COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2176-CR **Cir. Ct. No. 2014CT85**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK P. HAYNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: J. MICHAEL BITNEY, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Patrick Haynes appeals a sentence imposed after the revocation of his probation related to a judgment of conviction for third-offense

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

operating a motor vehicle while intoxicated (OWI). He argues the circuit court erroneously exercised its discretion by deviating from the sentencing guidelines and imposing the maximum sentence available under the law.[2] We disagree and affirm the judgment.

BACKGROUND

¶2 Haynes was charged in a criminal complaint with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as a third offense. According to the criminal complaint, Wisconsin State Patrol trooper A. Christian observed a van traveling southbound at approximately 9:00 p.m. on April 19, 2014, without its lights illuminated. Christian observed the driver lose control of the van and strike a light pole, causing the pole to fall. The driver then drove past Christian, away from the accident scene.

¶3 Christian initiated a traffic stop of the van. The driver, identified as Haynes, acknowledged hitting the light pole. Christian noticed Haynes had red, glossy eyes and slurred speech. He also observed two open cans of beer inside the vehicle, one lying on the passenger-side floor and the second in the rear passenger compartment. Christian detected a strong odor of intoxicants coming from the vehicle. Christian asked Haynes why he did not stop after striking the pole, to

[2] Haynes specifically argues the circuit court "abused its discretion." However, our supreme court replaced usage of the phrase "abuse of discretion" with "erroneous exercise of discretion" more than twenty years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

Additionally, in his brief-in-chief, Haynes inappropriately refers to himself by party designation rather than by his name, contrary to WIS. STAT. RULE 809.19(1)(i). We admonish counsel that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

which Haynes responded, "I was fucking around with my phone." Haynes also stated his license was suspended, the van was not insured, and that he had consumed "a little bit" of alcohol.

¶4 Christian attempted to have Haynes perform field sobriety tests. During the horizontal gaze nystagmus test, Christian observed a lack of smooth pursuit in both of Haynes' eyes, and Haynes swayed during the test. Haynes, however, refused to continue the test after he was unable to follow the directions. He also refused to perform the walk-and-turn and one-leg stand tests. Haynes told Christian he did not want to perform the tests because he knew he was not safe to drive and would be arrested. A subsequent test of Haynes' blood revealed he had a .204% blood alcohol concentration.

¶5 On November 18, 2014, Haynes pled guilty to third-offense OWI,[3] and the PAC charge was dismissed. Consistent with a joint sentencing recommendation, the circuit court withheld sentence and placed Haynes on two years' probation, with sixty-five days in jail as a condition of his probation.[4] The

[3] The judgment of conviction indicates that Haynes entered a plea of no contest. However, the transcript of the plea hearing reflects that Haynes pled guilty.

[4] Before proceeding to sentencing, the circuit court warned Haynes as follows:

> Okay. Well I want you to understand that if I go along with this agreement and you fall off the wagon, I think you probably know what corrections is going to do.
>
> ....
>
> ... That's going to translate into jail time fairly quickly, and in addition to whatever you're going to serve as part of the plea agreement, if you can't stay sober or find the means to stay sober, they're going to lock you up to protect the public, and that would be tragic for you and your family.
>
> ....

(continued)

court also ordered Haynes to pay a $2,117 fine, inclusive of all costs and assessments, and $2,982.49 in restitution to the City of Menomonie, among other probation conditions.

¶6 The circuit court stated it believed the joint sentence recommendation was appropriate given the seriousness of the offense, the need to protect the public, and Haynes' character and rehabilitative needs. In particular, the court indicated Haynes appeared to have a good work ethic, and it was "confident" that if Haynes remained sober, he would "find a job and work hard." However, the court also explained: "This is a serious offense. OWI claims the lives of thousands of people every year, and getting behind the wheel of a car after you've had too much to drink not only endangers the defendant, but it endangers the good people of this community ...." The court described Haynes as having "significant rehabilitative needs" and further noted Haynes continued to struggle with an alcohol addiction and would pose a danger to the public if he continued to consume alcohol.

¶7 Haynes was subsequently revoked from probation. On June 26, 2015, he appeared before the circuit court for sentencing after revocation. The State did not recommend a specific sentence but instead reiterated the recommendations of the Department of Corrections (DOC) and the "10th Judicial

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> ... And I don't want you to promise me forever, because I know that it's a one-day-at-a-time thing.
>
> ....
>
> ... Okay. But I would be very disappointed, Patrick, if you hurt yourself or somebody else while this case is on my watch.

District OWI Guidelines" (guidelines).[5] According to the State, the DOC recommended Haynes serve a six- to nine-month jail sentence. The guidelines, in turn, provided for a jail sentence of 110 days, or 140 days if the court followed the aggravated guidelines. Haynes acknowledged the "factors in the revocation packet are serious" but contended he was being prosecuted for that conduct separately.[6] He requested a sentence under the aggravated guidelines and asked for Huber privileges.

¶8 The circuit court again considered the seriousness of the OWI offense, the need to protect the public, and Haynes' character and rehabilitative needs. The court described the offense as having "underlying aggravated circumstances." The court explained, "Mr. Haynes was driving drunk, significantly impaired, at night[,] without his driver's headlights illuminated, so drunk that he hit a telephone or light pole and snapped it off and didn't bother stopping as the pole fell and shattered on the ground ...." The court indicated, "So you've got a gentleman here that's driving drunk at night on his cell phone, and I can't think of a much more dangerous combination." The court opined, when Haynes "drinks, he's a danger to the public, at least as it involves him operating a motor vehicle," and "[Haynes] absolutely was a danger not only to himself, but was a substantial and significant danger to the traveling public."

[5] The chief judge for the Tenth Judicial District approved these guidelines pursuant to WIS. STAT. § 346.65(2m)(a). The 2014 version of the guidelines is available on the Wisconsin Court System website at https://www.wicourts.gov/publications/fees/docs/d10owi.pdf (last updated Jan. 1, 2014).

[6] The record does not contain a separate document outlining the DOC's recommendation. The DOC's revocation packet is also not part of the record.

¶9 The circuit court further explained:

> In addition to the circumstances that ma[d]e this a grave offense in and of itself, [Haynes] ha[s] the character and rehabilitative needs of a man here who has failed miserably on probation. He was given an opportunity to rehabilitate himself and do minimal jail time, and he failed in that regard.

According to the court, when Haynes was arrested on a more recent incident, he lied and tried to blame his wife, which the court indicated did not speak well for Haynes' character. Additionally, the court stated that while Haynes was on probation he had a number of questionable portable-test readings despite being prohibited from using alcohol; "got high on Ambien"; "drove while under the influence"; was involved in another accident with circumstances similar to those in the present case; was terminated from treatment; and failed to make any payments toward restitution or court costs. During his probation Haynes was also charged with committing multiple burglaries and thefts, in which a number of items were stolen, including firearms.

¶10 The circuit court stated it was "fully aware" of the guidelines for third-offense OWI. However, the court emphasized that the guidelines are not binding and "[t]his is not a normal case." It added:

> Mr. Haynes is not a normal offender, he's a career criminal. He's a danger and a threat to the public, and I have no confidence that I can take him at his word or that if he's released he'll do positive things instead of going right back out there on the road, drinking and driving while under the influence and end up killing himself, or God forbid, his wife or some of their children.

The court sentenced Haynes to the maximum period of twelve months in jail with Huber privileges, with eighty-nine days' credit for time served. The court acknowledged the sentence was "harsh" and in excess of the guidelines and the

DOC's recommendation. However, the court also indicated it was not bound by the recommendations of counsel or the DOC, and it further remarked that Haynes needed to be locked up as long as possible "because he is a danger to society[.]" Haynes appeals the sentence after revocation.

DISCUSSION

¶11 We review a circuit court's sentencing decision for an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Id.***, ¶18 (alteration in ***Gallion***) (quoting ***State v. Borrell***, 167 Wis. 2d 749, 781-82, 482 N.W.2d 883 (1992)); *see also* ***State v. Davis***, 2005 WI App 98, ¶12, 281 Wis. 2d 118, 698 N.W.2d 823 ("There is a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence."). However, "[d]iscretion is not synonymous with decision-making." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). "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 founded upon proper legal standards." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (citing ***McCleary***, 49 Wis. 2d at 277).

¶12 "When considering a challenge to a sentence after revocation, we review both the original sentencing and the sentencing after revocation 'on a global basis, treating the latter sentencing as a continuum [sic] of the first.'" ***State v. Reynolds***, 2002 WI App 15, ¶8, 249 Wis. 2d 798, 643 N.W.2d 165 (2001) (alteration in ***Reynolds***) (quoting ***State v. Wegner***, 2000 WI App 231, ¶7, 239

Wis. 2d 96, 619 N.W.2d 289). When the same circuit court judge presides at both proceedings, as is the case here, we consider the original sentencing reasons to be implicitly adopted. *See* ***id.***

¶13 Haynes concedes that "[a]sking an upper court to reverse the sentence imposed by a trial court is no small request." He also acknowledges, "[A]s long as the trial court considered the proper factors and the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience." *See* ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). Further, he concedes the guidelines are not binding on a circuit court and "[i]t may well be possible to have cases that call for deviation from the guidelines[.]" Nevertheless, Haynes argues the circuit court erroneously exercised is discretion by deviating from the guidelines and by imposing the maximum sentence in this case.

¶14 We disagree. "Individualized sentencing ... has long been a cornerstone to Wisconsin's criminal justice jurisprudence." ***Gallion***, 270 Wis. 2d 535, ¶48. "When making a sentence determination, a court must consider the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant, as well as any appropriate mitigating or aggravating factors." ***State v. Salas Gayton***, 2016 WI 58, ¶22, ___ Wis. 2d ___, ___ N.W.2d ___. Here, the circuit court considered these primary sentencing factors and explained its reasons for imposing the maximum sentence, which reasons were based on the facts

properly before it.[7] While Haynes may disagree with the court's decision to sentence him to the maximum amount of jail time permitted under the law, the court did not erroneously exercise its discretion in so doing, especially given its stated reasons. The sentence is also not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment …." *See* ***Ocanas***, 70 Wis. 2d at 185.

¶15 We are further unpersuaded by Haynes' contention that the circuit court erroneously exercised its discretion by deviating from what he concedes are non-binding guidelines. *See* ***State v. Smart***, 2002 WI App 240, ¶15, 257 Wis. 2d 713, 652 N.W.2d 429 ("The guidelines are not mandatory, and a court may disregard them if it so chooses."). Contrary to Haynes' claims, the circuit court did not pay only "lip service" to the guidelines. Rather, the court expressly acknowledged the guidelines but determined the guidelines were not appropriate to follow in this case because Haynes "is not a normal offender" and "[t]his is not a normal case." The court then proceeded to explain why it believed a maximum jail sentence—and thereby a deviation from the guidelines—was warranted, *see supra* ¶¶8-10, including that Haynes "failed miserably on probation" when provided "an opportunity to rehabilitate himself and do minimal jail time." "[A circuit] court may determine that conduct following the first sentencing hearing

[7] Haynes appears to argue the circuit court could not consider the burglary and thefts he was charged with committing while on probation because he had not yet been convicted of those offenses at the time of sentencing. His argument in this regard is inadequately developed, as he does not cite any legal authority to support his claim that the court improperly considered the pending charges against him. We need not consider arguments that are unsupported by references to legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Moreover, "the court may consider not only 'uncharged and unproven offenses' but also 'facts related to offenses for which the defendant has been acquitted.'" ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436 (quoting ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341).

casts a defendant in a very different light." ***Reynolds***, 249 Wis. 2d 798, ¶13. Here, Haynes' conduct while on probation illuminated to the circuit court that, when sentencing Haynes on the third-offense OWI charge following revocation, the maximum term of confinement was necessary to protect the public.

By the Court.—Judgment affirmed.

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