

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 31, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1377-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN W. SCHMIDT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

FINE, J. Steven Schmidt appeals from a judgment convicting him of causing injury by the intoxicated use of a motor vehicle, see §§ 346.63(2)(a)(1) and 346.65(3), STATS., and from the trial court's order denying his motion for post-conviction relief. Schmidt pled "no contest" to the charge. The sole issue on appeal is whether the trial court misused its discretion in imposing sentence. We affirm.

Schmidt was under the influence of an intoxicant when he struck and injured a pedestrian. The trial court sentenced him to a six-month term of incarceration, with work-release privileges under § 303.08, STATS.

Sentencing is within the trial court's discretion and will only be overturned if there is an abuse of discretion or if discretion is not exercised. *Ocanas v. State*, 70 Wis.2d 179, 183-184, 233 N.W.2d 457, 460 (1975).

The exercise of discretion contemplates a process or 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.

Id., 70 Wis.2d at 185, 233 N.W.2d at 461. Thus, a court may impose a sentence within the limits set by statute, *ibid.*, if it considers appropriate factors.

The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for protection of the public.

Elias v. State, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, a particular sentence will not be reversed unless it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas*, 70 Wis.2d at 185, 233 N.W.2d at 461. "The weight to be given each factor is within the discretion of the trial court." *State v. Wickstrom*, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984).

The trial court here noted that the crime was serious and that Schmidt's blood-alcohol content tested at .24. The trial court also recognized in mitigation, however, that earlier in the day, when Schmidt had gone to Summerfest to drink, he had taken the bus rather than drive, and that Schmidt "has already taken steps to address any alcohol problem" by having an

assessment at the Milwaukee Council on Alcoholism and following up with programs administered by the Family Social and Psychotherapy Services. Nevertheless, the trial court opined that it was necessary to impose a substantial period of incarceration to both protect society and to punish Schmidt, even though Schmidt, too, had suffered as a result of his crime. The trial court considered the appropriate factors, and properly exercised its discretion.

Several months after sentencing, Schmidt brought a motion to modify his sentence. The motion alleged that although the trial court considered a report by a counselor employed in a drunk-driving program administered by Wisconsin Correctional Services, the trial court neither read a more “up-to-date” report nor heard testimony from the counselor. In denying Schmidt's motion, the trial court noted that it had considered evidence of Schmidt's efforts to address his alcohol problem and that it gave to Schmidt “significant credit” for those efforts. The trial court pointed out that if it were not for the positive aspects of Schmidt's life and his efforts at rehabilitation, it would have “given him a longer jail time.” The trial court properly held that there was an insufficient basis to modify Schmidt's sentence. *See State v. Ambrose*, 181 Wis.2d 234, 239-240, 510 N.W.2d 758, 760-761 (Ct. App. 1993) (trial court may not modify sentence upon mere reflection – there must be “new factors” not known to trial court at time sentence imposed but highly relevant to sentence).

By the Court. – Judgment and order affirmed.

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