COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1035-CR **Cir. Ct. No. 2010CF374**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE S. GRENIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Jesse Grenier appeals from a judgment convicting him of homicide by negligent operation of a vehicle and from an order denying his motion for postconviction relief. We reject his claims that he was sentenced on

inaccurate information or that his trial counsel rendered ineffective assistance. We affirm the judgment and order.

¶2 Grenier approached an intersection in dense fog driving a semi-truck loaded with milk. Grenier saw a stop sign when he was about ten feet from it. Knowing the "thrust" of the milk would not allow him to stop, Grenier continued through the intersection. Due to the fog, he did not see an oncoming pickup truck. They collided, instantly killing the driver of the pickup.

¶3 According to the Crash Data Retrieval record, in the two seconds before impact Grenier had slowed from fifty-eight to fifty-one miles per hour. The speed limit was fifty-five miles per hour. The sheriff's deputy's incident report indicated that Grenier said that he was familiar with the road, as he had driven it before and it used to be his normal route. The crash analysis/accident reconstruction report listed the primary causes of the accident as reduced visibility, speed, and Grenier's failure to yield the right of way. Grenier pled guilty to homicide by negligent operation of a vehicle. The circuit court imposed a ten-year prison sentence, the maximum available.

¶4 Postconviction, Grenier sought sentence reduction or, alternatively, resentencing. He asserted that the circuit court relied on inaccurate information the district attorney presented at sentencing—i.e., that the road was Grenier's "normal route at the time." Grenier also asserted that defense counsel James Martin was ineffective for failing to object to the prosecutor's comment. Grenier asserts that, instead of acknowledging that Grenier "had driven it before," Martin should have clarified that he had traveled that route on just four occasions. The court denied Grenier's motion, and he appeals.

¶5 Grenier argues that the circuit court sentenced him in reliance on the erroneous characterization that he was traveling his "normal" route. A defendant has a due process right to be sentenced upon accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. He or she must establish that there was inaccurate information before the sentencing court upon which the court actually relied. ***Id.***, ¶31. As Grenier, through Martin, did not object to what the prosecutor said, he has forfeited his right to review other than in an ineffective-assistance-of-counsel context. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

¶6 We follow the familiar two-part analysis for ineffective assistance of counsel claims established in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under this framework, Grenier must demonstrate that Martin's representation was deficient and that this deficient performance prejudiced him so that there is a "probability sufficient to undermine our confidence in the outcome." *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999) (citation omitted). Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. ***Id.*** at 634.

¶7 At the evidentiary hearing, Martin testified that he knew the route was not Grenier's normal one but that he believed running the stop sign and the gravity of the offense were more critical issues than was Grenier's degree of familiarity with the road. Accordingly, Martin tried to personalize Grenier and highlight his strengths and remorse.

¶8 The circuit court essentially agreed that Grenier gave too much weight to the "normal route" comment. It found that focusing on Grenier's positive qualities was an effective strategy and that an unfamiliarity objection would not have helped because one unaccustomed to the route should have approached with greater caution and a slower speed. These findings are not clearly erroneous. We agree that Martin did not render ineffective assistance.

¶9 Martin also challenges his sentence as an erroneous exercise of the circuit court's discretion. He complains that the court gave short shrift to what he believes are mitigating aspects of the crash analysis, overemphasized the protection of the public, and failed to credit him because his conduct was not intentional. We disagree.

¶10 On review, we must "start with the presumption that the circuit court acted reasonably." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We are bound to uphold a sentence on appeal if "from the facts of record it is sustainable as a proper discretionary act." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). In exercising its discretion, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It also must identify the sentencing objectives on the record and explain how the sentence imposed advances them. ***State v. Gallion***, 2004 WI 42, ¶¶40, 42, 270 Wis. 2d 535, 678 N.W.2d 197.

¶11 The circuit court complied with its obligations here. It acknowledged that Grenier is a hard-working family man with only a moderate need for rehabilitation. It also stressed, however, the grim consequence of

Grenier's choice to travel too fast for conditions; that his decision represented another link in a chain of poor decisions made throughout his life, including child abuse and two sexual assaults, that had serious impacts on the victims; and that protection of the public cried out for a serious sentence. Grenier's culpability was not mitigated by the fact that the crash analysis identified reduced visibility as the first cause of the accident and noted that the semi's brakes were "marginal to poor," thus preventing emergency braking. If anything, the reduced visibility is an aggravating factor, and there is no indication that emergency braking was used.

¶12 The circuit court properly balanced the relevant considerations, explained its rationale, and imposed a sentence within the range the legislature set. It did not ignore the crash analysis, Grenier's positive attributes, or the lack of intentionality. It simply afforded more weight to the protection of the public and the seriousness of the offense. The import accorded each factor is a determination particularly within the sentencing court's wide discretion. ***State v. Grady***, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364. Moreover, imposing the maximum sentence does not by itself mean that the sentence is excessive. Rather, a sentence is excessive only if it is "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 v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Here, it is not.

By the Court.—Judgment and order affirmed.

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