

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2009

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. 2008AP2463-CR

Cir. Ct. No. 2006CF878

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE D. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Antoine D. Robinson appeals from a judgment convicting him of felony bail jumping and from an order denying his motion to modify his sentence to make him eligible for the Earned Release Program (ERP)

and Challenge Incarceration Program (CIP). We conclude that the sentence and the decision not to modify it represent a proper exercise of discretion. We affirm.

¶2 In June 2004, Robinson was sentenced in another matter comprising three cases. The trial court, Judge Richard Kreul presiding, withheld sentence and placed Robinson on two years' probation. In January 2006, Robinson was charged with possession with intent to deliver cocaine, placed on a signature bond and released from custody. A condition of his bond was that he attend all future court appearances. A month later, he failed to appear at a motion hearing. In August 2007, Robinson's probation was ordered revoked in the three Judge Kreul cases.

¶3 On October 1, 2007, Robinson pled no contest to bail jumping in the cocaine case. On November 5, the trial court, Judge Emily Mueller presiding, imposed a two-year sentence, bifurcated as one year each of initial incarceration and extended supervision, consecutive to any other sentence. Judge Mueller declared Robinson ineligible for ERP or CIP.

¶4 Robinson moved postconviction for sentence modification on grounds of a new factor: that three weeks before Judge Mueller sentenced him, Judge Kreul sentenced him after revocation in the other three cases and found him ERP- and CIP-eligible. Robinson argued that Judge Mueller's determination of ineligibility on this consecutive sentence frustrated the purpose of Judge Kreul's sentence because it rendered Robinson ERP—and CIP—ineligible on all sentences. Judge Mueller concluded that Judge Kreul's sentencing constituted a new factor but that sentence modification still was unwarranted because she was entitled to exercise her own discretion and she believed he was not entitled to the privilege of participating in those programs. Robinson appeals.

¶5 To obtain sentence modification based on a new factor, a defendant must establish its existence by clear and convincing evidence. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). A new factor is a fact or set of facts highly relevant to sentencing, but not known to the sentencing judge because either it was not then in existence or it was in existence but all of the parties unknowingly overlooked it. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). In addition, the information or development must “frustrate the purpose of the original sentence.” *State v. Crochiere*, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524.

¶6 Judge Mueller concluded that the information regarding Judge Kreul’s sentencing constituted a new factor. The State disagrees. We will assume simply for the sake of discussion that Robinson has made that showing. He still must establish, however, that the new factor warrants sentence modification, *see id.*, a matter resting within the trial court’s discretion. *Michels*, 150 Wis. 2d at 97.

¶7 Robinson argues that Judge Mueller’s refusal to modify his sentence was an erroneous exercise of discretion because bail jumping does not statutorily render him ineligible and she did not exercise her discretion anew, but simply reiterated her reasons for the initial determination.

¶8 When imposing a bifurcated sentence, the court must decide, “as part of the exercise of its sentencing discretion,” whether or not the person being sentenced is eligible to participate in the ERP and CIP. *See* WIS. STAT. § 973.01(3g), (3m) (2007-08).¹ We review only whether the trial court

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

erroneously exercised its discretion. See *State v. Owens*, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. We will affirm if the decision is made based upon the facts of record and in reliance on the appropriate law. *Id.* A strong public policy exists against interfering with the trial court's sentencing discretion, and we presume the trial court acted reasonably. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶9 A sentencing court must consider three primary factors: the gravity and nature of the offense, the character and rehabilitative needs of the offender, and the need to protect the public. *Owens*, 291 Wis. 2d 229, ¶8. The court also may consider several other factors, such as the defendant's history of criminal offenses, undesirable behavior patterns, and need for close rehabilitative control, the presentence investigation (PSI) report, and the rights of the public. *Harris*, 119 Wis. 2d at 623-24. Punishment of the defendant also is a valid sentencing objective. *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The weight given to any one factor is left to the court's broad discretion. *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112.

¶10 In determining CIP and ERP eligibility, the sentencing court first must determine whether the offender meets preliminary statutory criteria. See WIS. STAT. §§ 302.045(2)(cm) and 302.05(3)(a)2. If so, the court then must exercise its own discretion to determine whether the offender is eligible for CIP or ERP. See WIS. STAT. §§ 973.01(3m) and 973.01(3g).

¶11 Here, at the original sentencing, Judge Mueller considered the PSI, Robinson's extensive record and the nature of the crimes comprising it, his gang involvement and her belief that he continued to be a threat to the community. She noted that he denied ever using cocaine, contradicting probation files showing

positive urinalyses. Although separate findings explaining the eligibility decision are unnecessary as long as the overall sentencing rationale justifies it, *see Owens*, 291 Wis. 2d 229, ¶9, Judge Mueller specifically concluded that Robinson was ineligible due to his “prior assaultive offenses” and, “given this record,” because he was revoked on bail jumping. In considering his request for sentence modification, Judge Mueller again reviewed his “very lengthy” offense history. She observed that, besides being sentenced for bail jumping, Robinson’s history confirmed her earlier belief that, “under all of the circumstances, [he] should not be given the privilege of participation in these programs.”²

¶12 We read Judge Mueller’s decision denying Robinson’s request for program placement as a determination that it is inconsistent with his character, his need for punishment and the need to protect the public. These are proper sentencing considerations, and the conclusion was reasonable. We therefore will sustain this exercise of discretion despite Judge Kreul’s different conclusion. *See State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

By the Court.—Judgment and order affirmed.

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

² Successful CIP and ERP completion converts the remaining confinement period to extended supervision. *See* WIS. STAT. §§ 302.045(3m), 302.05(3).

