COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP767-CR **Cir. Ct. No. 2011CF418**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARK A. GUNDRUM and JENNIFER R. DOROW, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Richard L. Gray appeals from an amended judgment of conviction entered upon his guilty plea to one count of operating a motor vehicle while intoxicated as a fourth offense and with a minor child in the

car. He also appeals from an order denying in part his motion for postconviction relief.[1] He asserts that the circuit court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 Police stopped Gray on April 24, 2011, while he was driving a car on a Wisconsin highway late on a Sunday afternoon. An adult woman and two children under sixteen years of age were riding as passengers in Gray's car. An investigation revealed that Gray was driving without a license and with a blood alcohol concentration of .359, that he had three prior convictions for operating a motor vehicle while under the influence of an intoxicant, and that one of his prior convictions occurred within the previous five years. The State charged Gray with three crimes. Incident to a plea bargain, Gray pled guilty to one count of feloniously operating a motor vehicle while intoxicated as a fourth offense and with a minor child in the car, pursuant to WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)4m., and 346.65(2)(f)2. (2009-10).[2]

¶3 Gray faced a maximum sentence of twelve years of imprisonment and a $20,000 fine. The circuit court imposed an eight-year sentence bifurcated as three years of initial confinement and five years of extended supervision.

[1] The Honorable Mark D. Gundrum presided over the plea and sentencing in this matter and entered the original judgment of conviction. The Honorable Jennifer R. Dorow presided over the postconviction proceedings and entered the amended judgment of conviction and the order resolving the postconviction motion.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Gray moved for sentence modification. The circuit court concluded that the length of extended supervision imposed exceeded the term allowed by law. Accordingly, the circuit court reduced the period of his extended supervision to three years and otherwise denied relief. Gray appeals, alleging that the circuit court imposed his sentence without properly considering relevant sentencing factors.

DISCUSSION

¶5 Gray challenges his sentence. Our standard of review is well settled and places a heavy burden on a convicted defendant. Sentencing lies within the sound discretion of the circuit court, and appellate review is limited to considering whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. This court has a "'duty to affirm a sentence on appeal if from the facts of record [the sentence] is sustainable as a proper discretionary act.'" ***State v. Hall***, 2002 WI App 108, ¶6, 255 Wis. 2d 662, 648 N.W.2d 41 (citation omitted, brackets in ***Hall***). Moreover, "in instances where a sentencing judge fails to properly exercise discretion, this court will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695 (citation omitted).

¶6 "Circuit courts must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The circuit court may also consider numerous other factors:

> (1) [p]ast record of criminal offenses; (2) history of undesirable behavior patterns; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id. (brackets added, quotation marks omitted). The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Further, we do not require the circuit court to use magic words when exercising sentencing discretion. *See* ***State v. Ziller***, 2011 WI App 164, ¶13, 338 Wis. 2d 151, 807 N.W.2d 241. The circuit court must address the appropriate sentencing factors, but need not recite them. *See* ***Odom***, 294 Wis. 2d 844, ¶25.

¶7 The circuit court must also "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

¶8 The record here reflects that the circuit court considered the primary sentencing factors. The circuit court discussed the gravity of the offense, stating that Gray was "in competition … for having the highest blood alcohol level [that the circuit court had] seen," and emphasizing that he was driving erratically in a construction zone with children in the car. In the circuit court's view, "without actually causing an accident and injuring or killing people, this is about as bad as it gets." The circuit court discussed Gray's character, noting "real positives" that

included Gray's family life and employment record. The circuit court also recognized that Gray had a limited criminal history, but the circuit court explained that "we just can't scratch away your drunk-driving record." The circuit court further lamented Gray's poor judgment in driving while intoxicated, particularly when a sober adult who could drive was with him in the car. The circuit court discussed the need to protect the public, finding that "it doesn't get more dangerous" than operating on a highway with a .359 blood alcohol concentration.

¶9 The circuit court identified protection of the public and deterrence as the primary sentencing goals. The circuit court explained that Gray must be confined "to keep people safe…. There's got to be something that deters you from this type of activity again, and that something is going to be prison time. There's no two ways about it here."

¶10 Gray asserts, however, that the circuit court erred because, he says, it did not address his rehabilitative needs and overlooked the benefit he could derive from alcohol and drug abuse treatment. We do not agree with Gray's characterization of the sentencing proceedings.

¶11 The circuit court began its remarks by explaining that it "need[ed] to consider [Gray's] character … [and] to consider, with that, [Gray's] rehabilitative needs." The circuit court then explicitly addressed those needs in a variety of ways.

¶12 First, the circuit court decided that Gray would be eligible for the earned release program after he served eighteen months of his term of initial confinement. *See* WIS. STAT. § 302.05. The earned release program is a substance abuse treatment program administrated in the Wisconsin prisons. ***State v. Owens***, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187. Indeed, the legislature

renamed the program effective August 3, 2011, and it is now known as the Wisconsin substance abuse program.[3] *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The circuit court has discretion to determine whether an inmate is eligible for this program. *See* WIS. STAT. § 973.01(3g). Here, the circuit court took into account that Gray could benefit from substance abuse treatment while incarcerated and allowed him the opportunity to participate in the program.

¶13 Second, the circuit court imposed conditions of extended supervision in this matter to address Gray's need for treatment and for ongoing "'rehabilitative control.'" *See* ***Harris***, 326 Wis. 2d 685, ¶28 (citation omitted). The circuit court ordered Gray to participate in "alcohol and other drug abuse assessment and [in] follow-up treatment as appropriate." The circuit court also required Gray to "maintain absolute sobriety" and further ordered: "no use or possession of alcohol, no use or possession of illegal drugs, no use or possession of prescription drugs unless it's with a valid prescription … [and] random urine screens." Further, the circuit court barred Gray from "any premises during that time period [of extended supervision] that primarily serves or sells alcohol." The circuit court explained to Gray: "[t]hat means no bars, no taverns, no liquor stores…. [T]he goal here is to keep you from places where you're just tempted. Better to keep you far away from those establishments in the first place."

¶14 In light of the foregoing, we cannot agree with Gray that the circuit court did not consider his rehabilitative needs or that it neglected to take into account the benefit he might receive from substance abuse treatment. The record

[3] The circuit court imposed sentence in this matter on July 25, 2011. Thus, at sentencing, the circuit court referred to the "earned release" program, the name of the program on the date of sentencing. *See* WIS. STAT. § 302.05.

shows that the circuit court considered those factors and addressed them as it deemed appropriate. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16. Accordingly, we reject Gray's challenge to the circuit court's exercise of sentencing discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).