

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 12, 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. 97-3699-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRY L. VAN DRESE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Brown County:  
PETER NAZE, Judge. *Affirmed.*

CANE, P.J. Terry Van Drese appeals his sentence for operating a motor vehicle while under the influence of an intoxicant, third offense, contrary to § 346.63(1)(a), STATS. The trial court sentenced Van Drese to fifty days in jail, a fine and assessment of \$871, an alcohol assessment and a thirty-month license revocation.

The underlying facts surrounding the offense are undisputed. Deputy Christine Truitt of the Brown County Sheriff's Department was dispatched to an area where she observed Van Drese's truck exit from a field and enter the parking lot of an apartment complex. Van Drese had been driving his truck on the bike trails in the woods in a reckless manner in order to "blow off steam." He does not dispute that children were present on the trails. Nor does he challenge the fact that he was intoxicated and had a blood alcohol concentration of .22. The State agrees with Van Drese that the OWI violation occurred only when he drove the truck onto the parking lot.

Van Drese argues the trial court should not have considered as an aggravating factor his reckless driving on the bike trails in the woods, which was not an OWI violation. He also argues the trial court erroneously exercised its sentencing discretion by failing to consider factors other than his blood alcohol level of .22 and two prior OWI convictions. Essentially, he contends the trial court erred by refusing to depart from the sentencing guidelines. This court rejects his arguments and affirms the sentence.

A sentencing decision is committed to the sound discretion of the trial court. *State v. Macemon*, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983). A sentencing decision is reviewed on appeal in the same manner as all trial court discretionary acts. *Id.* "[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." *State v. Hutnik*, 39 Wis.2d 754, 764, 159 N.W.2d 733, 738 (1968). In *Macemon*, the supreme court enumerated some of the factors recognized as properly considered in sentencing: a past record of criminal offenses; a history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of

the crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for close rehabilitative control; and the rights of the public. *Id.* at 667-68, 335 N.W.2d at 405-06.

Additionally, under the appellate standards of review, there exists a strong policy against interference with the trial court's discretion in passing sentence. *Id.* at 670, 335 N.W.2d at 407. In reviewing the sentence to determine whether discretion has been erroneously exercised, this court must start with the presumption that the trial court acted reasonably, and Van Drese must show some unreasonable or unjustifiable basis in the record for the sentence. *See id.*

There is nothing erroneous about the trial court considering Van Drese's conduct when driving his truck on the bike trails in the wooded area while highly intoxicated, in an agitated state and where children were present. Contrary to Van Drese's assertions, the trial court is not prohibited from considering these facts surrounding the offense. *See id.*

Also, contrary to Van Drese's assertions, a review of the record shows that the trial court reasonably exercised its discretion and did not blindly follow the sentencing guidelines. The trial court considered the fact that Van Drese's primary driving was off the roadway and there was no accident--although

there was damage to the truck. However, it balanced those factors with Van Drese's blood alcohol level which was virtually three times the legal limit<sup>1</sup> and the fact that while in this highly intoxicated state, he drove the truck recklessly in an area knowing children were present and its potential danger to the children and himself. Furthermore, it considered the Eighth District's sentencing guidelines<sup>2</sup> for a third OWI offense and concluded that under all the

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<sup>1</sup> Section 340.01(46m)(b), STATS., provides:

**(46m)** "Prohibited alcohol concentration" means one of the following:

....

(b) If the person has 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

<sup>2</sup> Section 346.65, STATS., provides in part:

**Penalty for violating sections 346.62 to 346.64.**

....

(continued)

circumstances, there was no reason to depart from the guidelines. This court concludes that the trial court reasonably exercised its sentencing discretion by considering the circumstances surrounding the charged incident and applying the sentencing guidelines for a third OWI offense. Accordingly, the sentence is affirmed.

*By the Court.*—Judgment affirmed.

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

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**(2m)** 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.

