COURT OF APPEALS
DECISION
DATED AND FILED

NOVEMBER 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1431-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT C. HARTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Scott C. Harty challenges the circuit court's denial of his motion for modification of sentence on the basis of "new factors" or, in the alternative, on the basis that the sentence was unduly harsh and unconscionable. The refusal of the Milwaukee county jail to afford Harty "Huber

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

privileges" because he faced a consecutive sentence in Waukesha county is not a "new factor." And, considering that the policy of this state is to remove drunk drivers from the highways in an attempt to stem the heavy toll drunk drivers exact upon society, a sentence of eleven months for a fifth drunk driving conviction is not unduly harsh or unconscionable. Therefore, we affirm.

¶2 Harty and the State entered into a plea agreement to dispose of the three counts arising from a drunk driving arrest. Under the agreement, Harty would enter a plea of "guilty" to the charge of fifth offense operating a motor vehicle while under the influence in violation of §§ 346.63(1)(a), 346.65(2) and 343.30(1q)(b), STATS. The State agreed to dismiss the charge of operating after revocation in violation of § 343.44(1), STATS., but use it as a "read in" and dismiss the charge of operating a motor vehicle with a prohibited alcohol concentration contrary to § 346.63(1)(b). The State also retained the right to recommend a sentence of eleven months in the county jail. The circuit court accepted Harty's plea and found him guilty. The only portion of the circuit court's sentence that is relevant to this appeal is the term of eleven months in the Waukesha county jail to be served consecutive to a sentence he was then serving in Milwaukee county.

¶3 Shortly after the sentencing, Harty filed a motion to modify his sentence. First, he asserted that there was a "new factor" justifying a modification. Harty maintained that the Milwaukee county jail denied him "work release privileges" because there was a hold placed upon him by Waukesha county and the Waukesha county jail would deny "work release privileges" because he did not have a job when he would be transferred from the Milwaukee county jail. Second, he contended that because he was without a job the eleven-month sentence made it impossible for him to pay his fines.

¶4 The circuit court denied his motion. The court stated that at the sentencing Harty requested the sentence be made concurrent to the Milwaukee county sentence so that he would have "work release privileges" and could seek employment; therefore, the court reasoned there was no "new factor" justifying a modification of the sentence. The court also held that the eleven-month sentence was justified because this was Harty's fifth conviction, he also was operating after revocation and his blood alcohol concentration was 0.217%.

¶5 Whether Harty has demonstrated the existence of a "new factor" is a question of law which we decide de novo. *See* ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A "new factor" is defined as: "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." ***Id***. (quoted source omitted).

¶6 We conclude that Harty has not demonstrated the existence of a new factor which would justify a reduction in his sentence. At sentencing, Harty's trial counsel apprised the court that because of the Waukesha county hold the Milwaukee House of Corrections denied Harty Huber privileges.

> I think significantly the Court should be aware that as a result of this matter, Mr. Harty has been denied the Huber that he was awarded through Judge Daughtery in Milwaukee County.
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> … Because of this case, because of the pending matter, this case, he was not able to go to work and work as a carpenter for the autumn months, which is basically his big time of business. He has some concern with regard to this matter in terms of where he can serve his Huber. At this point he's not working as a carpenter, obviously, because he's been in the House of Correction for the past five months. He does need to get to the union hall or whatnot to get farmed out and he's concerned that Milwaukee House –

> Milwaukee House of Correction, their Huber facilities will not allow him release to go to get a job. So if it would be possible, he would like to do … the remaining portion of this sentence in Waukesha County, 'cause Waukesha County would let him leave the Huber facility to let him go to the union hall and that kind of thing.

At the postconviction hearing, the trial court correctly held that there were no "new factors" present, recounting that Harty's counsel had made the request to have the Waukesha county sentence served concurrent with the Milwaukee county sentence. The court also observed that even if it were a "new factor" it would not have been relevant to the sentencing "because I felt he should serve additional time because this was an additional offense of operating auto while intoxicated."

¶7 As an alternative to his argument that a "new factor" supports resentencing, Harty asserts he should be resentenced because the eleven-month jail sentence imposed is unduly harsh and unconscionable because without work release privileges he is unable to earn the money necessary to pay his fines. He argues that this is a misuse of the court's sentencing discretion because it "flies in the face" of the court's purpose in granting work release so that he can pay his obligations. The trial court held that the sentence was appropriate because this was Harty's fifth conviction for drunk driving, he had a high blood alcohol concentration of 0.217% and he was driving after revocation.

¶8 A trial court may review its sentence for a misuse of discretion if it concludes that the sentence was unduly harsh or unconscionable. *See* ***Cresci v. State***, 89 Wis.2d 495, 504, 278 N.W.2d 850, 854 (1979). We review a trial court's conclusion that a sentence it imposed was not unduly harsh or unconscionable for an erroneous exercise of discretion. *See* ***State v. Ralph***, 156 Wis.2d 433, 438-39, 456 N.W.2d 657, 659-60 (Ct. App. 1990).

¶9 The trial court did not misuse its discretion. The factors mentioned by the court—fifth conviction, high blood alcohol concentration and driving after revocation—are aggravating factors that justify an eleven-month sentence. *See* ***State v. Krause***, 168 Wis.2d 578, 590, 484 N.W.2d 347, 351 (Ct. App. 1992) (the drunk driving statute's escalating penalty scheme reflects a recognition that repeat drunk driving is intolerable). Harty's inability to work is not the result of the sentence; rather, it is the product of his own behavior. The sentence is in keeping with the general legislative purpose behind drunk driving laws.

> Drunk driving is indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims. It may transform an innocent user of a highway into a victim at any time - with no advance notice and no opportunity to be heard. It is a tragedy where the intoxicated driver and the victim are often unwittingly the same person.
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> It is also a scourge on society: drunk driving exacts a heavy toll in terms of increased health care and insurance costs, diminished economic resources, and lost worker productivity. It is an affliction which produces no offsetting human or economic benefits; it engenders no positive human or economic incentive. It destroys and demoralizes personal lives and shocks society's conscience. It has no legitimate place in our society.

State v. Nordness, 128 Wis.2d 15, 33-34, 381 N.W.2d 300, 307 (1986).

By the Court.—Judgment and order affirmed.

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