COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP450-CR **Cir. Ct. No. 2006CF4**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. VANDUYSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jeffrey VanDuyse appeals a judgment of conviction, entered upon his no contest plea, for one count of homicide by intoxicated use of a motor vehicle, as well as an order denying his motion for

sentence modification. VanDuyse[1] argues that the court failed to adequately explain his sentence of twenty years' initial confinement and ten years' extended supervision. He further complains the thirty-year sentence is excessive. We reject his arguments and affirm the judgment and order.

Background

¶2 VanDuyse and his fiancée, Kerri Kirsch, went out to watch a football game. Both became intoxicated and when they were ready to go home, VanDuyse drove. As they approached a construction zone, VanDuyse was unable to navigate a sharp curve. He crossed into the other lane, colliding with an oncoming vehicle. Witnesses reported that VanDuyse appeared to be speeding. Kirsch sustained severe head injuries and died at the scene. The driver and passenger in the other vehicle were also injured, as was VanDuyse, who has no recollection of the accident. Tests later revealed that, at the time of the accident, Kirsch had a blood-alcohol concentration of approximately .154% and VanDuyse's was .191%.

¶3 VanDuyse was charged with eight counts: homicide by intoxicated use of a vehicle; homicide by use of a vehicle with a prohibited alcohol concentration; operating while intoxicated, fourth offense; operating with a PAC, fourth offense; two counts of OWI, causing injury; and two counts of operating with a PAC, causing injury. He agreed to plead no contest to the homicide count in exchange for the remaining charges being dismissed. The State agreed to recommend a fifteen-year sentence, consisting of ten years' initial confinement and five years' extended supervision. VanDuyse would be free to argue at

[1] It is not clear whether VanDuyse or Van Duyse is the appropriate spelling. We use the format captioned with the clerk's office.

sentencing. The court accepted the plea and ordered a presentence investigation, which recommended a sentence totaling ten to fourteen years, consisting of seven to ten years' initial confinement and three to four years' extended supervision.

¶4 The State made its sentencing recommendation as agreed and noted that VanDuyse had been cooperative with the prosecution and appeared to accept responsibility for his actions. It further noted VanDuyse was a Gulf War veteran and his last OWI had been in 1998. The State also thought it relevant that Kirsch was intoxicated, the driver of the other vehicle had tested positive for marijuana, and the road construction might have had a role in the accident. Nevertheless, the State considered VanDuyse responsible for the situation and believed its sentence recommendation was appropriate.

¶5 VanDuyse's attorney noted several of the same factors as the State, adding that the rear brakes of VanDuyse's vehicle had malfunctioned. While counsel also highlighted VanDuyse's remorse, he ultimately joined the State's sentence recommendation. VanDuyse allocuted, apologizing to those involved in the accident and taking responsibility for Kirsch's death.

¶6 The court accepted that VanDuyse was remorseful, but indicated the situation could have been much more tragic: VanDuyse could have killed the individuals in the other vehicle as well. The court noted the impact the accident had on Kirsch's two children, including Kirsch and VanDuyse's daughter, who turned one year old only four days after Kirsch was killed. Ultimately, the court concluded VanDuyse's actions "cr[y] out for a much more severe penalty than what's been recommended to me." Noting that it considered the maximum forty-year sentence justified by the record were the court so inclined, the court sentenced VanDuyse to twenty years' initial confinement and ten years' extended

supervision. VanDuyse moved for resentencing, arguing that the court failed to adequately explain his sentence, the sentence was excessive, and a new factor existed. The court denied the motion without a hearing.

Discussion

¶7 Sentencing is committed to the circuit court's discretion, and we limit our review to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A criminal defendant challenging a sentence has the burden to show an unreasonable or unjustifiable basis in the record. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We presume the circuit court acted reasonably. ***Id.*** As long as the sentencing court considered the relevant factors and the decision was within the statutory maximum, we will not reverse the sentence unless it is so wholly disproportionate to the offense as to shock public sentiment. ***State v. Brown***, 2006 WI 131, ¶22, 298 Wis. 2d 37, 725 N.W.2d 262.

¶8 Relevant primary factors at any sentencing include protection of the community, punishment and rehabilitation of the defendant, and deterrence of others. ***Gallion***, 270 Wis. 2d 535, ¶40. Multiple secondary factors that the court may also consider include the defendant's past criminal offenses and history of undesirable behavior; defendant's remorse, repentance and cooperativeness; defendant's need for close rehabilitative control; the rights of the public; and the effect of the crime on the victims. ***Id.***, ¶43 n.11. However, determining which factors are most relevant, and the weight assigned to each factor, is ultimately part of the circuit court's discretionary exercise. ***Brown***, 298 Wis. 2d 37, ¶39; ***Gallion***, 270 Wis. 2d 535, ¶41.

¶9 Here, VanDuyse does not assert the circuit court relied on improper factors, only that his sentence should have been shorter. He claims the circuit court: (1) did not consider the sentences of other defendants convicted of the same crime; (2) must have started at the maximum and taken time off of that sentence rather than considering the lowest necessary sentence, contrary to ***Gallion***; (3) did not consider such mitigating circumstances as his remorse and cooperation; and (4) did not properly explain why it was rejecting the sentence recommendations.

¶10 VanDuyse wanted to demonstrate, as a new factor, that other defendants convicted of homicide by intoxicated use of a motor vehicle received substantially shorter sentences than he did. But VanDuyse cites no authority for his proposition that the court must compare the sentences of other defendants. Even if this were a relevant factor, it could not be dispositive. Each sentence must still rise and fall on its own facts, and the sentence must be crafted by the circuit court's discretionary exercise after weighing and examining all the factors the court deems relevant. Implicit in the court's rejection of VanDuyse's motion is its determination that comparative sentences did not weigh as heavily as other factors already considered by the court.

¶11 Indeed, VanDuyse's sentence is within the statutory maximum and we may therefore presume it is reasonable. *See* ***State v. Scaccio***, 2000 WI App 265, ¶¶17-18, 240 Wis. 2d 95, 622 N.W.2d 449. The legislature has determined that homicide by intoxicated use of a motor vehicle merits up to forty years' imprisonment; we will not undermine that determination by mandating any one sentence be compared to that of other defendants convicted of the same crime.

¶12 VanDuyse correctly notes that each sentence "should call for the minimum amount of custody or confinement which is consistent with" the

sentencing objectives. ***Gallion***, 270 Wis. 2d 535, ¶23 (quoted source omitted). Thus, it would be an erroneous exercise of discretion for the court to use the maximum penalty as a starting point, deducting time for mitigating circumstances in order to create a sentence. While VanDuyse suggests the court did so here, review of the complete sentence hearing reveals VanDuyse's speculation is incorrect. The court merely commented that the circumstances of this case amply justified the maximum sentence. Nevertheless, over the course of twenty-four transcript pages, the court carefully reviewed all of the circumstances it considered relevant and assigned them the weight it deemed appropriate. The court also concluded that, in its determination, certain mitigating factors merited consideration, resulting in a sentence less than the maximum.

¶13 It is not accurate for VanDuyse to claim the court ignored mitigating circumstances. The court specifically acknowledged VanDuyse's genuine remorse, his service as a soldier, and the fact that, in twenty years, he might still be able to have a relationship with his daughter. These were the factors the court concluded weighed in VanDuyse's favor, and the court applied them as such.

¶14 VanDuyse also complains the circuit court did not properly explain its deviation from the PSI or the parties' sentencing recommendations. A PSI is not binding on the sentencing court. ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41. Here, the PSI erroneously indicated VanDuyse's offense was a Class D felony when, in reality, it was a Class C offense. A Class C felony has a maximum sentence of forty years; a Class D maximum is twenty-five years. It is not clear whether, had the PSI writer realized the error, the

recommendation would still have been ten to fourteen years.[2] Also, a plea agreement—and, therefore, a sentencing recommendation made pursuant to that agreement—is not binding on the court. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.[3] Because mathematical precision in sentencing is not required, *see* ***Gallion***, 270 Wis. 2d 535, ¶49, a court is not required to explain its deviation from the recommendations before it, or its rejection of irrelevant factors. It is only required to adequately explain the sentence it renders. *See* ***id.***, ¶¶53-55; ***State v. Echols***, 175 Wis. 2d 653, 682-83, 499 N.W.2d 631 (1993).

¶15 Here, the court's sentencing decision is adequately supported by its lengthy address to VanDuyse. The court identified several factors relevant to the protection of the community, punishment and rehabilitation of VanDuyse, and deterrence of others. The court noted it had received a letter, furious about the fact that this was VanDuyse's fourth OWI offense. The court commented, "I felt the screaming coming through in the letter, and I think that's what society believes as well." Like the citizen, the court considered VanDuyse's repeat offense aggravating, particularly in light of his complete record. His prior OWIs were in 1994, 1996, and 1998. However, he had other convictions, including ones for criminal trespass, battery, resisting an officer, and disorderly conduct with a domestic violence enhancer, plus at least five citations. The court noted that VanDuyse's probation was revoked on every occasion.

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[2] Indeed, had the court relied on the PSI, there would be an argument that it sentenced VanDuyse on incorrect information. In that case, despite discretion otherwise fully exercised, we might have been compelled to reverse. *See* ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990).

[3] We note there is no allegation that the plea colloquy was in any way deficient.

¶16 While VanDuyse alleged his military service left him with anger issues, the court commented that VanDuyse had multiple opportunities to obtain help for those issues. Further, the court noted, VanDuyse appeared to have a negative attitude towards treatment. Based on all of this, the court could conclude first, that the community needed protection because VanDuyse failed or refused to learn from his mistakes; second, that probation was not at all a viable option; and third, that a lengthy term of confinement was necessary both to ensure VanDuyse received all treatment necessary and to provide a deterrent effect on others.

¶17 The court also considered the impact of VanDuyse's crime on the victims here. The driver of the other car was angry at VanDuyse. She suffered seven broken ribs and a bruised lung, and her passenger—her daughter—had suffered severe internal bruising, making her seriously ill for several weeks. The court noted that, while Kirsch had also exercised bad judgment by becoming intoxicated, she paid for her decision with her life. Most compelling, perhaps, was a letter from Kirsch's son, who was thirteen at the time of sentencing. He wrote: "Dear Judge, my feelings about the death of my mother are the following: That I think Jeffery L. Vanduyse should get 15 years or longer in prison. Sad. Mad. Angry at Jeff. Lonely. Depressed."

¶18 Ultimately, the court's decision reflects careful consideration of appropriate factors. VanDuyse's disagreement with the court's prioritization of those factors is not a basis for resentencing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. S*ee* WIS. STAT. RULE 809.23(1)(b)5.