COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1330-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD A. NUCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

BROWN, J. The issue is whether the trial court erroneously exercised its discretion in sentencing Richard A. Nuchell to twenty days in jail as a condition of probation. We affirm.

Nuchell was subject to a domestic abuse injunction, in effect from May 5, 1997, until May 5, 1999. On July 16, 1997, at about 10:30 p.m., he drove past his ex-wife's home three times, honking the horn and screaming out the

window. At the time, he was driving under the influence. His blood alcohol concentration was 0.199%. Either that same day or the next, he put a note in his ex-wife's mailbox stating, "Todd will die." Todd is his ex-wife's boyfriend.

As a result of his acts, Nuchell was charged with disorderly conduct, two counts of violating the restraining order, driving under the influence and driving with a prohibited blood alcohol concentration. Pursuant to a plea bargain, Nuchell pled no contest to the disorderly conduct charge, one count of violating the domestic abuse injunction and driving under the influence. The second count of violating the domestic abuse injunction was dismissed but read in at sentencing. The prohibited blood alcohol concentration charge was dismissed.

The State recommended that the court withhold sentence on the disorderly conduct and injunction violation convictions and place Nuchell on probation for two years, conditioned upon serving twenty days in jail, plus a fine, costs and community service. The trial court followed the State's recommendation. Nuchell brought a motion to modify the sentence, which was denied, and Nuchell then brought this appeal.

It is within the trial court's discretion to place a convicted person on probation and to impose any conditions which appear to be reasonable and appropriate to probation. *See* ***State v. Brown,*** 174 Wis.2d 550, 553, 497 N.W.2d 463, 464 (Ct. App. 1993). Reasonableness and appropriateness of a condition of probation are determined by how well they serve the dual goals of probation: rehabilitation of the offender and protection of state and community interests. *See* ***id***. at 553-54, 497 N.W.2d at 464.

Nuchell questions why twenty days in jail serves to protect the public any better than a sentence of five days. Nuchell suggests that there was no

reason for the twenty days instead of a lower number and no reason was forthcoming by the trial court.

Nuchell also takes issue with the trial court's belief that he was in a pattern of "escalating conduct" such that a twenty-day sentence would "teach the defendant ... a valuable lesson." Nuchell claims that there is no pattern of escalating conduct. Specifically, Nuchell faults the court's reliance on a previous incident whereby, according to Nuchell, he only pushed his ex-wife back after she pushed him and she happened to bump her head on a shelf as a result. Because there was no conviction for that incident, Nuchell thinks the court improperly considered the instant convictions to be a "second offense" rather than a first. Nuchell concludes that the trial court gave too much weight to the prior incident.

Nuchell also questions whether the sentence properly serves his rehabilitative needs. Again, Nuchell centers on his belief that this was really his first offense, and to the extent that the trial court equated his rehabilitative needs with learning a lesson, he contends that the trial court was wrong to do so.

We conclude that it was entirely appropriate for the trial court to consider Nuchell's conduct to be part of an escalating pattern. Although the previous incident did not result in a conviction, ***State v. McQuay***, 154 Wis.2d 116, 452 N.W.2d 377 (1990), teaches that judges may consider any previous acts when sentencing, whether there were charges brought or not, whether there was an acquittal or not, and whether there was a conviction or not. *See* ***id.*** at 126, 452 N.W.2d at 381. Here, there was a domestic abuse injunction on the books when Nuchell violated the injunction the first time. That he was not convicted is of little moment. The fact is that his subsequent conduct evidences complete disregard for the injunction. The trial court no doubt determined that a twenty-day period of

confinement might just teach Nuchell that the domestic abuse injunction has the force of law and is seriously considered by our courts. It would have been reasonable for the trial court to conclude that a five-day sentence would no more teach him this lesson than no sentence at all—the ultimate effect of what took place the first time he violated the injunction.

Then too, the court had a read-in which it was entitled to take into account. *See* ***id.*** at 129 n.4, 452 N.W.2d at 381-82. Nuchell was not charged with just one incident of violating the injunction. He was charged with violating the injunction in a new and separate course of conduct. That the other charge was dismissed as part of the plea bargain is, again, of little moment when considering that the plea bargain allowed the dismissed charge to be read in. Moreover, the dismissed charge involved leaving a note threatening death to the boyfriend in the ex-wife's mailbox. The trial court certainly was on solid ground to have considered this course of action to be a separate, serious breach of the domestic abuse injunction and as further evidence of Nuchell's continuing disregard of the domestic abuse injunction.

Finally, the trial court stated that Nuchell had failed to show "any remorse and any insight into his conduct." The lack of remorse is also a factor which a trial court can consider and obviously did. *See* ***State v. Paske***, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). All the signs point to Nuchell "thumbing his nose" at the injunction and the purpose behind the statute. We read the trial court's decision to be voicing a concern that Nuchell appears not to have understood that the justice system is serious about curtailing abusive behavior not only during the marriage, but after the marriage is over. The legislature speaks as a voice of the community. The community does not approve of postmarriage abusive behavior, especially the continuing sort exhibited by Nuchell. The trial

court obviously considered that twenty days in jail would teach Nuchell the lesson that enough is enough. The marriage is over. He should walk away from it and instead focus his efforts on being a good father. We affirm.

By the Court.—Judgment affirmed.

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