

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 31, 2010**

A. John Voelker  
Acting 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. 2009AP1092-CR**

**Cir. Ct. No. 1991CF911618A**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SCOTT ALAN HEIMERMANN,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Scott Alan Heimermann appeals from an order summarily denying his motion for sentence modification. The issues are whether any of the following postconviction developments constitute new factors warranting sentence modification: (1) Heimermann's patent and technology

business; (2) Heimermann's alleged cooperation with law enforcement; or (3) the prosecutor's alleged withholding of information at sentencing explaining that "the state created the crime charged." We conclude that none of the foregoing constitutes new factors: (1) Heimermann has not shown how his patent or business frustrates the purpose of the original sentence; (2) Heimermann has not proffered sufficient corroboration of his cooperation; and (3) we have previously rejected his charge against the prosecutor; it is not new and we will not permit Heimermann to relitigate it. We further impose a sanction because this appeal is frivolous. As a result, Heimermann must pay the existing sanctions imposed against him by the state and federal courts for his previous repeatedly frivolous filings before he may be entitled to a fee waiver in conjunction with the case underlying this appeal for any future filings. Therefore, we impose that condition and affirm the trial court's order summarily denying his sentence modification motion.

¶2 A jury found Heimermann guilty of two counts of first-degree intentional homicide, as a party to each crime, for his role in the execution and burial of two men in the basement of his residence. The murders occurred in 1989; the victims' remains were not discovered until 1991. The trial court imposed two consecutive life sentences. Heimermann moved for a new trial, which the trial court denied. Heimermann filed additional postconviction motions including an ineffective assistance of trial counsel claim. The trial court summarily denied all of the motions except for the ineffective assistance claim on which it conducted a *Machner* (evidentiary) hearing.<sup>1</sup> Following that hearing, the

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<sup>1</sup> A *Machner* hearing is an evidentiary hearing to determine trial counsel's effectiveness. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

trial court also denied Heimermann's ineffective assistance claim. On direct appeal, Heimermann raised six issues. We affirmed the judgment of conviction and the postconviction orders. See *State v. Heimermann*, No. 95-0225-CR, unpublished slip op. at 1-2, 17 (Wis. Ct. App. Aug. 8, 1995). Subsequently, Heimermann filed more than twenty other motions and petitions challenging the judgment and postconviction orders in that case.

¶3 In 2009, Heimermann moved for sentence modification, alleging three new factors: (1) his patent for his newly-designed e-procurement system and his founding of I-Buy, a corporation “to bring the 976 Patent into fruition”; (2) his cooperation with Dodge County and Department of Corrections authorities; and (3) the State's allegedly fraudulent involvement in these crimes. The trial court summarily denied the motion, ruling: (1) Heimermann's “new invention is not an event that frustrates the reasons for incarceration,” which were “punishment, deterrence, and the need for community protection”; (2) Heimermann's cooperation claim is insufficient to warrant sentence modification, and is also untimely; and (3) Heimermann's fraud claim has already been litigated and rejected. Heimermann appeals.

¶4 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.”

*State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). 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). The defendant must establish the existence of a new factor by clear and convincing evidence. *See Franklin*, 148 Wis. 2d at 9. We use a two-part standard of review.

Whether a new factor exists is a question of law, which we review de novo. The existence of a new factor does not, however, automatically entitle the defendant to relief. The question of whether the sentence warrants modification is left to the discretion of the [trial] court.

*State v. Trujillo*, 2005 WI 45, ¶11, 279 Wis. 2d 712, 694 N.W.2d 933 (quotation marks and citations omitted).

¶5 Heimermann’s first claim is that his patent and business, which he describes on appeal as an “e-procurement system ideally suited to government use,” will benefit the national interest.<sup>2</sup> Heimermann does not demonstrate however, how this system “frustrates the purpose of the original sentence,” as required. *Michels*, 150 Wis. 2d at 99. Consequently, he has not shown that his patent and business are new sentencing factors.

¶6 Heimermann’s second claim is that his cooperation with Dodge County and Department of Corrections officials to be their “eyes and ears” in an undercover capacity to expose the misconduct of two prison officials constitutes a new sentencing factor. He relies on *State v. Doe*, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, in which we held that “a defendant’s substantial and important assistance to law enforcement after sentencing *may* constitute a new

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<sup>2</sup> Heimermann relies on *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989), and *Denny v. State*, 47 Wis. 2d 541, 545, 178 N.W.2d 38 (1970), contending that those defendants were credited for their “post-sentence entrepreneurial achievements.” These cases involve the constitutionality of imposing a harsher sentence after a new trial. *See Pearce*, 395 U.S. at 713; *Denny*, 47 Wis. 2d at 543. These cases do not involve sentence modification, and are therefore inapplicable.

factor that the trial court *can* take into consideration when deciding whether modification of a sentence is warranted.” *Id.*, ¶1 (emphasis added). To assess whether the defendant’s post-sentencing cooperation constitutes a new sentencing factor, the trial court considers:

- “(1) [and] evaluat[es] the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant’s assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; [and]
- (5) the timeliness of the defendant’s assistance.”

*See id.*, ¶9 (citing the U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004)).

¶7 Although Heimermann addresses these factors, he provides no corroboration from law enforcement officials in Dodge County or in the Department of Corrections of the nature or value of his cooperation.<sup>3</sup> It is

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<sup>3</sup> Although Heimermann appeals only from the trial court’s order denying his motion for sentence modification, he subsequently moved twice for reconsideration, which the trial court also twice summarily denied. In his second reconsideration motion, he filed correspondence from the Warden of the Dodge Correctional Institution “not[ing]” the involvement of Heimermann and his parents in an investigation that was “most certainly appreciated.” The Warden told Heimermann that his involvement in the investigation may be relevant to the Parole Commission. The Warden also wrote Heimermann that:

while your interpretation is that this was over and above the call of duty, most citizens would view this as the price of being a good citizen, of doing the right thing regardless of personal cost.

(continued)

consequently impossible to assess the value of Heimermann’s cooperation and any incident risk because Heimermann is the source of this information. Moreover, we question Heimermann’s timing. His referenced cooperation occurred in 1998. Even if he did not realize that his cooperation could be considered a new factor for sentencing purposes, we decided *Doe* in 2005. In addition to the absence of corroborating evidence from law enforcement, Heimermann does not explain why he waited four years to raise his cooperation as a new sentencing factor.

¶8 Heimermann’s third new factor is the alleged fraud perpetrated by the State in “creat[ing] the crime,” in reference to one of the victims and to Heimermann’s relationship to his accomplice. We rejected that claim two years ago. *See State v. Heimermann*, No. 2007AP1518, unpublished slip op. ¶10 (WI App July 1, 2008). We will not revisit an issue that we previously decided. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). More importantly, this factor is not new. We therefore will not revisit this issue.

¶9 The State urges this court to sanction Heimermann for his prolific, frivolous filings. In the decision on the fraud issue that Heimermann previously

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Doing the right thing at this time does not negate your legally incurred obligation of serving two life terms for the deaths of two individuals.... Your assistance in this investigation is a sign that you have made steps toward rehabilitation, but it does not excuse you from the consequences that you have already incurred as a result of past behavior.

First, the Warden’s correspondence initially appeared in Heimermann’s second reconsideration motion. Second, the Warden’s general and conclusory sentiments are insufficient to substantiate the value of Heimermann’s cooperation pursuant to the *Doe* factors. *See State v. Doe*, 2005 WI App 68, ¶9, 280 Wis. 2d 731, 697 N.W.2d 101. We consequently refer to Heimermann’s motion as either lacking corroboration, or (if we consider the belatedly filed correspondence from the Warden) as insufficiently substantiated to support Heimermann’s cooperation claim.

raised, the trial court recounted that the underlying postconviction motion was Heimermann's twenty-second challenge to the judgment in Milwaukee County Circuit Court Case No. 91CF1618, making Heimermann's current sentence modification motion at least his twenty-third. In our decision rejecting Heimermann's fraud claim, we declined to impose sanctions, despite Heimermann's "numerous motions and appeals that have lacked merit." *Heimermann*, No. 2007AP1518, unpublished slip op. ¶12.

¶10 In 2001, the Milwaukee County Circuit Court sanctioned Heimermann \$7500 for repeatedly pursuing a claim that he could not maintain in good faith.<sup>4</sup> In 2003, the United States Court of Appeals for the Seventh Circuit sanctioned Heimermann \$5000 for his "repeated frivolous filings." In that order, the court warned Heimermann that "until he pays the fine, any papers submitted on his behalf will be returned unfiled with the exception of criminal cases and habeas corpus petitions not challenging his 1991 Wisconsin murder conviction."

¶11 Heimermann knew or should have known that sentence modification was not warranted on any of his current new factor claims. On his business claim, he failed to allege how his patent and related business "frustrate[d] the purpose of the original sentence," a requisite for a new factor. *See Michels*, 150 Wis. 2d at 99. His original cooperation claim was unsubstantiated; he also does not explain why he waited over four years following *Doe*, or why he waited over ten years since he cooperated with law enforcement to raise his claim. His apparent familiarity with *Doe* renders his belated and insufficiently substantiated and

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<sup>4</sup> Heimermann did not challenge the amount of that sanction on appeal. *See Heimermann v. Kohler*, No. 98-3292, unpublished slip op. ¶¶11-12 (WI App. Aug. 1, 2000).

untimely cooperation claim lacking to the point of frivolousness. His attempt to re-litigate a claim he raised almost two years ago and his characterizing it as a “new” factor is frivolous.

¶12 Heimermann’s failure to pay the sanctions previously imposed by the state and federal courts, coupled with his repeated frivolous filings in this underlying case, Milwaukee County Circuit Court Case No. 91CF1618, support our imposition of a sanction for Heimermann’s repeated abuses and overlitigation in this case. In any challenge from Milwaukee County Circuit Court Case No. 91CF1618, Heimermann must present verification from the: (1) Clerk of the Milwaukee County Circuit Court that the previously imposed \$7500 sanction has been paid; and (2) Clerk of the United States Court of Appeals for the Seventh Circuit that the previously imposed \$5000 sanction has been paid. Heimermann’s failure to present the foregoing verification will result in the denial of a waiver of the filing fee in the Wisconsin circuit and appellate courts to proceed *in forma pauperis* in any challenge from Milwaukee County Circuit Court Case No. 91CF1618. In lieu of presenting the foregoing verification, Heimermann may obtain counsel, who by signing the pleading submitted for filing, is verifying the propriety and nonfrivolous nature of the proposed claim.<sup>5</sup> See WIS. STAT. § 802.05 (2007-08).<sup>6</sup>

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<sup>5</sup> The assistant attorney general shall file this decision with the Chief Judge and the Clerk of the Milwaukee County Circuit Court, and the Clerk of the Supreme Court and the Court of Appeals.

<sup>6</sup> All references to the Wisconsin Statutes are to the 2007-08 version.



*By the Court.*—Order affirmed.

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

