

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 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.

No. 98-2990-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERVIN J. SEIDL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

CURLEY, J.¹ Ervin Seidl appeals from a judgment convicting him of operating a motor vehicle after license revocation, second offense, contrary to § 343.44(1), STATS., entered after he pled guilty. He claims that the trial court violated his constitutional rights when it: (1) mentioned at sentencing for the

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

driving after revocation charge that he was operating his automobile while intoxicated, despite the fact he was acquitted of the charge of operating while intoxicated by a jury; and (2) commented that his blood alcohol concentration test results at the time of the offense were twice the legal limit, although the blood alcohol report was never admitted into evidence at the jury trial due to a missing state chemist and the charge was dismissed. He also argues that if the trial court's conduct was not unconstitutional, the court erroneously exercised its discretion by placing too much weight on one sentencing factor; his extreme intoxication at the time of the offense. Finally, he claims that the trial court erred by sentencing him to an additional six months' incarceration if he failed to pay the \$1000 fine because he had previously been found indigent and he was financially unable to pay the fine.

The trial court is affirmed. This court concludes that the trial court could lawfully consider Seidl's intoxication and his high blood alcohol concentration test results as aggravating factors at his sentencing for operating a motor vehicle after revocation, and that the trial court did not erroneously exercise its discretion by placing too much weight on one sentencing factor. Finally, this court concludes that Seidl has waived his right to appeal the alternate sentence if he fails to pay the \$1000 fine because this argument is being raised for the first time on appeal.²

² This issue will not be addressed as it is raised for the first time on appeal. Pursuant to *State v. Rogers*, 196 Wis.2d 817, 539 N.W.2d 897, failure to raise a specific challenge in the trial court waives the right to raise it on appeal.

I. BACKGROUND.

On December 5, 1997, Ervin Seidl was arrested and charged with operating a motor vehicle while under the influence of an intoxicant (fourth offense), operating a motor vehicle with a prohibited alcohol concentration, and operating after revocation, second offense. These charges resulted from the observations of Village of Shorewood Police Sergeant Terry Zimmerman, who first noticed Seidl driving in the parking lane on a Shorewood street and then observed Seidl making an improper turn at an intersection.

Following the filing of criminal charges, Seidl appeared in court claiming an inability to hire a lawyer in a timely fashion. The trial court subsequently found him indigent and appointed trial counsel, and later, appointed appellate counsel for him at County expense.³ Seidl brought a motion challenging the traffic stop which was denied by the trial court. At trial, before the jury was selected, Seidl agreed to plead guilty to the charge of operating after revocation and the State was forced to dismiss the charge of operating a motor vehicle with a prohibited alcohol concentration due to the unavailability of the state's chemist. The jury trial proceeded on the remaining count of operating while intoxicated and Seidl was acquitted.

At the sentencing for the charge of operating a motor vehicle after revocation, second offense, the trial court, over the objection of Seidl's attorney, entered the chemist's report into evidence, which reflected that Seidl's blood

³ The trial court hired trial counsel for Seidl without a State Public Defender determination of indigency. The State Public Defender did interview Seidl for appellate counsel purposes and determined that he was not indigent and, therefore, ineligible for an appellate counsel appointment through their office. Seidl was ordered to repay the County.

alcohol concentration was .169% at the time of his arrest. During sentencing, the trial court remarked that the blood alcohol report reflected a blood alcohol level twice the legal limit and noted that Seidl was driving while intoxicated when he was driving after revocation. The trial court found these to be aggravating factors and sentenced Seidl to six months in the House of Correction and a \$1,000 fine. The trial court also sentenced Seidl to an additional six months in jail if he failed to pay the fine within 120 days. This appeal follows.

II. ANALYSIS.

Seidl argues that during the sentencing proceeding, the trial court violated the U.S. Constitution's Fifth Amendment right to be free of double jeopardy and the Fourteenth Amendment right to due process and equal protection under the law. He also argues that if the trial court's actions were not unconstitutional, then the trial court erroneously exercised its discretion when it gave too much weight to one sentencing factor.

At the sentencing proceeding, the trial court stated:

I am critical of you for getting behind a wheel under the influence of an intoxicant at a level which is twice the legal limit for somebody in your status who was looking at a third conviction for operating under the influence.⁴

Given that you have two priors, I am of the opinion that the only fair and just punishment to respond to our societal needs to protect people against drunk drivers, and your tendency to flaunt the law and drive under the influence as you did, and the seriousness of this offense is reflected by your level of the intoxication, and your willingness to drive in just a month or two after I had just refused the request

⁴ Contrary to the trial court's comments, the acquitted charge of operating while intoxicated would have been Seidl's fourth conviction.

for an occupational license, requires a maximum punishment.

Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). An erroneous exercise of discretion occurs when the trial court errs in its application of the law. “If a judge bases the exercise of his discretion upon an error of law, his conduct is beyond the limits of discretion.” *State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733, 737 (1968).

A. Double jeopardy.

Seidl argues that the trial court violated both his Fifth Amendment right under the United States Constitution and Article I, § 8 of the Wisconsin Constitution.

The U.S. Constitution’s Fifth Amendment reads: “No person shall be subject for the same offense to be twice put in jeopardy of life and limb.” The Wisconsin Constitution parodying the U.S. Constitution’s Fifth Amendment reads: “No person ... for the same offense may be put twice in jeopardy of punishment.” WIS. CONST. art. I, § 8(1).

Seidl argues that the trial court effectively prosecuted him twice for the identical offense for which he was acquitted when, in its sentencing colloquy, the trial court stated that Seidl’s driving while intoxicated was an aggravating factor. Seidl argues that “by relying heavily on allegations for which the defendant appellant was acquitted when imposing its sentence, the trial court’s actions served to punish [him] for a crime he was actually acquitted of, in violation of his constitutional right to be free of double jeopardy.” He argues that

this action on the trial court's behalf is tantamount to a second prosecution for the same offense after an acquittal. This court disagrees.

The fact that the trial court considered the evidence submitted at the earlier trial that revealed Seidl was intoxicated at the time of his arrest for operating after revocation does not rise to the level of a second prosecution. He was charged only once with operating while intoxicated on December 5, 1997, and he was found not guilty. He did not face any additional sentence for the crime for which he was acquitted, nor did the trial court extend the maximum period of incarceration or fine for the second offense of operating after revocation beyond that authorized by the legislature. *See* § 343.44(2)(b), STATS. Although the trial court's sentence was severe, it fell within the parameters set by the legislature for the crime of operating after revocation, second offense. Therefore, Seidl's double jeopardy rights were not violated.

B. Due Process.

Seidl contends that the trial court's sentencing remarks reflect that the trial court was punishing him for acquitted or dismissed charges. Seidl argues that by doing so, the trial court violated his due process rights.

The U.S. Constitution's Fourteenth Amendment prohibits any state to "deprive any person of life, liberty or property without due process of law." This identical right can be found in the Wisconsin constitution. "No person may be held to answer for a criminal offense without due process of law." WIS. CONST. art. I, § 8(1).

Seidl states that it was contrary to the due process clauses of the United States and Wisconsin Constitutions for the trial court to sentence him based

upon the facts which were presented at his operating while intoxicated trial when he was acquitted of that charge, and equally violative of the due process clauses of the United States and Wisconsin Constitutions to use the blood alcohol test report reflecting that Seidl's blood alcohol was twice the legal limit on the night in question, when it was never admitted into evidence at trial and the charge dismissed. This court disagrees.

In explaining his use of the acquitted charge and the blood alcohol test, the trial court stated:

I am entitled to consider any reliable information at a sentencing hearing which goes to the seriousness of the offense, the character of the defendant, and the needs of society. I am entitled to consider the reliable information even if it was otherwise suppressed because of some violation of the exclusionary rule or State statutes, which set forth the manner in which evidence might be collected and used at trial.

So the fact that Mr. Seidl was found innocent by the jury of operating under the influence and the fact that the State failed to have its extra [sic] witness in court yesterday to present information, does not preclude me from considering that on his arrest on December 5th, a chemical analysis of his blood showed that his alcohol level was point .169 percent.

The trial court correctly recited the law. The level of proof needed to be considered at sentencing is different than the level of proof required to obtain a criminal conviction. "Information upon which a trial court bases a sentencing decision, as opposed to a finding of guilt, need not ... be established beyond a reasonable doubt." *State v. Bobbitt*, 178 Wis.2d 11, 17, 503 N.W.2d 11, 14 (1993). "[S]entencing courts quite appropriately can consider all the facts and circumstances surrounding an offense, established in the course of a trial, even when individual elements may not have been proven beyond a reasonable doubt."

State v. Marhal, 172 Wis.2d 491, 510, 493 N.W.2d 758, 767 (Ct. App. 1992) (Schudson, J., concurring). Moreover, the trial court is not bound by the rules of evidence at sentencing. Under § 911.01(4), STATS.,⁵ the rules of evidence do not apply at sentencing.

The events leading to the charge of operating after revocation were identical to those leading to the operating while intoxicated charge and, under these circumstances, the trial court is permitted to consider acquitted charges. “Accordingly every United States Court of Appeals that has decided [whether the trial court can consider acquitted charges at sentencing], but one, has ruled that a sentencing court may consider conduct for which the defendant has been acquitted.” *Marhal*, 172 Wis.2d at 503, 493 N.W.2d at 764. Thus, the trial court was free to use the information provided at the operating while intoxicated jury trial in assessing Seidl’s character, including the evidence of his intoxication.

The facts in this case are similar to the facts found in *Bobbitt*, 178 Wis.2d at 11, 503 N.W.2d at 11. In *Bobbitt*, the jury found the defendant not guilty of attempted first-degree intentional homicide, but guilty of armed robbery and false imprisonment. *Id.* at 13, 503 N.W.2d at 13. Like the situation here, all

⁵ Section 911.01(4), STATS., provides:

(4) RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations:

....

(c) Miscellaneous proceedings. Proceedings for extradition or rendition; sentencing, or granting or revoking probation, issuance of arrest warrants, criminal summonses and search warrants; proceedings under s. 971.14 (1) (c); proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail or as otherwise provided in ch. 969.

of the charges stemmed from the same set of facts. The trial court sentenced Bobbitt to nine years' imprisonment and stated that it considered the alleged violence associated with the attempted homicide as an aggravating circumstance. *Id.* at 13-14, 503 N.W.2d at 13. Bobbitt argued on appeal that there is no authority in Wisconsin for the use of acquitted charges in sentencing. In response, the appellate court ruled that "accordingly, we conclude that the trial court did not misuse its discretion when it considered the violent conduct surrounding the attempted homicide for which Bobbitt was acquitted." *Id.* at 18, 503 N.W.2d at 15.

The appellate court's rationale was that

[t]he acts of violence surrounding the robbery which the trial court considered were relevant to important sentencing factors; namely the gravity of the offense, the character of the defendant, and the need to protect the public. The consideration of the violent acts for sentencing purposes, even though Bobbitt was acquitted of the homicide charge was not a denial of due process

Id.

The trial court could also utilize the blood test results. The blood test results were not admitted because the chemist was unavailable at the time of the jury trial and the charge was dismissed. However, Seidl never challenged the accuracy of the test results which reflected a blood alcohol concentration of .169%. In fact, in a preliminary matter, Seidl's attorney stated that "The defense is prepared to stipulate to the blood test at this point." Thus, the test results had sufficient indicia of reliability to be used at sentencing.

Accordingly, in applying the holding in *Bobbitt*, this court determines that the trial court properly considered the circumstances surrounding

Seidl's arrest. Seidl not only drove while intoxicated when he was operating a motor vehicle after revocation, but also his blood alcohol test results reflected that his blood alcohol content was twice the legal limit. Under *Bobbitt*, these were appropriate sentencing factors. Thus, the trial court did not violate Seidl's due process rights.

C. Trial Court's Erroneous Exercise of Discretion.

Finally, Seidl argues that even if the trial court could properly consider the fact that he was severely intoxicated at the time of the offense, the trial court erroneously exercised its discretion by placing too much emphasis on it. Seidl's argument rests on case law that has found that considering one factor too heavily, or to the exclusion of other contravening considerations, to be an erroneous exercise of discretion. See *Ocanas v. State*, 70 Wis.2d 179, 187, 233 N.W.2d 457, 462 (1975). Seidl submits that the trial court's sentencing remarks relied on one factor too heavily, that is, that he drove a motor vehicle while intoxicated and that the trial court failed to consider other factors which reflected positively on Seidl's character. This court is unpersuaded.

Reviewing courts are generally "reluctant to interfere with the trial court's sentence because the trial court has a great advantage in considering the relevant factors and the demeanor of the defendant." *State v. Echols*, 175 Wis.2d 653, 681, 499 N.W.2d 631, 640 (1993). As noted, at sentencing the trial court is obligated to consider three factors: (1) the gravity of the offense; (2) the character and rehabilitative needs of the defendant; and (3) the need to protect the public. *Rosado v. State*, 70 Wis.2d 280, 291, 234 N.W.2d 69, 74 (1975). Here, the trial court touched on all three factors when sentencing Seidl. The trial court considered the charge a serious one due to the fact it was not Seidl's first

conviction for operating after revocation and that he was intoxicated at the time. Regarding Seidl's character, the trial court remarked that Seidl's "tendency to flaunt the law and drive under the influence as you did, and the seriousness of this offense is reflected by your level of the intoxication." Finally, the trial court commented that there was a strong need to protect society from Seidl's actions. The trial court did not rely too heavily on one factor, nor, as was discussed previously, was it improper for the trial court to consider Seidl's intoxicated state. All of the trial court's sentencing remarks were relevant to the sentencing factors set forth in *Rosado* and the trial court's analysis supports the maximum sentence. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

