COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1425-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

FINE, J. Timothy White was convicted on a guilty plea of operating a motor vehicle under the influence of an intoxicant, fourth offense. *See* §§ 346.63(1)(a) and 346.65(2), STATS. The trial court sentenced him to a one-year term of incarceration, under § 303.08, STATS. (Huber privileges), imposed a fine

of $750, and revoked White's operating privileges for three years.[1] White claims that the sentence was excessive, and that the trial court erred in denying his motion to modify sentence.[2] We affirm.

I.

The only review of the events leading to White's conviction was recited without contradiction by the prosecutor at White's plea hearing. According to the prosecutor, White was driving a pickup truck on Interstate Highway 894 in the early evening in July of 1996. A West Allis police officer saw White weaving through the three lanes, hit a car, which lost control and spun across three lanes of traffic before hitting the median wall.

White did not stop. Rather, he continued driving, and left the highway at the Interstate Highway 94 Zoo Interchange. The West Allis officer stopped White when White's truck got a flat tire.[3] White appeared to be drunk,

[1] The State recommended incarceration for one year with Huber privileges, a $1,000 fine, and a three-year revocation of White's license, plus forfeiture of White's vehicle (*see* § 346.65(6), STATS.). At sentencing, White claimed not to own the vehicle. The State should investigate to determine whether White owned the vehicle at the time of the offense, and, if so, whether he deliberately divested himself of that asset to avoid a possible forfeiture. *See* § 346.65(6)(k), STATS.

[2] White was also given citations for operating a motor vehicle without a license and for following too closely. Those citations were dismissed as a result of the State's plea bargain with the defendant.

[3] At the postconviction hearing on White's motion to modify his sentence, White disputed some of the State's assertions at the plea hearing, but these disputes are not at issue on this appeal. Given White's silence during the State's plea-hearing portrayal of the incident, and White's failure to contend either before the trial court or on appeal that the trial court relied on inaccurate information in passing sentence, we accept the State's plea-hearing portrayal of the incident as accurate for the purposes of this appeal.

and failed the field sobriety tests. He refused to permit a test of his blood-alcohol level.

II.

1. *Sentence*.

White claims that the trial court erroneously exercised its sentencing discretion in imposing what White characterizes as an "excessive" sentence. We disagree.

As White recognizes, sentencing is within the trial court's discretion and will only be overturned if there is an erroneous exercise of discretion or if discretion is not exercised. ***Ocanas v. State***, 70 Wis.2d 179, 183–184, 233 N.W.2d 457, 460 (1975). The exercise of discretion contemplates a process of reasoning based 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 standards. ***Id.***, 70 Wis.2d at 185, 233 N.W.2d at 461. Thus, a court may impose a sentence within the limits set by statute if it considers the appropriate factors. *See* ***ibid.***

The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. ***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, a particular 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***, 70 Wis.2d at 185, 233 N.W.2d at 461. "The 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). A sentencing court may appropriately consider uncharged or unproven offenses. ***Elias***, 93 Wis.2d at 284, 286 N.W.2d at 562.

In a meticulously reasoned analysis, the trial court here considered all of the pertinent sentencing factors. It noted that not only was White involved in an accident that "presented extreme danger" even though apparently no one was seriously injured physically, but also that it was White's fourth drunk-driving offense.[4] The trial court pointed out without contradiction at the sentencing hearing that White "fled the scene," refused to submit to a test of his blood-alcohol level, and did not even have "a valid license" and, therefore, "shouldn't have been driving at all."[5] The trial court also considered the positive aspects of White's situation: that he was working, was caring for his two teen-aged children, and was going to be entering an alcohol-treatment program. Under all these circumstances, the trial court imposed the sentence recommended by the State, and declined to permit White's sentence be served on electronic monitoring because that "would unduly depreciate the seriousness" of White's crime. It did, however, give White a thirty-day stay of his sentence "to make arrangements for [his] children."

The trial court considered the appropriate factors, and exercised discretion within the limits set by the legislature. The sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is

[4] The others were in September of 1991, July of 1994, and January of 1995.

[5] White was not charged with leaving the scene of an accident, although the trial court at the plea and sentencing hearing characterized the incident without objection as "fle[eing] the scene." The prosecutor at the plea and sentencing hearing called it a "hit-and-run," also without contradiction or objection.

right and proper under the circumstances." *See* ***Ocanas***, 70 Wis.2d at 185, 233 N.W.2d at 461. The trial court did not erroneously exercise its discretion. *See* ***Anderson v. State***, 76 Wis.2d 361, 364, 251 N.W.2d 768, 770 (1977).

2. *Sentence modification motion.*

White sought modification of his sentence because, according to him, his wife decided not to return to Wisconsin in January of 1997, but, rather, remain in Florida. Thus, White argued that his wife would not be able to help to care for the children until they went to Florida for the summer. Asserting that this was a "new factor," White sought to serve the portion of his sentence on electronic monitoring until the children left for Florida.[6] The trial court denied the motion, explaining:

> I think that Mr. White is certainly in a predicament here with his children. However, they may have to go to social services or to friends' homes. I think to allow him on the electronic monitoring even for a month and a half would unduly depreciate -- or two months -- would unduly depreciate the seriousness of the offense under all the facts and circumstances here; and I think what is concerning to me is I am hearing how Mr. White believes that the, the children need him; but I think that if he continues on this type of path, there is a great likelihood that he is going to seriously injure himself or kill someone or himself and not be available to care for the children long-term.
>
> And I think that the term in jail is necessary for part of his rehabilitation, punishment, deterrence, and the protection of the community; and I don't find that electronic monitoring, even for this period of time, is warranted.

A sentence can be modified to reflect consideration of a new factor. ***State v. Macemon***, 113 Wis.2d 662, 668, 335 N.W.2d 402, 406 (1983). A new

[6] Although technically moot, this issue may be revived once the children return from Florida, if that is where they now are. Accordingly, we discuss it.

factor is one that is highly relevant to the imposition of sentence but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it. ***Ibid.*** There must also be a nexus between the new factor and the sentence, that is the new factor must operate to frustrate the sentencing court's original intent when imposing sentence. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether a new factor exists presents a question of law that this court reviews *de novo*. ***Id.***, 150 Wis.2d at 97, 441 N.W.2d at 279. If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification. ***Ibid.***

Although the trial court did not indicate specifically whether it believed that the decision of White's wife to remain in Florida was a "new factor," the tenor of its comments indicates that it did not. On our *de novo* review, we agree.

The trial court was aware of White's child-care problems at the time it imposed sentence. Indeed, it gave White time to make arrangements for the children for the period between the date of sentencing, October 8, 1996, and January, when White said that his wife would return. A fair review of the trial court's comments during the sentencing hearing and at the hearing on White's motion to modify his sentence reveals that the failure of White's wife to return to Wisconsin in January did not frustrate the sentencing court's original intent when imposing sentence. *See* ***Michels***, 150 Wis.2d at 99, 441 N.W.2d at 280.

By the Court.—Judgment and order affirmed.

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