COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2183-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT.

V.

KENNETH L. DADE,

DEFENDANT-APPELLANT.

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

¶1 BROWN, P.J. [1] Kenneth L. Dade appeals his fourth conviction for operating a vehicle while intoxicated (OWI). He claims that this is actually his third conviction, not his fourth, because an administrative suspension in Illinois

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to 1997-98 version unless otherwise noted.

for refusing to take a breathalyzer test was not a "conviction" and, therefore, should not have been counted. He also claims that the trial court erroneously exercised its discretion during sentencing by following a sentencing matrix promulgated by the Second Judicial District, by allowing the State to argue that he fled and eluded when the State had not charged him with that particular crime, and by considering recent legislative action to make a fifth offense of OWI a felony. We reject each argument and affirm.

¶2 Regarding his claim that this is a third, not a fourth, conviction, Dade explains that in Illinois a person who refuses to take a breathalyzer has his or her driver's license administratively suspended. That person then is entitled to an administrative hearing and the suspension is either sustained or rescinded. There is no conviction entered; the refusal hearing is never the subject of court action. Dade posits that this scheme, therefore, is unlike ours in Wisconsin where, if the driver wants a review of an administrative suspension, he or she requests a refusal hearing before a trial court pursuant to WIS. STAT. § 343.305(9)(am)5.c. Dade contends that because Wisconsin's administrative suspension is subject to judicial review, the upholding of the administrative refusal is treated as a "conviction" in Wisconsin. But because there is no similar judicial review in Illinois, an adverse outcome resulting from an administrative hearing cannot be considered a conviction. Thus, since WIS. STAT. § 343.307(1)(d) allows the State to add convictions of foreign jurisdictions so long as they are substantially similar to

Wisconsin's, and because the Illinois process is dissimilar, Dade's offense should be considered a third, not a fourth, offense.[2]

¶3 The argument is a nonstarter. We do not agree with Dade that the Illinois process is dissimilar to Wisconsin's under WIS. STAT. § 343.305(9)(am)5.c nor do we even agree that the test is whether the foreign jurisdiction's process is "similar" to Wisconsin's. But rather than get into a long analysis of why Dade is wrong, we need only refer to WIS. STAT. § 343.307(1)(e). The statute reads, in pertinent part, as follows:

> **(1)** The court shall count the following …:
>
> ….
>
> (e) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.

Id. It is true that § 343.307(1)(d) concerns "convictions" from other jurisdictions. But para. (1)(e) deals with "suspensions." Under the clear language of the statute, suspensions arising out of the refusal to submit to chemical testing are counted. The statute is silent about whether the process by which a person is suspended for refusing to submit to chemical testing in a foreign jurisdiction must be "similar" to Wisconsin's process. We conclude, therefore, that such a prerequisite does not exist. So, it does not matter whether the Illinois suspension that Dade received should be considered a "conviction." He was suspended for refusing to submit to chemical testing. Under para. (1)(e), it counts.

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[2] Dade further asserts that we must give full faith and credit to the Illinois scheme and not consider the Illinois refusal process as a conviction because Illinois obviously does not consider it to be tantamount to a conviction. But as pointed out by the State, this constitutional issue is raised for the first time on appeal. It is therefore waived. We will not consider it. *See* ***State v. Rogers***, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995) (failure to raise a specific challenge in the trial court waives the right to raise it on appeal).

¶4 Next, Dade claims that the court did not, in fact, exercise its discretion, but merely followed a sentencing matrix formulated by the Second Judicial District, made up of judges in Racine, Kenosha and Walworth counties. It is true that a trial court may not consider the guidelines as mandatory. A preconceived or rigid policy, or a "fixed view" as to sentencing, is the antithesis of discretion. *See* ***United States v. Foss***, 501 F.2d 522, 527 (1st Cir. 1974). But it is also true that sentencing guidelines may serve as direction for the court in making its sentencing consideration. This is because a trial court should consider all relevant information bearing upon the sentence. *See* ***State v. Guzman***, 161 Wis. 2d 80, 90, 467 N.W.2d 564 (Ct. App. 1991), *aff'd*, 166 Wis. 2d 577, 480 N.W.2d 446 (1992).

¶5 Here, the trial court did not blindly follow the matrix. Rather, the court considered Dade's claim of mitigating factors. In deciding to reject Dade's entreaty, the court concluded that he "hasn't learned yet that this type of behavior, drinking and driving is serious, wrong …. I think it would be a disfavor for me to give you a leniency here. So I think the recommendations are appropriate. So I will sentence in accordance with our guidelines. I think it falls within the guidelines." It is clear that the court did exercise discretion. It listened to reasons why the guidelines should not be applied in Dade's instance and then made a decision that the guidelines should, in fact, be applied.

¶6 Dade next complains that the trial court erred by allowing the State to argue that Dade's fleeing and eluding should be considered when sentencing. In Dade's view, if the State wanted to penalize Dade for this conduct, it should have charged him with fleeing and eluding. According to Dade, the State should not be allowed to comment upon and the court should not be allowed to consider conduct for which he was not charged. This issue is also a nonstarter. The fleeing

and eluding behavior was part of the underlying facts. The sentencing court has a right—even a duty—based on public policy, to consider all relevant information bearing upon the sentence. Uncharged conduct, especially if part of the factual background of the charge that was pled, may be considered. Here, Dade's conduct bears upon his uncooperativeness and unsafe driving. Both of these factors are relevant to the sentencing decision.

¶7 Finally, Dade argues that the court misused its discretion when it considered the fact that the legislature recently made a fifth OWI offense a felony. He claims that the court took into consideration "law not in existence at the time." This issue has no merit. The trial court was merely using the recent legislative action as an example of how the citizens of this state consider repeat drunk driving to be a serious problem. We read the trial court's comment to be nothing more than a statement that like the legislature—and like the citizenry electing the legislators—the court similarly considers repeat drunk driving to be a serious situation. Trial courts must consider the seriousness of an offense in sentencing. The court was merely fulfilling its duty of considering the seriousness of Dade's offense when it made the comment concerning recent legislative action. We affirm the conviction.

By the Court.—Judgment affirmed.

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