COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2002

Cornelia G. Clark
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. 01-2690-CR **Cir. Ct. No. 99-CT-1250**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATTY E. JORGENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Patty Jorgensen appeals a judgment of the circuit court finding her guilty of operating a motor vehicle while intoxicated, fourth offense. She also appeals an order denying her motion for postconviction relief.

FACTS

¶2 At about 3 a.m. on May 21, 1999, Keith Anderson heard a knock on his door while he was in the shower. Anderson lives on a rural two-lane highway with only one nearby house. Anderson went to the door, but did not see anything. About five minutes later, he observed a car with its engine running in front of his house. The car was not on the side of the road in a manner suggesting the driver had pulled to the side of the road, but instead was nose-down in a ditch. While he was watching it, Anderson heard the car's engine shut off and saw its lights turn off. Anderson put on his shoes and went outside to investigate. He discovered Patty Jorgensen asleep in the car's driver's seat. Anderson woke Jorgensen, who explained that she was alone and out of gas. Jorgensen not only told Anderson she was alone, she asked for gasoline so she could get back to Janesville, without suggesting that anyone else had been with her. Anderson did not have any gasoline, but offered to call someone to help her out. Jorgensen asked Anderson to call a man named Gary and gave Anderson the phone number. Anderson telephoned Gary, but Gary declined to provide assistance. Subsequently, Anderson called 911.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 Two police officers responded to the call for assistance. One officer observed Jorgensen asleep in the car's driver's seat with an open can of beer spilled on the floor of the car. Another officer saw the keys to the car on the passenger seat. Jorgensen's shoes were on the floor in front of the passenger's seat.

¶4 Jorgensen initially told one of the officers that a friend had been driving the vehicle, but would not divulge the friend's name. That officer threatened to arrest Jorgensen if she did not tell him her friend's name. He placed her in his squad car "to think about the consequences that she was facing." Jorgensen eventually told the officer that Gary had been driving the car. The officer did not observe anyone else in the area who might have been walking for help. Jorgensen failed field sobriety tests and was arrested for operating a motor vehicle while intoxicated.

¶5 On July 14, 1999, Jorgensen brought Michael Simmons to speak to her attorney. Simmons admitted to Jorgensen's attorney that he was driving Jorgensen's car on the night of the incident. Simmons said he went for gas and, when he returned to the scene of the accident, nobody was there. At trial, Jorgensen explained that the reason she did not reveal the name of the driver earlier was because she hardly knew Simmons. Simmons told the district attorney he was the driver, but recanted when a detective investigating the case questioned him.

¶6 When Simmons testified at trial, he said he first met Jorgensen after her drunk driving arrest in late June or early July of 1999. Simmons testified that Jorgensen lived with him for two to three weeks in July 1999. He testified that he

agreed to pretend to be the person who was driving Jorgensen's car during the incident in question, but changed his mind after worrying about getting in trouble.

¶7 Jorgensen disputed Simmons's testimony. Jorgensen testified that she had met Simmons months before her arrest and that Simmons was driving the car when it went into the ditch. Jorgensen said that Simmons went off to find help after she knocked on Anderson's door. Jorgensen testified that she mistakenly told the officer that Gary had been driving because she had been talking about Gary earlier and became confused. Jorgensen testified that Simmons began to ask for sexual favors while she lived in his house, and she felt that he was threatening to change his story if she did not comply. Both Simmons and Jorgensen agreed they did not have sexual relations. Jorgensen said she moved out of Simmons's house shortly after he asked for sexual favors.

¶8 A jury found Jorgensen guilty of operating a vehicle while under the influence of an intoxicant and of operating a vehicle while having a prohibited blood alcohol concentration, both as fourth offense. Judgment of conviction was entered on the count of operating a vehicle while under the influence of an intoxicant. The court sentenced Jorgensen to seven months in jail.

DISCUSSION

¶9 This case presents two issues. First, whether Jorgensen received ineffective assistance of counsel when her counsel failed to move to suppress the statement Jorgensen made to the police officer about Gary being the driver. Second, whether the sentencing judge violated Jorgensen's due process and equal protection rights by using a circuit court judicial district sentencing guideline when imposing sentence.

A. Ineffective Assistance of Counsel

¶10 A defendant alleging ineffective assistance of counsel has the burden of showing that counsel's performance was deficient and that he or she suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶11 An ineffective assistance of counsel claim is a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127. The trial court's factual findings will not be overturned unless clearly erroneous. ***Id***.; ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). The legal conclusions of whether the performance was deficient and prejudicial based on those factual findings, however, are questions of law that are reviewed independently by this court. ***Johnson***, 153 Wis. 2d at 128; ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

1. Counsel's Failure to Move for Suppression

¶12 Jorgensen alleges, and the State does not contest, that Jorgensen's statement about Gary being the driver should have been suppressed because it was illegally obtained in violation of her ***Miranda*** rights. Jorgensen implicitly contends that her counsel performed deficiently because counsel failed to move for suppression. Because the State does not argue that Jorgensen's statement to the officer regarding Gary was admissible, we will assume without deciding that Jorgensen's counsel deficiently failed to move for suppression.

2. Whether Counsel's Failure to Move for Suppression was Prejudicial

¶13 Demonstrating prejudice means showing that defense counsel's alleged errors actually had some adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The defendant must show the alleged deficient performance "so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id***. at 686. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. ***Id***. at 693. Instead, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id***. at 694; ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The requisite reasonable probability must be sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694; ***Moats***, 156 Wis. 2d at 101. This prejudice determination involves consideration of the totality of the evidence and the strength of the State's case. *See* ***Strickland***, 466 U.S. at 695-96.

¶14 We determine, based on the totality of the evidence, that counsel's error was not prejudicial. Our confidence in the outcome is not undermined by the erroneous admission of Jorgensen's statement about Gary being the driver.

¶15 It is readily apparent that the "Gary" statement did not affect the verdict. Jorgensen told Anderson, an uninterested witness, that she was alone. Jorgensen was found in the driver's seat shortly after the engine stopped running. She asked for gasoline so she could drive to Janesville. There was no evidence to corroborate her testimony that someone else was driving. Police officers responding to the call did not observe anyone walking for help in the vicinity of the incident.

¶16 Jorgensen failed to produce Simmons's name, the alleged driver of her car, until almost eight weeks after her arrest, and she explained at trial the delay was because she barely knew him. Simmons testified that he was not the driver, and that he did not even know Jorgensen at the time of her arrest.

¶17 Jorgensen argues that the error was prejudicial because it damaged her credibility by making it appear she had been attempting to fabricate a different driver since the night she was arrested. Jorgensen further argues that even if the jury believed Simmons's testimony, they could still have found Jorgensen's story to be true because Simmons did not refute her contention that someone else was driving the car. We are not persuaded.

¶18 If the jury believed Simmons's testimony, that would necessarily mean the jury believed Jorgensen lied about Simmons. Moreover, Jorgensen's real problem was Anderson's testimony and the physical evidence.

¶19 First, Jorgensen's testimony completely fails to explain why her car was nose-down in a ditch with its engine running. The car obviously did not run out of gas because its engine was still running even after Jorgensen had time to go to the Anderson house and Anderson had time to get out of the shower and investigate.

¶20 Second, Jorgensen admitted she was the person who knocked on Anderson's door. If Jorgensen was telling the truth when she said she was with another person who had gone to get help, why did that person not go to Anderson's house on this rural road, and where did this person go for help? Anderson testified there was only one other house nearby.

¶21 Third, Jorgensen was not so drunk that she could not walk to Anderson's house and knock on the door. Nor was she too drunk to correctly recite Gary's phone number. At the same time, she would have the jury believe she was too drunk to tell Anderson there was another person present.

¶22 We conclude that there is no reasonable probability that suppressing the "Gary" statement would have led to a different result in this case.[2]

B. Whether Using the Sentencing Guidelines Deprives Jorgensen of Her Due Process and Equal Protection Rights

¶23 Pursuant to WIS. STAT. § 346.65(2m)(a), the Fifth Judicial District has adopted sentencing guidelines establishing a range of sentences for persons convicted of driving while intoxicated. Standard sentence ranges are based on the defendant's number of previous convictions and are increased if aggravating factors are present, such as causing an accident or injuring someone while driving intoxicated. In this case, the applicable Fifth District guideline for fourth offense OWI for Jorgensen's intoxication level with aggravated driving suggests a sentence in the range of ninety days to one year. At her postconviction hearing, Jorgensen presented sentencing guideline sheets from the Fourth and Eighth Judicial Districts. For the comparable category of offense, the Fourth District's guidelines recommend a presumptive sentence of 105 days and the Eighth District's guidelines recommend 150 days. Jorgensen asserts that a circuit court's reliance on such district-by-district guidelines violates due process and equal protection principles.

¶24 Initially, the parties dispute whether the circuit court in this case actually relied on the guidelines. Our review of the record discloses that the

[2] The State argues that the jury could have found Jorgensen guilty of a technical violation of the operating while intoxicated statute because she was at the controls of the vehicle while in the right-of-way of a public highway. Jorgensen does not respond to this argument in her reply brief, and this argument appears to provide an alternative basis on which to affirm her conviction. Still, we need not address it because we have already determined that the admission of the "Gary" statement did not prejudice Jorgensen.

circuit court considered aggravating and mitigating factors independently and then also looked to the sentencing guidelines for guidance. We will assume for purposes of this decision that the circuit court was influenced by the guidelines and move on to consider whether such reliance is unconstitutional.

¶25 In effect, Jorgensen asserts that WIS. STAT. § 346.65(2m)(a) is unconstitutional because the implementation of the statute necessitates and, in fact, has created varying sentencing guidelines for drunk drivers among the ten circuit court judicial districts in Wisconsin. Jorgensen contends the use of the guidelines required by the statute denies defendants due process and equal protection because the guidelines make it likely that similarly situated defendants will be treated differently based solely on geography.

¶26 Thus, we must subject WIS. STAT. § 346.65(2m)(a) to a constitutional analysis of its provisions. A statute is presumed to be constitutional. The party asserting its unconstitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt. ***Employers Health Ins. Co. v. Tesmer***, 161 Wis. 2d 733, 737, 469 N.W.2d 203 (Ct. App. 1991).

1. Due Process

¶27 Jorgensen states that a statutory sentencing scheme violates due process if it lacks a rational basis. We agree that "[d]ue process ... requires that the means chosen by the legislature to effect a valid legislative objective bear a rational relationship to the purpose sought to be achieved." ***State v. Joseph E.G.***, 2001 WI App 29, ¶13, 240 Wis. 2d 481, 623 N.W.2d 137. However, we conclude that Jorgensen has failed to demonstrate that the statutory scheme at issue here lacks a rational basis.

¶28 Jorgensen asserts that proper sentencing guidelines reduce sentencing disparity, while the district-by-district guideline system at issue here "increases sentencing disparity among various parts of the state." The fatal flaw in Jorgensen's argument is that she has failed to show that the effect of district-by-district sentencing guidelines is an increase in the disparity of sentences imposed on intoxicated drivers.

¶29 Jorgensen wants us to compare the district-by-district guidelines to the uniformity achieved by a statewide guideline. However, there is no requirement that the legislature choose the most effective means of reducing disparity. Rather, the proper comparison is between having no guidelines and having district-by-district guidelines. The legislature rationally believed that individual judges varied greatly in the severity of sentences imposed on similarly situated defendants. It was likewise rational for the legislature to believe that if each district created sentencing guidelines for OWI offenses, the overall effect would be to reduce the disparity between the very high and the very low sentences imposed by individual judges. Therefore, Jorgensen has failed to show that there is no rational basis for the legislative scheme and has also failed to support her factual assertion that the "guideline system for drunk driving increases sentencing disparity among various parts of the state."

2. Violation of Jorgensen's Equal Protection Rights

¶30 Jorgensen alleges a violation of equal protection. Jorgensen implicitly concedes that the statutory classification does not involve a suspect class or a fundamental interest because she argues that the statute must have a rational basis in order to be constitutional. We concur that this statute will be upheld if a rational basis exists to support it. ***Nankin v. Village of Shorewood***,

2001 WI 92, ¶11, 245 Wis. 2d 86, 630 N.W.2d 141. "A statute violates equal protection only when 'the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy.'" ***Id.*** (quoting ***Milwaukee Brewers Baseball Club v. DHSS***, 130 Wis. 2d 79, 99, 387 N.W.2d 254 (1986)).

> The basic test is not whether some inequality results from the classification but whether there exists a rational basis to justify the inequality of the classification. Any reasonable basis for the classification will validate the statute. A statute will be declared violative of equal protection only when the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy.

Milwaukee Brewers, 130 Wis. 2d at 99.

¶31 Jorgensen challenges the propriety of using sentencing guidelines developed in each district pursuant to WIS. STAT. § 346.65(2m)(a). Jorgensen contends that using different sentencing guidelines in each judicial district results in an unconstitutional disparity in sentences. Because we conclude that criminal defendants do not have a constitutional right to uniform sentencing guidelines, we affirm the sentence of the circuit court.

¶32 In this case, the legislature has created different classes of people. A defendant in one district will face different guidelines than a defendant in another. WISCONSIN STAT. § 346.65(2m)(a) does not explicitly state a rationale for treating defendants differently in different counties. However, we have identified a rational basis for this statute: to reduce the disparity among sentences imposed by individual judges. Thus, sentencing guidelines, even if they differ from district to district, serve to reduce disparity among sentences.

¶33 We conclude that because a reduction in disparity is a rational basis for establishing district-by-district sentencing guidelines, Jorgensen has not met her burden to prove that WIS. STAT. § 346.65(2m)(a) is unconstitutional. Jorgensen apparently contends that the State must employ uniform sentencing guidelines in order to comply with Jorgensen's right to equal protection. But, as we have stated above, the State does not have to eliminate all disparity between sentences; the State need only have a rational purpose behind any disparity that it creates.

¶34 Jorgensen cites ***Nankin***, 2001 WI 92, in support of her contention that disparate treatment of persons convicted of operating a vehicle while under the influence violates the equal protection clause. ***Nankin***, however, does not present a comparable situation. In this case, we begin with a system in which individual trial judges may, and likely do, vary significantly in how they sentence similarly situated persons convicted of driving while intoxicated. As explained above, so far as the record in this case shows, the implementation of district-by-district guidelines has served to reduce, not increase, disparity in sentences for this class of convicted persons. In contrast, ***Nankin*** only involved different treatment based on the population of the taxpayer's county. Nothing about the challenged statute in ***Nankin*** served to reduce disparate treatment; it only created disparate treatment.

¶35 Because we conclude that WIS. STAT. § 346.65(2m)(a) is constitutional, the circuit court's reliance on the sentencing guidelines was appropriate and we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.