

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 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. 2007AP2587-CR

Cir. Ct. No. 2006CF5302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Adam Smith appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the sentence the court imposed was unduly

harsh. Because we conclude that the circuit court properly exercised its discretion when it sentenced Smith, we affirm.

¶2 Smith pled no contest to one count of homicide by intoxicated use of a motor vehicle. Smith, who was twenty-one years old at the time, drove his car the wrong way on a highway, striking head-on the car driven by a seventeen-year-old girl. When his blood was tested later, his blood alcohol content was .162. The girl died from her injuries. At the sentence hearing, a number of people spoke, both about the victim and the effect her death had on them, and about Smith. The court sentenced Smith to ten years of initial confinement and six years of extended supervision.

¶3 Smith then filed a postconviction motion arguing that the sentence imposed was unduly harsh. Smith argues that he had received a significant amount of counseling since his arrest, and that, combined with his age and other personal characteristics, made the sentence too harsh. The circuit court concluded, however, that his behavior on the night of the incident was completely irresponsible, that while his treatment attempts were commendable, they were too late for both him and the victim, and that the community needed to be protected from intoxicated drivers. The court concluded that the sentence was not unduly harsh, and denied the motion.

¶4 In this court, Smith renews his argument that the sentence was unduly harsh. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* “The primary considerations in imposing a

sentence are the gravity and nature of the offense (including the effect on the victim), the character of the defendant and public safety.” *State v. Carter*, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997). The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court’s discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶5 In this case, the circuit court considered all the appropriate factors. The court considered the gravity of the offense, particularly the young age of the victim and the horrendous effect her death had on her family and friends. The court also considered Smith’s relatively young age, his lack of a criminal record, the quantity of alcohol he had consumed, the choices Smith made when he became intoxicated and drove, the need to protect the community from intoxicated drivers and the need to deter others from engaging in similar behavior. In sum, the court considered all of the appropriate factors, and then imposed a sentence that was less than the maximum allowed by law. We conclude that the circuit court properly exercised its discretion when it sentenced Smith and when it denied his motion for postconviction relief. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

