

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

April 1, 1997

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.

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

No. 96-1909

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JESSE RODGERS,

DEFENDANT-APPELLANT.

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

WEDEMEYER, P.J.¹ Jesse Rodgers appeals from a judgment entered after he pled guilty to operating a motor vehicle while intoxicated, second offense, contrary to §§ 346.63(1)(a) and 346.65(2), STATS. He also appeals from a postconviction order denying his request for sentence modification. He claims that: (1) the trial court erroneously exercised its sentencing discretion and

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

imposed an unduly harsh sentence; and (2) the trial court erred in denying his motion for sentence modification based on a new factor. Because the trial court did not erroneously exercise its sentencing discretion, because the sentence imposed was not unduly harsh, and because Rodgers's medical condition does not constitute a new factor, this court affirms.

I. BACKGROUND

On January 24, 1995, Rodgers pled guilty to OWI, second offense. The trial court accepted the plea. The State recommended a sentence consisting of incarceration at the House of Correction for sixty days and a \$300 fine. Sentencing was delayed, however, because of some medical problems that Rodgers was having. Sentencing resumed on September 27, 1995, where the State reiterated its sentencing recommendation. Rodgers requested that his sentence involve electronic monitoring rather than incarceration so that he could continue therapy related to his medical condition.

The trial court did not impose a sentence on that date because it wanted to review the medical records relating to Rodgers's condition. Finally, on October 5, 1995, the trial court imposed a ninety-day sentence and a \$300 fine. Rodgers filed a postconviction motion seeking sentence modification. The trial court denied the motion. Rodgers now appeals.

II. DISCUSSION

A. Sentencing.

Rodgers first claims that the trial court erroneously exercised its sentencing discretion and imposed an unduly harsh sentence. This court is not persuaded.

Our review is limited to a two-step inquiry. This court must first determine whether the trial court properly exercised its discretion in imposing the sentence. If so, this court will then consider whether the discretion was misused by imposing an excessive sentence. *State v. Glotz*, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984).

The primary factors that a trial court must consider in imposing sentence are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the defendant; and (3) the need to protect the public. *State v. Echols*, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640, *cert. denied*, 510 U.S. 889 (1993).

Rodgers claims that the trial court erroneously exercised its sentencing discretion in the first instance by failing to give proper consideration to his medical and mental status and by relying on incorrect information, i.e., that an accident had occurred. This court has reviewed the record and is unable to conclude that the trial court erroneously exercised its sentencing discretion.

The record demonstrates that the trial court properly exercised its discretion in imposing sentence. It considered the three primary factors. The trial court considered the severity of the offense, indicating that this was a "very serious violation of the law," and that "anytime you drive while under the influence you put your life and the lives of anyone you encounter into serious

danger.” The trial court also considered Rodgers's character, noting his age, education level, and the extensive medical records presented to the court. Finally, the record shows that the trial court considered the need to protect the public, noting that Rodgers was not presently seeking help with his drinking problem.

This court is not persuaded by Rodgers's claim that the trial court should have afforded more weight to his medical condition. The weight to be given to each of the relevant factors is left to the wide discretion of the trial court. *State v. Curbello-Rodriguez*, 119 Wis.2d 414, 433-34, 351 N.W.2d 758, 767-68 (Ct. App. 1984). The fact that the trial court did not weigh Rodgers's medical condition as heavily as Rodgers would have liked does not mean that it erroneously exercised its discretion. The trial court considered this factor and adjourned sentencing so that it could adequately review and consider the medical records.

This court is not persuaded by Rodgers's claim that the trial court relied on erroneous information regarding an accident having occurred. Rodgers contends that an accident did not occur because he was able to stop his car before impact. The record demonstrates that the trial court was told that when the police pulled Rodgers over, he put his car in reverse, hit the squad, and then got out of his car while it was still moving. Rodgers did not object to this characterization of the facts and in fact confirmed that these facts were "essentially true." Accordingly, when the trial court recounted the fact that Rodgers "hit a squad car," it was not relying on incorrect information.

Having concluded that the trial court did properly exercise its discretion, this court next considers whether the trial court imposed an excessive sentence. This court will not find that the trial court imposed an unduly harsh

sentence unless the sentence imposed 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 v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Here, Rodgers faces a possible maximum of 180 days in jail. The trial court imposed only half of that maximum, or ninety days, in the House of Correction, along with a \$300 fine. Given the threat a second-offender drunk driver poses to the public, this court cannot conclude that the sentence imposed is "shocking to public sentiment."

B. New Factor.

Rodgers next claims that the trial court erred in denying his motion for sentence modification based on a new factor. Rodgers contended that a worsening in his medical condition constituted a new factor justifying a sentence reduction. The trial court denied the motion.

A sentence can be modified to reflect consideration of new factors. *State v. Macemon*, 113 Wis.2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a fact that is highly relevant to the imposition of the sentence, but was not known to the sentencing court either because it did not exist or because the parties unknowingly overlooked it. *Id.* There must also be a nexus between the new factor and the sentence, i.e., the new factor must operate to frustrate the sentencing court's original intent when imposing sentence. *State v. Michels*, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether a new factor exists presents a question of law which this court reviews independently. *Michels*, 150 Wis.2d at 97, 441 N.W.2d at 279. Further, it is the defendant's burden to show by clear and

convincing evidence that a new factor exists that would warrant sentence modification.

Rodgers argues that medical treatment subsequent to sentencing which showed that his medical condition had deteriorated and that he suffered from a serious medical condition constituted a new factor. He also argues that the trial court's findings at sentencing that his medical condition was not as serious as Rodgers contended should now be changed and his sentence should be modified. This court is not persuaded by Rodgers's claims.

A change in a defendant's health after the original sentencing is not a new factor which requires a modification of sentence. *Id.* at 99-100, 441 N.W.2d at 280-81. A deterioration or worsening of a defendant's health is a matter more properly addressed by the division of corrections. *Id.* Further, it is clear from the record that the trial court's sentence would not change regardless of Rodgers's medical status. The purpose of the sentence was to address Rodgers's repeat offender status and the severity of the crime. Therefore, even if his medical condition had worsened, that would not frustrate the purpose of the trial court's ninety-day sentence. We conclude that Rodgers has failed to show by clear and convincing evidence that a new factor exists and the trial court appropriately denied his motion seeking sentence modification.

By the Court.—Judgment and order affirmed.

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

