COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 98-1901-CR
98-2677-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMADO V. SALDANA, JR.,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Amado Saldana appeals judgments convicting him of hit and run involving injury, injury by intoxicated use of a vehicle and second offense driving while intoxicated. He also appeals an order denying his motion to modify the sentence based on new factors. He argues that the trial court

improperly exercised its discretion when it imposed the maximum consecutive sentences totaling six and one-half years because it failed to consider favorable character evidence, relied on inaccurate information and erroneously made the sentences consecutive to the sentence another court imposed. He also argues that he established new factors warranting a sentence modification and that he should receive a new sentencing hearing in the interest of justice.[1] We reject these arguments and affirm the judgments and order.

Saldana struck a vehicle that was stopped at a railroad crossing, pushing the vehicle over the train tracks approximately three-hundred feet. Both of the occupants were injured in the accident. Saldana then fled the scene traveling eastbound in the westbound lane of traffic. When the police stopped him, he became combative, agitated and irate. The officer noticed the odor of intoxicants on his breath, slurred speech and difficulty standing upright. The

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[1] Saldana also filed a pro se brief. The brief is not authorized by RULE 809.19, STATS. Nonetheless, because we can easily dispose of the arguments he raises, we accept the brief for filing and respond to his arguments without giving the State an opportunity to brief the issues.

Saldana argues that a blood sample was taken before the police read him his ***Miranda*** rights and that he was incapable of understanding what his rights were. The State's case is not based on any statements against interest by Saldana. The privilege against self-incrimination does not protect a suspect from compulsion to produce physical evidence. *See* ***State v. Hubanks***, 173 Wis.2d 1, 15, 496 N.W.2d 96, 100 (Ct. App. 1992). The failure to inform Saldana of his ***Miranda*** rights does not taint the seizure of his blood at the hospital.

Saldana also argues that he was suffering a diabetic reaction in addition to his intoxication at the time of his arrest. The officers had probable cause to believe Saldana was intoxicated based on the odor of alcohol and his behavior, even if his behavior was partially caused by a diabetic reaction. To the extent Saldana argues that he was not competent to consent to seizure of his blood, his consent was not necessary. Because alcohol rapidly dissipates in the bloodstream, police may seize a blood sample without a warrant and without consent based on probable cause that a felony involving alcohol has been committed. *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966); ***State v. Bohling***, 173 Wis.2d 529, 539, 494 N.W.2d 399, 402 (1993).

officers took Saldana to the hospital for treatment of a cut on his nose. Blood was drawn and tested, indicating .27% alcohol by weight.

Pursuant to a plea agreement, Saldana pleaded no contest to second-offense drunk driving, injury by intoxicated use of a vehicle and hit and run involving injury. Other offenses were dismissed but read in for sentencing purposes. The court imposed maximum consecutive sentences totaling six and one-half years, consecutive to a sentence imposed in 1995 for which Saldana was released on bail pending appeal.

The trial court properly considered the gravity of the offenses, the need to protect the public and Saldana's character when imposing sentence. *See* ***Elias v. State***, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). The weight given each of these factors is particularly within the trial court's discretion. *See* ***State v. Larsen***, 141 Wis.2d 412, 428, 415 N.W.2d 535, 542 (Ct. App. 1987). The court primarily focused on the seriousness of the offenses and the need to protect the public. It also considered numerous aspects of Saldana's character, including the fact that he was on bail pending appeal for another alcohol-related conviction when he committed these offenses. Not consuming alcohol was a condition of his bail. In addition, Saldana has a lengthy criminal history,[2] including convictions for endangering safety, sexual assault, disorderly conduct and domestic battery.

The court reasonably chose to give little weight to Saldana's employment history, his support of his children, his claim to be suffering from an insulin attack at the time the collision occurred and his expression of remorse. His

[2] Saldana faults the trial court for not giving him an opportunity to correct any misinformation about his prior criminal history. His postconviction motion and his brief on appeal do not identify any errors regarding his prior criminal history.

employment history and support of his children do not make him any less dangerous to the public. The suggestion that diabetes contributed to the accident ignores his blood alcohol content and suggests that he continues to deny responsibility for his acts.

Saldana argues that the trial court relied on erroneous information because it indicated that he had undergone alcohol assessment four or five times when, in fact, it had only been ordered twice. This misstatement of fact does not undercut the court's sentencing rationale because the misstatement occurred after sentence had been imposed when the prosecutor asked the court to order Saldana to submit to assessment. Saldana does not raise any issue regarding the trial court's decision on the alcohol assessment. The record does not show that the sentencing decision was based on any error of fact.

The court properly ordered the sentences to run consecutive to sentences imposed in another court. Section 973.15(2)(a), STATS., provides that a new sentence can be consecutive to any other sentence "imposed at the same time or previously." The other sentence was previously imposed. The fact that it was stayed pending appeal has no significance.

Finally, the trial court properly rejected Saldana's motion to modify the sentence based on new factors. Whether new factors have been established is a question of law that this court reviews without deference to the trial court. *See* ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). 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 it was unknowingly overlooked by all of the parties. *See* ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor is

an event or development that frustrates the purpose of the original sentencing. ***State v. Johnson***, 158 Wis.2d 458, 466, 463 N.W.2d 352, 356 (Ct. App. 1990). The new facts or events identified by Saldana were his desire to work so he could pay restitution, his involvement with his church and his daughter's mental and behavioral problems. They do not constitute new factors justifying a sentence reduction. None of these facts or events frustrates the purpose of the original sentence. The sentence was based primarily on the seriousness of the offense, Saldana's negative character traits and the need to protect the public. His willingness to work and pay restitution, involvement with his church and the problems experienced by his daughter that are attributable to his imprisonment do not undercut the rationale expressed by the trial court for its sentencing decision.

By the Court.—Judgments and order affirmed.

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