COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1237-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG P. HELGELAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded.*

NETTESHEIM, J. Craig P. Helgeland pled guilty to operating a motor vehicle while under the influence of an intoxicant (OWI) in violation of § 346.63(1)(a), STATS. Helgeland challenges the sentence imposed by the trial court on two grounds. Helgeland argues that the court erred by applying the sentencing guidelines established pursuant to § 346.65(2m), STATS. Although we disagree with Helgeland that the sentencing guidelines could not be considered

by the trial court, we agree with Helgeland's further argument that the court erred by considering the guidelines as mandatory. We reverse the sentencing portion of the judgment and remand for a new sentencing.

FACTS

On October 24, 1996, Helgeland was stopped and arrested by an officer of the Town of Bloomfield Police Department. Helgeland was issued a citation for operating a motor vehicle while intoxicated, third offense, contrary to § 346.63(1)(a), STATS. Helgeland was also issued a citation for operating a motor vehicle with a prohibited blood alcohol concentration (PAC) contrary to § 346.63(1)(b).[1] In due course, the State charged both offenses in a criminal complaint based upon Helgeland's prior convictions. On April 11, 1997, Helgeland entered a plea of no contest to the OWI charge and the matter proceeded to sentencing.[2]

Early on in the sentencing proceedings, the trial court stated, "[Y]ou can argue, but I won't probably deviate from the [sentencing] matrix …. I have to tell you, frankly, that the matrix is called for by state statute, it's called for by judicial rules and also required of us in this district." The court then heard testimony from Helgeland's alcohol abuse counselor and arguments from counsel. The court additionally heard a statement from Helgeland accepting responsibility for the offense and notifying the court of his progress in rehabilitation. The court then made the following statements:

[1] Actually, Helgeland refused the officer's request that he voluntarily submit to a chemical test. Thus, Helgeland was also charged with improperly refusing a chemical test. However, the criminal complaint indicates that Helgeland's blood sample was forcibly drawn. The test of the blood sample resulted in the PAC charge.

[2] The PAC charge was subsequently dismissed by the trial court.

> The court has made several references to the sentencing matrix. The sentencing matrix is prescribed by statute, 346.65(2m), as prescribed in Supreme Court Rule 70.34.
>
> ….
>
> [T]o deviate from the matrix itself is contrary to statute, contrary to Supreme Court rules, contrary to district rules, and contrary to good sense.

The court then fined Helgeland $1364, sentenced him to six months in jail and revoked his license for thirty-six months. The trial court's sentencing decision was based on the fines, jail time and revocation recommended for the matrix "cell block" into which Helgeland fell as a third offender, nonaggravated, who refused blood alcohol testing. Helgeland now appeals the sentence imposed by the trial court.

DISCUSSION

A sentencing decision is committed to the sound discretion of the trial court. *See* ***State v. Macemon***, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983).

> [T]here must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standard. As we pointed out in *State v. Hutnik*, (1968), 39 Wis.2d 754, 764, 159 N.W.2d 733, "… there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth."

McCleary v. State, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). A preconceived or rigid policy, or a "fixed view" as to sentencing, is the antithesis of discretion. *See* ***United States v. Foss***, 501 F.2d 522, 527 (1st Cir. 1974). A sentencing court is presumed to have acted reasonably, and a sentence will be set aside only if the defendant shows an unreasonable or unjustified basis for the

sentence. *See* ***State v. Wickstrom***, 118 Wis.2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984).

Helgeland first argues that under § 346.65, STATS., the trial court should not have applied the sentencing matrix in this case. This issue involves the interpretation of § 346.65(2m). Statutory construction presents a question of law which we review independently. *See* ***Gonzalez v. Teskey,*** 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990). However, despite our de novo standard of review, we value a trial court's ruling on such a question. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993).

Section 346.65(2m), STATS., provides:

> In imposing a sentence under sub. (2) for a violation of s. 346.63 (1) (b) or (5) or a local ordinance in conformity therewith, the court shall review the record and consider the aggravating and mitigating factors in the matter. If the level of the person's blood alcohol level is known, the court shall consider that level as a factor in sentencing. The chief judge of each judicial administrative district shall adopt guidelines, under the chief judge's authority to adopt local rules under SCR 70.34, for the consideration of aggravating and mitigating factors.[3]

Helgeland contends that § 346.65(2m), on its face, does not apply to OWI convictions. We agree. The plain language of the statute speaks only to sentences for a violation of § 346.63(1)(b) and (5) STATS., which prohibits operation of a motor vehicle with a prohibited blood alcohol concentration. The State concedes as much in its brief, stating that the "[OWI] Sentencing Guidelines are required by statute for consideration when the defendant has a [PAC]" and are not

[3] SCR 70.34, entitled "Uniform rules for judicial administrative districts," provides:

> The director of state courts shall develop uniform rules for trial court administration. Each chief judge may adopt additional local rules not in conflict with the uniform judicial administrative rules.

"specifically required by statute for consideration when a defendant pleads to OWI."

Nonetheless, we are not prepared to say that a sentencing court in an OWI case may never consider the guidelines. That information may be relevant to a sentencing decision in an OWI case. Here, as in many OWI cases, the accompanying PAC charge was dismissed in keeping with § 346.63(7)(b), STATS., which permits the entry of but one conviction where a defendant is charged with both OWI and PAC. The dismissal of the PAC charge under those circumstances in no way impugns the integrity of the chemical test result. When sentencing a drunk driver on an OWI charge, it may be very relevant for the sentencing court to know where the result of the chemical test puts the defendant on the guideline matrix. To hold otherwise would deprive the sentencing court of relevant information.

Therefore, we agree with the State that in an OWI sentencing, the PAC sentencing guidelines may "serve as direction for the trial court when making its sentencing decision." We stress that this authority to consider the guidelines does not come from the guideline statute since that statute is expressly limited to PAC sentences. Rather, this authority stems from the sentencing court's right, based on public policy, to all relevant information which bears upon the sentence. *See* ***State v. Guzman***, 161 Wis.2d 80, 90, 467 N.W.2d 564, 567 (Ct. App. 1991), *aff'd*, 166 Wis.2d 577, 480 N.W.2d 446 (1992).

That brings us to Helgeland's alternative argument. Helgeland contends that even if the trial court could consider the guidelines, the court erred by considering them as mandatory. On this point, we agree with Helgeland.

Section 346.65(2m), STATS., states that "each judicial administrative district shall adopt guidelines … for the consideration of aggravating and mitigating factors." When the sentencing court is instructed by statute to take guidelines into consideration, then it "must 'consider' the guidelines, no more and no less. The court must be aware of the guidelines and consider them when imposing sentence. It does not mean that the sentence imposed must fall within the guidelines. That is within the sound discretion of the sentencing court." ***State v. Speer***, 176 Wis.2d 1101, 1125, 501 N.W.2d 429, 437-38 (1993).[4]

Thus, even when sentencing for a PAC violation, the PAC guidelines are not mandatory. It follows that the same is all the more true when sentencing for an OWI violation. In this case, the trial court's remarks at sentencing reveal a belief that the court was obligated to follow the sentencing guidelines and to impose a sentence within the matrix. Prior to testimony and arguments at the sentencing hearing, the trial court stated that "the matrix is called for by state statute, it's called for by judicial rules and also required of us in this district." Again, near the close of the hearing the trial court stated that "[t]o deviate from the matrix itself is contrary to statute, contrary to Supreme Court rules, contrary to district rules, and contrary to good sense."

In exercising its discretion, the trial court must base sentencing decisions on legitimate considerations relevant to the individual case. *See* ***State v. Anestos***, 107 Wis.2d 270, 273, 320 N.W.2d 15, 16 (Ct. App. 1982). In support of the trial court's sentencing decision, the State points to testimony presented to the

[4] We recognize that the supreme court in ***State v. Speer***, 176 Wis.2d 1101, 501 N.W.2d 429 (1993), addressed the sentencing guidelines under § 973.011, STATS., which have now been repealed. Nonetheless, the court's discussion as to the application of guidelines is instructive.

court relating to gravity of the offense, the defendant's character, and the need to protect the public. Indeed, the trial court must consider these factors in sentencing. *See* ***McCleary***, 49 Wis.2d at 276, 182 N.W.2d at 519. However, the record indicates that the trial court considered this information only in relation to whether Helgeland belonged in an aggravated or nonaggravated category on the sentencing matrix.

Contrary to the State's argument, the issue in this case is not whether the trial court was presented with information regarding appropriate factors before ultimately sentencing Helgeland. Rather, the issue is whether the sentencing court's remark reveals an erroneous view of the law. Whether or not the sentencing court subjectively believed that it was required to sentence pursuant to the guidelines, the court's sentencing remarks convey the belief that it was so constrained.

In summary, we hold that a trial court may consider a chemical test result as assessed under the guidelines when sentencing on an OWI conviction. However, the guidelines are just that—guidelines. They are not mandatory. We reverse the sentencing portion of the judgment and we remand for a new sentencing.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.24(1)(b)4, STATS.