COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2706-CR **Cir. Ct. No. 2003CF89**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW EDWIN VOIGT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Matthew Voigt appeals a judgment of conviction for four counts of injury by intoxicated use of a motor vehicle and one count of homicide by intoxicated use of a motor vehicle, as well as an order denying his motion for sentence modification. Voigt argues: (1) he was sentenced on

inaccurate information; (2) the presence of new factors warrants sentence modification; and (3) his sentence is unduly harsh. We reject Voigt's arguments and affirm the judgment and order.

Background

¶2 On July 27, 2002, Voigt was driving a vehicle with two passengers. Bryan Primley was in the front seat and Adam Racine was asleep in the back seat. Voigt ran a stop sign at fifty-five miles per hour and struck a vehicle with three occupants. Racine was killed; Primley and the other vehicle's occupants were severely injured. A report from the scene indicated Voigt's blood-alcohol concentration was over .24%.

¶3 The criminal complaint, as amended, charged Voigt with ten counts: one count of homicide by intoxicated use of a motor vehicle for Racine; four counts of causing injury by intoxicated use of a motor vehicle, one for each of the four other victims; and the companion charges of homicide and injury through operation or handling of a vehicle while having a prohibited alcohol concentration.

¶4 Voigt ultimately pled no contest to the five intoxicated use charges and the PAC charges were dismissed and read in. The court sentenced Voigt to ten years' initial confinement and twenty years' extended supervision on the homicide charge. For the injury charges, the court sentenced Voigt to one year of initial confinement followed by four years' extended supervision on each count, concurrent to each other and the homicide charge. The court also revoked Voigt's license for five years and ordered absolute sobriety, participation in a victim impact panel, approximately $1,000 in costs, and more than $38,000 in restitution. Voigt later filed a motion for sentence modification, which the court rejected. Voigt appeals.

Discussion

Inaccurate Information

¶5 Voigt contends he was sentenced based on inaccurate information. He argues Primley gave multiple inconsistent statements to various investigators and the trial court erred by accepting some of Primley's statements as true during sentencing. We discern five specific errors with which Voigt is concerned: (1) whether Racine was asleep in the car or voluntarily got in it; (2) whether Primley attempted to confiscate Voigt's keys, only to have Voigt retake them; (3) how the accident occurred; (4) the amount of alcohol Voigt and Primley consumed; and (5) the identity of the driver. However, we conclude the court did not rely on any of this information at sentencing and, therefore, there was no error.

¶6 We note that Voigt pled no contest to these charges. A valid plea waives all nonjurisdictional defects and defenses. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. It also means the defendant gives up his right to put the State to its proof as well as the right to vigorously cross-examine witnesses and put on a defense. *See* WIS JI—CRIMINAL SM-32 (1995). In other words, Voigt surrendered his opportunity to challenge Primley's credibility.

¶7 Nonetheless, it is true that defendants have a due process right to be sentenced on the basis of accurate information. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). However, a defendant seeking resentencing because of allegedly inaccurate information must show the information was inaccurate and that the trial court relied on it. ***Id.*** The defendant must meet this burden with clear and convincing evidence. ***State v. Groth***, 2002 WI App 299, ¶22, 258 Wis. 2d 889, 655 N.W.2d 163. Even if Primley's

statements are inaccurate, Voigt fails to show the court relied on any of the information.

¶8 The three primary sentencing factors that the court must consider are the gravity of the offense, including the effect on the victim, the character and rehabilitative needs of the offender, and protection of the public. *See* ***State v. Naydihor***, 2004 WI 43, ¶78, 270 Wis. 2d 585, 678 N.W.2d 220; ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987); *see also* WIS. STAT. § 973.017(2) (2003-04). Besides these primary sentencing factors, the trial court may also consider, in conjunction with the main factors:

> the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance, and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Echols, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993) (citation omitted). Sentencing is committed to the trial court's discretion. *See* ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). Here, the record reveals the court based its sentencing on appropriate factors and none of the misinformation of which Voigt complains.

¶9 Regarding the gravity of Voigt's offenses, the court noted four people suffered debilitating injuries, some permanent, that resulted in lost wages, depleted savings, physical discomfort, mental anguish, and marital strife. This, the court noted, is in addition to the fact that Voigt killed one person. Regarding Voigt's character, the court disapproved of his continued drinking problem. The

court observed that despite Voigt's own father being killed by a drunk driver and then Voigt later killing someone in this accident, neither event inspired Voigt to stop drinking. The court was also convinced the public needed protection from Voigt's deadly habit.

¶10 Those observations went merely to the three primary factors. The court also commented on several of the secondary factors as well. Four hours after the accident, Voigt's blood-alcohol concentration was .175%. Based on expert testimony regarding the dissipation of alcohol in the bloodstream, the court estimated that Voigt's blood-alcohol concentration at the time of the accident was .235%, a particularly aggravating factor considering Voigt had six underage drinking citations on his record.[1] These citations indicated a record of offenses that simultaneously reveal a "history of undesirable behavior patterns" of the same nature as the present offenses.

¶11 The court further found it "very difficult to get a handle on [Voigt's] level of remorsefulness." Although Voigt apologized on the record, he evidently made little attempt at a substantive apology prior to his statement at sentencing. Also, Voigt denied—and apparently disputes on appeal—he was the driver. While he points to Primley's inconsistent statements on this matter, DNA evidence in the form of blood in the cracked windshield confirmed Voigt was in the driver's seat.

¶12 Finally, the court was also concerned with deterrence. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. It wanted to

[1] To the extent Voigt challenged Primley's account of how much beer they consumed, Primley's account is irrelevant, since Voigt's blood-alcohol concentration of .175% was confirmed by laboratory tests.

illustrate that drunk driving has serious consequences for the offender, particularly where death is involved.

¶13 None of these concerns as articulated by the court reveals any reliance on Primley's contradictory statements. At most, the court may have referenced some of those statements in passing. Thus, Voigt fails to carry his burden and there is no basis for resentencing.

New Factors

¶14 Voigt also argues there is new information regarding the accident that should be considered. This new information is allegedly in a letter sent to the court by Racine's brother and sister-in-law. According to Voigt, this letter demonstrates that Racine voluntarily got into the car—he was not simply asleep in the back when Voigt drove off—and that Primley did not try to take the keys away from him.

¶15 Whether something is a new factor warranting modification is a question of law. ***Johnson***, 158 Wis. 2d at 466. Among other things, a new factor must be a development that "frustrates the purpose of the original sentencing." ***Id.*** (citation omitted).

¶16 Despite any other information in the letter, the Racines also stated they were "so confused of what happened and today still don't know for sure." Curiously, while Voigt complains of the court appearing to rely on Primley's inconsistent and confused statements, he has no problem insisting the court rely on the Racines' confusion. More to the point, however, nothing in the Racines' letter contradicts or frustrates the purpose of the original sentence. None of the factors

articulated by the court at sentencing are changed by the letter. The Racines' letter does not contain new information justifying sentence modification.

Truth-In-Sentencing (TIS) Changes

¶17 Finally, Voigt seeks resentencing based on changes from TIS-I to TIS-II. He argues modification of the maximum penalties is a new factor, and he argues that his TIS-I sentence is unduly harsh compared to the new TIS-II penalty for the same crime. Homicide by intoxicated use of a motor vehicle, for example, was reclassified from a Class B felony with a maximum total imprisonment of sixty years to a Class D felony with a maximum of twenty-five years' imprisonment. We reject both of Voigt's arguments.

¶18 Wisconsin switched from an indeterminate sentencing structure to the "truth-in-sentencing" scheme on December 31, 1999. ***State v. Trujillo***, 2005 WI 45, ¶3, 279 Wis. 2d 712, 694 N.W.2d 933. TIS was, however, adopted in two phases with phase two beginning February 1, 2003. ***Gallion***, 270 Wis. 2d 535, ¶7 n.3. In other words, criminal classifications and sentencing under TIS-II apply to crimes *committed* on or after February 1, 2003, despite Voigt's arguments to the contrary. ***Id.***, ¶74.

¶19 The result of the two-phase implementation is that defendants convicted of felonies committed between December 31, 1999, and February 1, 2003, generally serve longer periods of confinement than the maximum penalty provided under TIS-II. ***Trujillo***, 279 Wis. 2d 712, ¶6. Nonetheless, "TIS-II's reduced maximum confinement for the same TIS-I felony does not constitute a new factor when a defendant moves for the modification of a sentenced imposed under TIS-I." ***Id.***, ¶2.

¶20 Additionally, ***Gallion*** rejected the notion that a TIS-I sentence is unduly harsh merely because it is compared to the maximum TIS-II sentence for the same crime. ***Gallion***, 270 Wis. 2d 535, ¶74. The maximum penalty Voigt faced under TIS-I was 100 years—sixty years for the homicide and ten years for each of the injury counts. Voigt was sentenced to a total of thirty years' imprisonment, consisting of ten years' initial confinement and twenty years' extended supervision. Under the facts of this case, we cannot say Voigt's mid-range sentence is "harsh and excessive" or shocking to public sentiment. *See* ***id.***; ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶21 To the extent Voigt explicitly challenges the validity of ***Gallion*** and implicitly challenges ***Trujillo***, we merely point out that this court may not modify or overrule the holdings of the supreme court. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

By the Court.—Judgment and order affirmed.

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