COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1526-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KIMBERLY S. SKAVLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

DEININGER, J.[1] Kimberly Skavlen appeals a judgment convicting her of operating a motor vehicle after revocation of her operating privilege (OAR), in violation of § 343.44(1), STATS. The conviction was for a fourth OAR offense and occurred while Skavlen was under revocation as an habitual traffic offender

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

(HTO), thus subjecting her to penalties as set forth in §§ 343.44(2)(d)1. and 351.08, STATS. She also appeals an order denying her postconviction motion for sentence modification. Skavlen claims that the trial court erroneously exercised its sentencing discretion and violated her constitutional right to equal protection of the laws when it ordered that the first thirty days of a forty-five-day jail sentence be served "in actual confinement," as opposed to under a monitored home detention program. We conclude that the sentence imposed was neither an erroneous exercise of sentencing discretion, nor, on this record, a violation of equal protection.

BACKGROUND

The State filed complaints charging Skavlen, a Dane County resident, with committing two OAR offenses in Rock County, alleged to be her fourth and fifth OAR offenses within five years. She entered into a plea agreement whereby, on her plea of no contest to OAR fourth offense, the fifth offense charge was dismissed and the State limited its sentencing recommendation to forty-five days in jail. She had also sought agreement from the State that her sentence could be served in Dane County under a home detention electronic monitoring program available in that county, but the prosecutor opposed her request for home detention in lieu of jail confinement.

The court accepted Skavlen's plea, and following arguments by counsel, sentenced her to forty-five days in jail, with work release privileges, to be served in either Rock or Dane County, specifying, however, that the first thirty days must be "in actual confinement, and the balance can be on electronic monitoring." The court ordered the sentence to be consecutive to a sixty-day sentence in Dane County that Skavlen had recently received for similar offenses,

under which she was apparently eligible for a Dane County electronic monitoring program. The court also imposed a fine plus costs and assessments, which are not at issue on this appeal.

Skavlen moved postconviction for a modification of her sentence to allow the entire sentence to be served "in an appropriate electronic monitoring program." In her motion, Skavlen alleged certain health conditions that made jail confinement "inappropriate," and that the sentence constituted cruel and unusual punishment and violated her rights to due process and equal protection. The court denied her motion, and Skavlen appeals. She does not challenge the length of the jail sentence ordered, only the "arbitrary denial of electronic monitoring."

ANALYSIS

We will not disturb a sentence imposed by the trial court unless the court erroneously exercised its discretion. ***State v. Thompson***, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). A trial court erroneously exercises its discretion when "it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factor in the face of other contravening considerations." ***Id.*** at 264, 493 N.W.2d at 732 (citation omitted). When imposing a sentence, it is imperative the trial court consider: "the gravity of the offense, the offender's character, and the public's need for protection." ***Id.*** (citation omitted). However, the trial court has broad discretion in determining the weight to be given to each sentencing factor. ***Id.***

Appellate courts in Wisconsin adhere to a strong policy against interference with the discretion of a trial court in passing sentence. Appellate judges should not substitute their sentencing preference merely because, had they

been in the trial judge's position, they would have meted out a different sentence. In reviewing a sentence to determine whether discretion has been properly exercised, "'the court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of.'" ***State v. Macemon***, 113 Wis.2d 662, 670, 335 N.W.2d 402, 407 (1983) (quoted source omitted).

The trial court acknowledged at sentencing that Rock County did not have an electronic monitoring program in place for use in lieu of jail confinement. At both the sentencing and postconviction hearings, the court indicated its support for the use of such programs in appropriate cases, but concluded that Skavlen should be treated consistently with other Rock County OAR offenders, stating a desire "to as much as possible treat people equally." At the postconviction hearing, the court explained its frustration with the "confused" state of sentencing options and requirements for repeat OAR offenses in Wisconsin, but emphasized that its sentence in this case was motivated in large part by a desire to achieve deterrence: "[T]he real problem is, I guess, the number of convictions for this and the hope that someone will stop driving …. So the court feels that the schedules that we use are related to that factor of trying to keep people off the streets who don't possess a valid driver's license and who in fact have had their privilege … revoked."

That the court's sentence was primarily influenced by proper considerations of deterrence and public protection is further indicated by the prosecutor's argument to the court at sentencing. Where a record indicates that the trial court acquiesced in arguments of counsel, or that those arguments governed the court's determination, we may consider them in assessing the court's exercise

of discretion. ***Hagenkord v. State***, 100 Wis.2d 452, 464, 302 N.W.2d 421, 428 (1981). The prosecutor argued for a sentence of actual confinement as follows:

> [Skavlen] wanted the court and the state to agree to electronic monitoring. I have been unwilling to do so for several reasons.
>
> One, we don't do it in Rock County. So it isn't available. Two, I think it's inappropriate to do it. And I think it minimizes the seriousness of the offense and results in no penalty or no punishment….
>
> My request is that you sentence Miss Skavlen to 45 days in the county jail, that that be consecutive to any term she is going to serve in Dane County. Anything concurrent will even further minimize her conduct.
>
> I think it's important to note, Judge, that Miss Skavlen has been revoked on a safety responsibility suspension for two years now. It's an indefinite safety responsibility suspension that went into effect on November 29th, 1994. At least, to the best of my knowledge, she has done nothing to see that that has changed and has continued to drive apparently here and in Dane County.
>
> If the court sentences her to concurrent time and electronic monitoring, we don't send much of a message to her. We certainly don't have any punishment for her criminal traffic behavior.

The record also shows that the trial court considered Skavlen's medical history when it imposed the sentence. Both counsel commented on Skavlen's medical condition and argued its relevance at the sentencing hearing. In its remarks at the conclusion of the postconviction hearing, the court stated that it was aware of Skavlen's medical history at the time of sentencing but had concluded that "it certainly wasn't a medical impossibility to provide her with the treatment that she may or may not need at a jail either in Rock County or in Dane County."

Section 343.44(2p), STATS., provides that "[t]he legislature intends that courts use the sentencing option under § 973.03(4) [court-ordered,

electronically monitored home detention] whenever appropriate for persons subject to sub. (2)." The legislature has also declared, however, that HTOs "have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws [and] courts … of this state." Section 351.01(2), STATS. Thus, the legislature has provided that persons convicted of OAR while in HTO status may be subjected to enhanced penalties in order to "discourage repetition of traffic violations by individuals against the peace and dignity of this state." Section 351.01(3), STATS. Under § 343.44(2)(d)1., STATS., Skavlen could have received a sentence of up to one year in the county jail, and since she was convicted as an HTO, an additional 180 days of incarceration could have been imposed under § 351.08, STATS. The forty-five-day jail sentence imposed by the court, with thirty days of "actual confinement," was therefore considerably less than one-tenth of the incarceration that could have been ordered for the enhanced offense.

For the foregoing reasons, we cannot conclude that the trial court erroneously exercised its discretion in sentencing Skavlen to forty-five days in jail, the first thirty days of which were to be in "actual confinement." The sentencing option under § 973.03(4), STATS., on its face, is a discretionary option for sentencing courts. ("In lieu of a sentence of imprisonment to the county jail, a court *may* impose a sentence of detention at the defendant's place of residence ….") (emphasis supplied). ***Id***. Skavlen has not argued that the court's sentence conflicts with § 302.425(2), STATS., which grants authority to sheriffs to "place in the home detention program any person confined in jail who has been … sentenced for a crime." We therefore do not address that issue. ***Waushara County v. Graf***, 166 Wis.2d 442, 453, 480 N.W.2d 16, 20 (1992) (court of appeals has no duty to consider any issues not presented to it).

Skavlen's equal protection argument also fails. Her premise is not that her sentence was disparate from that of other four time OAR offenders in Rock County. Indeed, the record implies just the opposite. Rather, she asserts that "[o]ther persons convicted of this same offense who happen to reside in other counties or committed it in other counties are afforded the opportunity provided by the Statute." Except for several statements by the court and counsel that electronic monitoring programs were apparently available in Dane County and not in Rock County, the record is absolutely devoid of any evidence regarding the use or availability of these programs in the counties of Wisconsin. An appellant has the duty to see that evidence material to his or her claims of error is in the record, and a failure to incorporate such evidence may be grounds for dismissal of the appeal. ***State v. Smith,*** 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972).

For all we know from this record, Dane County may be the only county in the state which routinely makes home detention monitoring available to persons convicted of repeat OAR offenses, although, as we have noted, the legislature has encouraged the same in § 343.44(2p), STATS. Nothing in § 973.03(4), STATS., requires counties (or the State) to implement electronic monitoring home detention programs so that courts may employ them in sentencing. Section 302.425(4), STATS., provides that the Department of Corrections "shall ensure that electronic monitoring equipment units are available, pursuant to contractual agreements with county sheriffs … throughout the state on an equitable basis." As we have stated above, we do not address the provisions of § 302.425, since its relevance to this appeal, if any, has not been argued. We note, however, that the statute implies a local option to implement monitoring programs, rather than a state mandate to do so.

Finally, we do not wish to imply that if Skavlen had established that four time OAR offenders were routinely sentenced to monitored home detention in most or all other Wisconsin counties, we would necessarily conclude from that fact that Rock County's failure to implement the optional sentencing program constitutes a violation of equal protection. Our holding is only that we are precluded from even beginning such an inquiry on the record before us.

CONCLUSION

We conclude that the sentence imposed on Skavlen does not represent an erroneous exercise of discretion by the trial court, and that Skavlen has failed to provide this court a proper record to support her claim that the sentence violates her equal protection rights.

By the Court.—Judgment and order affirmed.

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