COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3417

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. NAGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

HOOVER, J. Christopher Nagel was convicted of causing injury by operating a motor vehicle while under the influence of intoxicants, contrary to § 346.63(2)(a)1, STATS. He appeals his sentence, contending that it was both

excessive and based upon inappropriate factors.[1] This court first notes that Nagel did not pursue a postconviction motion for sentence modification and is therefore not entitled to relief from this court.[2] Alternatively, this court disagrees that the trial court committed the errors complained of and therefore affirms the sentence.

Nagel was charged with two alcohol-related offenses as a result of a collision he caused by driving into the rear of a vehicle that was stopped at a stop light. Nagel was operating his vehicle with a blood alcohol content of 0.207 grams per 100 milligrams. The occupant of the vehicle into which Nagel drove, Mark Springstroh, was injured as a result of the collision. Nagel pled no contest to causing injury while under the influence of intoxicants, and the other count was dismissed. The maximum penalty for a violation of § 346.63(2)(a)1, STATS., is a fine from $300 to $2,000, one year in the county jail and license revocation for at least one, but no more than two, years.[3] Nagel was sentenced to nine months in jail, the minimum mandatory fine, attendance at a victim impact class pursuant to § 346.65(2i), STATS., revocation of his operating privileges for one year and the alcohol and drug abuse assessment mandated by § 343.30(1q)(c), STATS.

Nagel contends that the trial court erred by either considering or, alternatively, placing too much weight on the victim's statement and injuries. He

[1] Nagel argues, in part, that the court gave impermissible weight to his failure to carry liability insurance and to the damage to the victim's vehicle. The arguments he raises are wholly unsupported by authorities and are best characterized as consisting of conclusory statements that ignore the true context of the sentencing colloquy. This court therefore declines to address them further. *See* ***State v. Waste Mgmt.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

[2] *See* ***State v. Chambers***, 173 Wis.2d 237, 261, 496 N.W.2d 191, 201 (Ct. App. 1992) (motion for sentence modification required under RULE 809.30, STATS., in order to obtain appellate review of sentence as a matter of right).

[3] Sections 346.65(3) and 343.31(3)(e), STATS.

also asserts that a sentence of nine months in jail is excessive punishment for the conduct in question.

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *See* ***State v. Rodgers***, 203 Wis.2d 83, 93, 552 N.W.2d 123, 127 (Ct. App. 1996). Appellate courts have a strong policy against interference with that discretion. *See* ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). 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) (quoting ***Elias v. State***, 93 Wis.2d 278, 281-82, 286 N.W.2d 559, 560 (1980)).

In reviewing whether a trial court erroneously exercised sentencing discretion, this court considers whether the trial court applied the appropriate factors and whether the trial court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). The primary factors a court considers in fashioning a sentence are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994). As part of these primary factors, the sentencing court may consider, among other things, the defendant's criminal record; history of undesirable behavior patterns; personality, character and social traits; the aggravated nature of the crime; degree of culpability; demeanor; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; and the rights of the public. ***Id***. The weight of the factors is within the trial court's discretion. ***Id***. Imposition

of a sentence may be based on any of the three primary factors after all relevant factors have been considered. *See* ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984).

When judicial sentencing discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion. ***McCleary v. State***, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). Error similarly occurs if the sentencing court fails to state on the record the factors influencing the sentence or if too much weight is given to one factor in the face of contravening factors. ***State v. Larsen***, 141 Wis.2d 412, 428, 415 N.W.2d 535, 542 (Ct. App. 1987). Finally, an erroneous exercise of discretion may be found when the sentence is so excessive and unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Nagel's sentencing record reflects that the trial court considered what Springstroh characterized as the enormous daily physical, financial and emotional impact the crime had on him and his family. Springstroh received lacerations, complained of neck pain and had to be hospitalized. He experienced lingering pain even as of the date of sentencing. Moreover, the court was informed that the damage to Springstroh's vehicle exceeded $5,000. Further, the sentencing judge noted the dangerous and irresponsible nature of Nagel's conduct in operating a motor vehicle substantially impaired, having consumed enough intoxicants so as to have in his system more than twice the amount of alcohol sufficient to presume substantial impairment. The trial court considered it irresponsible as well that Nagel did not have liability insurance through which the latter could make reparation to Springstroh.

It further appears that the court inferred from a witness's statement and a photograph depicting the Springstroh vehicle that Nagel was operating at an excessive speed when he crashed into the Springstroh vehicle. The court opined that the seriousness of the offense, involving intoxicated driving, injury and property damage, and the need to deter operating while under the influence of an intoxicant required a degree of punishment. The court also considered the mitigating factors of Nagel's "relatively clean driving record"[4] and his general reliability, although in the court's opinion the lack of liability insurance combined with Nagel's willingness to place others at risk by virtue of his substantially impaired driving reflected poorly on the latter's character.

The foregoing review of the sentencing record reflects the trial court's careful consideration of all the required sentencing criteria. It referred to the gravity of the offense, Nagel's character and the need to protect the public from the risk posed by chemically impaired drivers through accountability and deterrence. The record does not support the conclusion that the trial court relied on an unreasonable or unjustifiable basis in arriving at the sentence it imposed and thus Nagel has not overcome the presumption that the trial court acted reasonably.

None of the perceived errors of which Nagel complains overcomes the presumption that the trial court acted reasonably. He first notes that Springstroh submitted a written statement to the sentencing judge and also spoke at the sentencing hearing. Nagel implies both that these presentations described

[4] The prosecutor informed the court during the hearing that Nagel had a 1993 speeding conviction that resulted in a forfeiture. His operating privileges were suspended when he failed to pay the forfeiture, but were later restored.

Springstroh's injuries[5] and that it was error to consider the victim's written statement because it was not admitted into evidence. Nagel also expressly contends that a victim has the right to submit a written statement only in felony cases, pursuant to § 950.04(2m), STATS., or as part of a presentence report investigation under § 972.15, STATS. He points out that he was convicted of a misdemeanor, the victim's written statement was not authenticated, reliability of neither the oral nor written statement was tested through cross-examination or established by corroborative evidence and no presentence report was ordered. These circumstances notwithstanding, Nagel argues, the sentencing court placed "a great amount of weight upon the severity of the injuries … and used this to impact the length of the jail term."

Nagel's contention that the court placed undue weight upon the severity of Springstroh's injuries is supposition unsupported by the record. Nagel seeks to demonstrate improper reliance by arguing that the court alluded to the severity of the injuries immediately prior to pronouncing the jail term. The record reveals, however, that the court referred to Nagel's substantial impairment and his awareness of the threat he posed to the public at the time of the incident as additional reasons for imposing a nine-month jail term. These three factors alone justify Nagel's sentence, although it is unreasonable to assume the court excluded from its determination of the proper length of the jail term and the other circumstances it noted in its sentencing colloquy.

Nagel offers no authority for the balance of his arguments concerning the victim's statements. Indeed, his position is contrary to applicable

[5] In fact, Springstroh did not give a specific account of his physical injuries at the sentencing hearing, nor did the judge describe them in detail.

authority. As the State correctly points out, the rules of evidence do not apply at a sentencing hearing. *See* § 911.01(4)(c), STATS. A sentencing hearing is not a trial. *See* ***State v. J.E.B.***, 161 Wis.2d 655, 670, 469 N.W.2d 192, 198 (Ct. App. 1991). Moreover, in ***State v. Voss***, 205 Wis.2d 586, 596, 556 N.W.2d 433, 436 (Ct. App. 1996), this court specifically recognized that art. I, § 9m of the Wisconsin Constitution confers upon a crime victim the right to address a sentencing court. Finally, this State recognizes a strong public policy that all information relevant to sentencing be brought to the attention of the court. ***State v. Guzman***, 161 Wis.2d 80, 90, 467 N.W.2d 564, 567 (Ct. App. 1991). "A statement from the victims about how the crime affected their lives is relevant to one of the considerations that a judge must take into account at sentencing—the gravity of the crime." ***Voss,*** 205 Wis.2d at 595, 556 N.W.2d at 436. Nagel's challenge to the sentence based upon claimed error surrounding information the victim shared with the court is without merit.[6]

Nagel also contends that the sentence imposed is excessive. He argues that the facts of this case do not warrant the sentence he received. Rather, to justify a nine-month jail sentence, "There would have to be more than driving while intoxicated and causing injury." Nagel thus characterizes the operating under the influence and the injury as the only factors before the court when it determined an appropriate sentence. As has already been demonstrated, however,

[6] Springstroh's written statement is not part of the appellate record. It appears from Nagel's reply brief that he may be arguing that the statement was never made available to him. This court cannot, however, ascertain whether this is in fact a component of his argument, demonstrating that it is, at best, undeveloped. This court declines to address issues raised on appeal that are inadequately briefed. *See* ***State v. Flynn***, 190 Wis.2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994).

these were not the sole factors relied upon by the court in fashioning its sentence. Thus, this argument is inherently flawed and, as such, unpersuasive.

Nagel finally offers what he views as mitigating circumstances to support his contention that the sentence imposed was shocking. He notes that the record is unclear as to the extent of Springstroh's injuries, the victim's vehicle "was not totaled," and that this incident constituted a mistake by an otherwise law-abiding citizen who cooperated with authorities and took responsibility for his conduct. The record reveals that the court took these factors into account in considering an appropriate sentence, albeit not always from the same perspective as Nagel. That the trial court, however, did not perceive the salient circumstances in the manner Nagel proposes or did not ascribe the same weight to the mitigating circumstances as he urges on this court does not render the sentence excessive. Nagel was substantially impaired when he crashed into Springstroh's stationary vehicle and caused lingering physical and substantial property injury. Impaired drivers pose a known, obvious and substantial danger to the public such that retribution and deterrence are proper responses. It thus cannot reasonably be contended that imposing a nine-month jail term and the minimum mandatory revocation and fine is so excessive and unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under these circumstances.

In summary, the sentencing record reflects the trial court's careful consideration of the appropriate sentencing criteria: the gravity of the offense, the defendant's character and the need to protect the public from the risk posed by chemically impaired drivers. Nagel has failed to show some unreasonable or unjustifiable basis in the record for the sentence and thus has not overcome the presumption that the trial court acted reasonably. Moreover, Nagel was

substantially impaired when he crashed into Springstroh's stationary vehicle and caused what the court characterized as severe physical and substantial property injury. These circumstances, combined with the others relied upon by the court, justify the sentence Nagel received. It certainly was not so excessive and unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under these circumstances.

By the Court.—Judgment affirmed.

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