

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 23, 1996

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. 96-0684-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. VAN PATTER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Michael A. Van Patter appeals from a judgment of conviction, entered after he pled guilty to operating a motor vehicle while under the influence of an intoxicant (4th offense), contrary to §§ 346.63(1)(a) and 346.65(2), STATS. He also appeals from an order denying his postconviction motion to modify the sentence. Van Patter claims the trial court erroneously exercised its sentencing discretion when it denied him Huber

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

privileges for the first sixty days of his nine-month sentence. Because the trial court did not erroneously exercise its sentencing discretion, this court affirms.

I. BACKGROUND

Van Patter pled guilty to operating a motor vehicle while under the influence of an intoxicant (4th offense). He was sentenced to nine months in the House of Correction. The first two months were ordered served without Huber privileges. His sentence also included a \$1,200 fine, a thirty-six-month suspension of his driver's license and seizure of a vehicle. After this sentence was imposed, Van Patter brought a motion to modify the sentence. Van Patter requested that the trial court restructure his sentence to enable him to be released so that he could work. The trial court denied the motion. Van Patter now appeals.

II. DISCUSSION

This court's review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion. *State v. Echols*, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640-41, *cert denied*, 114 S. Ct. 246 (1993). There is a strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably. *Id.* This court will conclude that the trial court did not erroneously exercise its sentencing discretion if the record demonstrates that the trial court considered the appropriate factors and articulated a reasonable basis for the sentence imposed. *Id.*

The primary factors the trial court must consider in imposing sentence are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *Id.* In reviewing the record, this court concludes that the trial court did not erroneously exercise its discretion.

The sentencing transcript documents the trial court's ruling:

In imposing a sentence, there are three factors that I am supposed to keep in mind. One is the character of the defendant, what the defendant brings with him when he walks into the courtroom; another is the seriousness of the offense; and the last factor is the need to protect the public. [This case involves v]ery serious conduct, [and a] great need to protect the public, [the defendant has a] terrible history when it comes to operating while under the influence of an intoxicant.

I think that you have proven to me that nothing other than a serious sentence is going to bring the message home. I'm taking into account the fact that you have accepted responsibility here, not just by entering a guilty plea, but that you have done a number of things in order to get treatment; and I am taking that into account in imposing a sentence in this case.

It is clear from this excerpt that the trial court considered each of the primary factors. Two factors weighed against Van Patter—the seriousness of the offense and the need to protect the public. One factor weighed in Van Patter's favor—his character.

Van Patter's argument is that the trial court put too much weight on the gravity of the offense factor, instead of Van Patter's character. The weight to be given to each of the primary sentencing factors, however, is left to the trial court's discretion. *State v. Thompson*, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). This court sees nothing in the record to demonstrate that the weight afforded to the gravity of the offense factor constituted an erroneous exercise of discretion. All three primary factors were considered and the trial court articulated a reasonable basis for its decision. The trial court determined that a serious sentence, which included denial of Huber privileges for the first sixty days, was required in order to “bring the message home.” This indicates that the trial court believed that denying Huber privileges was necessary in order to punish Van Patter, to protect the public, and to facilitate Van Patter's rehabilitation. Given the fact that this conviction is Van Patter's fourth offense for OMVWI within a period of seven years, this court cannot

conclude that the trial court's discretionary decision to deny Huber privileges was erroneous.

Further, this court cannot say the trial court erred in denying Van Patter's motion to modify the sentence. Van Patter failed to present any new or additional information at the motion hearing to justify an alteration of the original sentencing decision. Therefore, the trial court acted properly in denying his motion. *See State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989) (in order to justify sentence modification, defendant must show that new factor exists).

By the Court. – Judgment and order affirmed.

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