COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1507-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY BADALICH,

DEFENDANT-APPELLANT.

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

¶1 FINE, J. Gregory Badalich appeals from a judgment convicting him on his guilty plea of operating an automobile while under the influence of an intoxicant, as a third offense, and from the trial court's order denying his motion for postconviction relief. *See* § 346.63(1)(a), STATS. He raises two claims of alleged trial-court error. First, he claims that the trial court erred when it denied his motion to suppress results of a blood test that showed him with a blood-alcohol

content exceeding .17.[1] Second, he contends that the trial court erroneously exercised its sentencing discretion. We affirm.

¶2 Badalich was arrested for operating an automobile under the influence of an intoxicant after he admitted to driving a Jeep into a lamppost, and the officers perceived evidence of intoxication. Badalich does not challenge the arrest. Rather, he contends that he had a right to refuse submitting to a test of his blood because he had already given a valid sample of his breath. The trial court ruled that the police lawfully required him to permit blood to be drawn from his body. We agree.

1. *Blood Test.*

¶3 Under Wisconsin's implied consent law, every motorist driving on our roads consents to submit to the testing of his or her blood-alcohol content:

> Any person who ... operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to *one or more tests of his or her breath, blood or urine*, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law enforcement officer under sub. (3)(a).

Section 343.305(2), STATS. (emphasis added). Additionally, pursuant to § 343.305(3)(a), STATS. (request upon arrest), "[c]ompliance with a request for one type of sample does not bar a subsequent request for a different type of sample." Moreover, blood may be drawn from a person involuntarily without a warrant because the exigency of the body's metabolism of the alcohol makes time of the essence. *See* ***State v. Bohling***, 173 Wis.2d 529, 533–534, 494 N.W.2d 399,

[1] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. Section 971.31(10), STATS.

400 (1993) ("[A] warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.") (footnote omitted), *cert. denied*, 510 U.S. 836. There is no dispute but that none of the exceptions inherent in ***Bohling***'s criteria is present here, except, in Badalich's view, the fourth. Badalich's only complaint is that he should not have to give two samples—breath and blood. The statute, however, provides otherwise. Accordingly, it is not the type of "reasonable objection" envisioned by ***Bohling***; "drivers accused of operating a vehicle while intoxicated have no 'right' to refuse a chemical test." ***State v. Reitter***, 227 Wis.2d 213, 225, 595 N.W.2d 646, 652 (1999). As the State points out in its well-written, well-reasoned brief, Badalich's claim of trial-court error is without merit.

2. *Sentencing*.

¶4 Badalich complains that the trial court sentenced him to the maximum period of incarceration, albeit with work-release privileges. He argues that the trial court gave too much weight to "the seriousness of the accident and the defendant's breath alcohol concentration."

¶5 Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably. *See* ***State v. Lechner***, 217 Wis.2d 392, 418, 576 N.W.2d 912, 925 (1998). The primary factors considered in

imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. *See* ***Elias v. State***, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). We have read the sentencing transcript. The trial court reasonably exercised its discretion. Moreover, contrary to the implication in Badalich's argument, "[t]he weight to be given each factor is within the discretion of the trial court." ***State v. Wickstrom***, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984).

By the Court.—Judgment and order affirmed.

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