

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 18, 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. 98-0826-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VICTORIA L. STARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and JEAN W. DIMOTTO, Judges. *Affirmed.*

CURLEY, J. Victoria Stark appeals from a judgment convicting her of driving while intoxicated (“DWI”) and from an order denying her postconviction motion for sentence modification. Stark argues that the circuit court erroneously exercised its discretion in sentencing her because her sentence is harsh and excessive. This court concludes that the circuit court properly exercised

its discretion and the sentence was neither harsh nor excessive; therefore, the judgment is affirmed.

I. BACKGROUND.

At the scene of an accident involving Stark, the police detected the smell of alcohol and noticed that Stark's eyes were bloodshot and glassy. Stark was given and failed the field sobriety tests. The results of a breath sample revealed her blood alcohol level was 0.19%. Stark was charged with driving while intoxicated, driving with a prohibited blood alcohol concentration, and speeding.

Stark pleaded guilty to driving while intoxicated, contrary to § 346.63(1)(a), STATS., and the State recommended the dismissal of the other two charges. Stark had a history of traffic offenses, including two previous DWI violations and several violations for driving with a suspended license. Following the State's sentencing recommendations, the circuit court sentenced Stark to eight months in the House of Correction with Huber privileges and imposed a \$1,000 fine. Stark moved for sentence modification on the grounds of a "new factor" which rendered her sentence harsh and excessive and required resentencing.¹ The circuit court denied Stark's motion. Stark now appeals.

II. ANALYSIS.

This court will not reverse a sentence absent an erroneous exercise of discretion. *State v. Echols*, 175 Wis.2d 653, 681-682, 499 N.W.2d 631, 640 (1993). The reviewing court generally is "reluctant to interfere with a trial court's

¹ On appeal, Stark has apparently abandoned her contention that a new factor exists requiring resentencing.

sentence because the trial court has a great advantage in considering the relevant factors and the demeanor of the defendant.” *Echols*, 175 Wis.2d at 682, 499 N.W.2d at 640.

The denial of Stark’s postconviction motion for sentence modification does not leave Stark with a harsh and excessive sentence. A harsh and excessive sentence is one that 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 v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 452 461 (1975). In imposing sentence, the circuit court considers these primary factors: (1) the gravity of the offense, (2) the character of the defendant, and (3) the need for protection of the public. *State v. Mosley*, 201 Wis.2d 36, 43-44, 547 N.W.2d 806, 809 (Ct. App. 1996). The defendant has the burden to show there was an erroneous exercise of discretion, *id.* 201 Wis.2d at 43, 547 N.W.2d at 809; thus, the defendant must show that the circuit court did not consider the primary sentencing factors.

Stark’s brief-in-chief argues the trial court did not accurately weigh the primary sentencing factors. This court is not persuaded by Stark’s argument. There is no need for the trial court to exhaustively delineate to what degree each factor supports the weight of the sentence. “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” *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 452, 461 (1975). The circuit court is entrusted with wide discretion to decide the proper weight to be given to each of the factors. *See id.*

In Stark's reply brief, she argues that the brevity of the circuit court's remarks demonstrate a failure to exercise its discretion because no reasons are stated for the sentence. Again, this court disagrees. The circuit court's sentencing remarks reflect each sentencing factor was considered:

Bearing in mind your character, the nature of the offense before the Court, the need to punish you, and deter you, as well as protecting society and rehabilitation, and keeping in mind the sentencing criteria set forth for sentencing for operating while under the influence of intoxicant offenses, I will find the following is fair and reasonable. I will sentence you as follows: I will sentence you to eight months in the House of Correction. That time would be served consecutive to any other time that you are serving. It would not be served on electronic monitoring.

In addition, the reviewing court may "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512, 522 (1971). Such a review reveals that the circuit court properly exercised its discretion. The record reveals that the circuit court was told of many of the qualities touching on Stark's character; i.e., the fact that she was hard-working and had made a commitment to total sobriety. The circuit court was also aware of Stark's long history of traffic offenses and the fact that this was her third DWI. These facts both aggravated the gravity of the offense and suggested a strong need to protect the public. The circuit court implicitly expressed its concern for the need to protect the public, as it specifically refused to allow Stark the penalty of electronic monitoring and, instead, ordered her to serve time in the House of Correction. Also, despite Stark's poor record, the circuit court did not impose the maximum possible sentence of twelve months. At sentencing, the prosecutor recommended a sentence of eight to nine months, and defense counsel a sentence of six to seven months. The sentence imposed by the circuit is only a month longer than what

defense counsel deemed appropriate. Under these circumstances, there is no evidence of a sentence so harsh or excessive that it offends or shocks public sentiment.

By the Court.—Judgment and order affirmed.

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

