentencing for the identical crime for which he pled guilty, the trial court need not have stated with specificity why a consecutive sentence was necessary because, given this background and the fact that it had already characterized the nature of the offense as "aggravated," the trial court adequately explained its rationale.

modification of his sentence, he has not proved the existence of a new factor by clear and convincing evidence. Consequently, we affirm.

I. BACKGROUND.

¶2 On February 22, 2004, M.J., a juvenile, reported to the police that Dansby had sexually assaulted her. According to the victim, Dansby tried to kiss her and, when she rebuffed his advances, he threw her down, removed her pants, began to strangle her, and placed an object in her anus, which she believed was a finger. Shortly thereafter, he placed his penis in her vagina. Dansby then got up and fled the residence. The victim reported to the police that Dansby made several calls to her in which he apologized for his actions. One such call was intercepted by the police.

¶3 Dansby was charged with second-degree sexual assault. Later, he agreed to plead guilty in exchange for a recommendation by the State for a prison sentence of an unspecified length of time and a request for a presentence investigation report. The trial court accepted his guilty plea and ordered a presentence investigation report. When the matter came back to court for sentencing, Dansby's attorney informed the court that Dansby had denied the offense to the presentence investigation writer. The court further was informed that Dansby claimed he only pled guilty because his attorney told him to do so. The matter was adjourned to explore whether Dansby wanted to withdraw his guilty plea. Apparently Dansby's mother and girlfriend were present on the adjourned date hoping to testify. On that date, Dansby advised the court that he did not wish to withdraw his guilty plea and a sentencing hearing was held. Nothing was said to the court about Dansby wishing to have his mother and girlfriend testify. The State told the court of the earlier plea negotiation and

recommended that Dansby be sentenced for a period of initial confinement, leaving to the court's discretion the determination of whether the confinement time should be concurrent or consecutive to the sentence he was currently serving for an earlier conviction for second-degree sexual assault.

¶4 In the presentence report, the agent related how Dansby had denied the offense, claiming that it was "all crap" and recommended to the trial court that Dansby be sentenced to a consecutive term of between six and eight years of initial confinement, and to a term of between five and six years of extended supervision. The trial court sentenced him to seven years of confinement and seven years of extended supervision, to be served consecutively to the sentence he was then serving. Dansby filed a postconviction motion seeking a modification of his sentence because of new factors. These alleged new factors included, among others, Danby's evaluation for Social Security disability payments reflecting that he met the definition of mental retardation; evaluations showing that he suffered from a learning disability, was in special education classes, and had academic delays; as well as Dansby's severe asthma. The trial court denied the motion without a hearing. This appeal follows.

II. ANALYSIS.

¶5 Dansby argues that the trial court erred in denying his postconviction motion without a hearing because he established that there were new factors which had been overlooked at sentencing.

¶6 A trial court may modify a sentence on the basis of a new factor. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). 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. (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). The defendant must clearly and convincingly prove the existence of a new factor warranting sentence modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8-10, 434 N.W.2d 609 (1989). Whether a fact or set of facts constitutes a new factor is a question of law which this court reviews *de novo*. ***Hegwood***, 113 Wis. 2d at 547. Once the defendant has established the existence of a new factor, the trial court must determine whether that "'new factor' ... frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). ***Michels*** further explains that "[t]here must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***Id.***

¶7 In his postconviction motion, Dansby claimed that the information being provided to the trial court concerning his Social Security disability file and his school records were new factors because the trial court indicated it was troubled by Dansby's inability to recognize the seriousness of his behavior, and "did not appear to consider the Defendant's mental and emotional limitations and problems at all in fashioning a sentence." Dansby went on to explain:

> [The documents provided to the court] explain needs and problems of the offender unknown to the court at sentencing which differentiate the aggravated nature of his behavior in this case from someone committing the identical act but not having these needs and problems and also demonstrate correctional needs different from those known to the court at the time of the original sentencing.

Because of this, Dansby contends the information constitutes new factors.[3] We are not persuaded.

¶8 The trial court, in its decision denying the motion, wrote:

> The court was aware that the defendant suffers from learning disabilities when it sentenced him; however, it did not see a correlation between his learning problems and the pattern of sexually assaultive behavior. The court has reviewed the documentation provided by the defendant, and it finds that there is nothing in the records which demonstrates that the defendant is unable to appreciate the wrongfulness of his actions because of learning disabilities. Consequently, the court finds that the additional information does not alter the court's assessment of the defendant's correctional needs or frustrate the purpose and goals of the original sentence (i.e. punishment; deterrence; community protection). In sum, the court finds that the defendant has not alleged a new factor for modification purposes.

We agree.

¶9 The documentation attached to the postconviction motion was mostly cumulative to information already provided to the court. The presentence report contains information concerning Dansby's schooling and his assignment to special education classes. The report explained that Dansby had only moderate success at school and that he felt that school was very difficult for him. The presentence writer also alerted the trial court to Dansby's significant asthma problem and that he currently was mildly depressed.

[3] Dansby also claims that the failure of the trial court to hear the testimony of his mother and the mother of his child constitutes a new factor. First, Dansby never raised this issue in his postconviction motion. As discussed earlier, we decline to address matters not raised in the trial court. Secondly, Dansby does not tell us what these two witnesses would have said that constituted a new factor.

¶10 While the court was unaware that Dansby's testing scores put him in the category of mental retardation, the trial court knew that Dansby had some intellectual shortcomings and some serious health issues. None of the newly submitted documentation suggested that Dansby's intellectual deficits were so great that he was incompetent or unable to appreciate the wrongfulness of his actions. So too, his health issues had no connection to his criminal acts. As noted by the trial court, none of Dansby's problems set forth in the postconviction motion would explain his pattern of sexually assaulting young women. Consequently, the information did not constitute a new factor, and thus, there was no need for a hearing. For the reasons stated, this court affirms the judgment of conviction.

By the Court.—Judgment and order affirmed.

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