

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 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. 2009AP1507-CR

Cir. Ct. No. 2008CF2298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN THOMAS MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Steven Thomas Miller appeals from a judgment of conviction for robbery and for driving a vehicle without the owner's consent, and from a postconviction order denying his motion for sentence modification. The issue is whether the trial court's alleged failure to fully explore Miller's bipolar

condition and recognize the positive results from his treatment warrants sentence modification. We conclude that the trial court was aware of Miller's bipolar condition, and neither his condition nor his positive results from his current treatment constitutes a new sentencing factor, much less one that frustrates the purpose of the original negotiated sentence. Therefore, we affirm.

¶2 Miller pled guilty to robbery with the threat of force as a party to the crime, in violation of WIS. STAT. §§ 943.32(1)(b) (2007-08) and 939.05 (2007-08), and to taking and driving a vehicle without the owner's consent, in violation of WIS. STAT. § 943.23(2) (2007-08).¹ In exchange for Miller's guilty pleas, the State agreed to recommend an eight-year sentence for the robbery and a four-year concurrent sentence for the vehicle conviction, each divided into equal four- and two-year periods of initial confinement and extended supervision to run consecutive to a revocation sentence. The trial court adopted the State's recommendation. Consequently, Miller would serve a four-year period of initial confinement. Seven months after sentence was imposed, Miller moved for sentence modification, alleging that his diagnosis of bipolar disorder and his successful treatment with psychotropic medications for that disorder constituted a new sentencing factor warranting modification. The trial court summarily denied the motion. Miller appeals.

¶3 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.”

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

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). 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).

¶4 Miller concedes that the trial court was generally aware of his mental health issues, but attaches medical records documenting his diagnosis, treatment and positive results from that treatment, contending that the trial court did not “[sufficiently] consider[] ... his ongoing mental illness as a contributing factor to his behavior and that as he is now actively receiving mental health care, this should be a factor mitigating the length of his sentence.” The trial court knew that Miller indicated that he was bipolar and was taking medication for that disorder. Consequently, Miller’s disorder and related treatment were not new factors.

¶5 At the plea hearing, the trial court was mindful that Miller indicated on his plea questionnaire and waiver of rights form that he suffered from a bipolar disorder and it confirmed with Miller that he was on a prescribed medication regimen (specified in writing on the questionnaire and orally at the plea hearing) to “address[] th[os]e mental health issues.” Miller also confirmed that the medication did not affect his understanding of the court proceedings.

¶6 At the sentencing hearing, conducted by the same trial court judge two weeks after the plea hearing, defense counsel explained that Miller was disabled in a car accident and “carries a mental health diagnosis, and he hadn’t been aware that there were other means to get prescription medication for his bipolar mental health problems. He has now found out how to get them on a more prompt basis.... He now understands he can get [his medication] more promptly.”

During his allocution, Miller told the trial court:

I am trying real hard to focus basically on my mental illness, and part of [the] problem was when I came out [of prison], I was only given two weeks of medication. I don’t want to say that my being off the medication for the period I was was a big factor, but I think that it has something to do with the choices I made that day.

The trial court acknowledged Miller’s:

[mental health] difficulties, [and told him] that if you had your medication, maybe if things had gone better in your life you wouldn’t have been in that situation. But we all -- We all face crises, and it is how we deal with those crises. It looks to [the trial court] like in the past when you faced problems, you [took] it out on others.

¶7 In denying Miller’s postconviction motion for sentence modification, the trial court explained that Miller:

has an extensive prior record and was on extended supervision for burglary when he committed the offense[s] in this case. His prior criminal activity included theft, forgery, robbery, theft from person, fleeing, retail thefts, operating a vehicle without [the] owner’s consent, and recklessly endangering safety. This history of criminal activity spanned 29 years. Based on the defendant’s prior history, punishment, deterrence, and the absolute need to protect the public, the court imposed four years of confinement time followed by four years of extended supervision.

¶8 Miller’s bipolar disorder was mentioned at the plea hearing and again at the sentencing hearing. It was mentioned by Miller’s trial counsel, and referred to by Miller himself, and by the trial court. It is seriously doubtful that Miller’s bipolar disorder and successful treatment were “highly relevant” to his sentence; however, even if they were, they were not “overlooked,” but repeatedly mentioned. *Rosado*, 70 Wis. 2d at 288. Miller has not established that his bipolar disorder and treatment (successful thus far) are new sentencing factors, much less that they “frustrate[] the purpose of the original sentence.” *See id.*; *Michels*, 150 Wis. 2d at 99.

By the Court.—Judgment and order affirmed.

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

