COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP329-CR **Cir. Ct. No. 2000CF2291**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANCE L. EGNER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Lance Egner appeals from an order reconfining him to prison following the revocation of his extended supervision, and from an order denying his motion for sentence modification. We affirm for the reasons discussed below.

BACKGROUND

¶2 An administrative law judge (ALJ) revoked Egner's extended supervision on a series of charges including attempted armed burglary, possession of a firearm by an adjudicated delinquent, violation of a restraining order, and multiple counts of bail jumping. The ALJ recommended that Egner be reconfined for a total of three years on this case and a companion revocation case.

¶3 At the reconfinement hearing, the State argued that Egner should be reconfined for a total of eight to ten years on this case and the other case. The defense argued for time served, or in the alternative an additional six-to-twelve-month jail term with Huber privileges. The court also reviewed a revocation packet with the supervision agent's recommendation of four years, nine months and nineteen days on this case, and ten months and twenty-four days on the other case, but that packet did not contain the ALJ's recommendation, and no one else brought the ALJ's recommendation to the court's attention.

¶4 The court discussed the standard sentencing factors. It emphasized the violent aspects of Egner's criminal history and an "extraordinary pattern of obsessive … contacts" and dangerous behavior with women exhibited over a long period of time. The court noted that Egner's violation of his supervision rules by having contact with a woman whom he knew his agent would not allow him to see represented a deliberate decision to avoid rules designed not only to protect women and their children from him, but also to ensure that any relationships Egner did develop were "healthy and nonmanipulative." The court then adopted the agent's recommendation of four years, nine months and nineteen days of reconfinement for this case.

¶5 Egner moved to modify his reconfinement sentence on the grounds that no one had advised the court about the ALJ's recommendation. The circuit court denied his motion without a hearing, and he appeals.

DISCUSSION

¶6 A court has inherent authority to modify a previously imposed sentence based upon a new factor. ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. A new sentencing 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 sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (citing ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). In order to warrant sentence modification, the new factor must be shown to frustrate the purpose of the original sentence. ***Champion***, 258 Wis. 2d 781, ¶4 (citations omitted). The defendant bears the burden of establishing a new factor by clear and convincing evidence. ***Id.*** Whether a particular set of facts constitutes a new factor is a question of law which we review de novo. ***Id.*** However, whether a new factor warrants a modification of sentence is a discretionary determination by the circuit court to which we will defer. ***Id.***

¶7 We first question, as did the circuit court, whether an ALJ's recommendation constitutes a "fact," as opposed to an opinion. Assuming for the sake of argument that it does, and further assuming that such a recommendation would be "highly relevant" to sentencing, we conclude that Egner still failed to allege facts sufficient to show that the recommendation here—which was plainly already in existence—was *unknowingly* overlooked by all of the parties.

¶8 While Egner pointed out that no one had brought the ALJ's recommendation to the court's attention, he did not allege that either the prosecutor or defense counsel was unaware or forgot about the recommendation at the time of sentencing. Given that the ALJ's recommendation did not support either the State's or the defense's position at sentencing, it could easily be inferred that one or both of the parties had a strategic reason for not bringing the recommendation to the court's attention. Since a defendant bears the burden of establishing a new factor by clear and convincing evidence, we conclude that Egner's motion was conclusory to the extent that it failed to allege facts sufficient to negate an obvious potential reason for the parties' failure to discuss the ALJ's recommendation. In other words, we are not persuaded it was sufficient to rely on an inference that both parties must have forgotten about the ALJ recommendation or assumed that the court was already aware of it, without asking either attorney if that was the case and so alleging.

¶9 In any event, the circuit court's determination that its lack of awareness of the ALJ's recommendation did not frustrate the purpose of the sentence is fatal to Egner's claim. It was ultimately within the trial court's discretion to determine whether the ALJ's recommendation warranted sentence modification, and it is plain from the court's written decision that it was not convinced that any modification was warranted.

By the Court.—Orders affirmed.

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