COURT OF APPEALS DECISION DATED AND FILED

March 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2005AP1888-CR

Cir. Ct. No. 2004CT315

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL E. MCGRATH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Michael E. McGrath appeals from an order denying his postconviction motion for sentence modification. After pleading guilty, McGrath was convicted for operating a vehicle while intoxicated (OWI), third offense. The trial court sentenced McGrath in accordance with a sentencing matrix to 360 days in the Walworth county jail, reducible to 300 days upon completion of a victim impact panel, a $2000 fine, court costs, license revocation for thirty-six months, and forty-five hours' community service.

¶2 Against this sentence, McGrath makes three arguments: (1) the sentencing court erroneously concluded that it was compelled to follow the sentencing matrix, (2) the court should have considered home detention as an alternative to incarceration, and (3) the sentence violates his rights under the Sixth Amendment. Because these arguments are not persuasive, we affirm the order.

Background

¶3 The facts are undisputed. On April 27, 2004, a city of Elkhorn police officer observed a vehicle swerve across the center line. The officer turned to follow the vehicle, and later found it stopped but still running with lights illuminated at the bottom of an on-ramp to U.S. Highway 12. After identifying the driver as McGrath, the officer inquired if there was a problem. When McGrath replied that his contact lenses were bothering him, the officer noticed that McGrath had slurred speech and bore an odor of intoxicants. The officer then requested McGrath to submit to field sobriety tests, but McGrath refused.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

McGrath was arrested and later also refused to voluntarily submit to a blood draw. An involuntary blood draw revealed an alcohol content of 0.29 percent.

¶4 McGrath was charged with OWI as a third-time offender and with operating a motor vehicle with a prohibited alcohol content (PAC) under WIS. STAT. § 346.63(1)(a) and (b), respectively. He pled guilty to the OWI charge and the PAC charge was dismissed.[2]

¶5 At the sentencing hearing, McGrath presented the following testimony about himself and his family. He resides in Genoa City with his wife and two young children. His son has a learning disability, is being evaluated for autism, and has neutropenia, a chronic illness that has led to numerous hospitalizations. The disorder requires both parents to administer injections several times a week. McGrath himself has hepatitis C, which may or may not be contagious, and he has undergone treatment for alcoholism since his last arrest. McGrath was honorably discharged from the Air Force with several citations for good conduct. He has been employed by the same employer for five years. His father-in-law recently passed away and his legally blind mother-in-law may move in with his family. McGrath also submitted his Air Force discharge papers, and letters from his employer, a friend in his AA group, and his wife.

¶6 At the close of the evidence, McGrath's attorney asked the trial court to consider home monitoring. The court responded that Walworth county did not have the required monitoring devices and that such a sentencing provision would

[2] A defendant may be charged and prosecuted for both OWI and PAC but may not be convicted of both if the charges arise out of the same incident. WIS. STAT. § 346.63(1)(c). Here, the PAC charge was dismissed at the end of the sentencing hearing, and McGrath's conviction was entered on the OWI count.

require the court to order the county to acquire such equipment. Defense counsel responded that home monitoring was statutorily authorized, although he did not know whether the court could order the county board to appropriate the money.

¶7 In its sentencing remarks, the trial court acknowledged McGrath's "very compelling circumstances," but also noted that this was a third offense and that McGrath had been in jail at least once before for drunk driving. The court also asked why the circumstances McGrath presented "should be any more compelling to me than they should have been to the defendant." The court also observed that Walworth county led Southeastern Wisconsin in alcohol-related accidents and was third in drunk driving arrests. The court termed drunk driving and the resultant accidents "a serious situation" and "a plague."

¶8 The trial court then turned to the actual sentencing, stating, "Therefore, on this record I will look at the sentencing matrix."[3] Acknowledging that the matrix "gives the Court a great deal of discretion," the court nonetheless concluded that it would adopt the matrix recommendation. The court sentenced McGrath to 360 days in the county jail, but reduced the sentence to 300 days for McGrath's attendance at a victim impact panel. The court allowed McGrath to serve the sentence with Huber privileges "for all purposes which includes child care."[4]

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[3] Walworth county, as part of the Second Judicial Administrative District, has adopted sentencing guidelines pursuant to authority granted to the chief judge by WIS. STAT. § 346.65(2m) and SCR 70.34 (2004). These guidelines are known as a sentencing matrix.

[4] The sentence also included a fine, community service, license revocation and an interlock device.

¶9 On July 1, 2005, McGrath filed a motion for sentence modification pursuant to WIS. STAT. § 973.19(1)(a). His motion contended that, although the trial court had acknowledged the existence of mitigating factors, the court nonetheless sentenced according to the matrix. The motion also contended that the court had disregarded home detention as an appropriate alternative. The court denied the motion. McGrath appeals, raising the same issues.

Discussion

¶10 McGrath argues that the sentencing court misused its discretion when, despite mitigating factors, it adhered to the sentencing matrix and did not consider sentencing alternatives, specifically home detention.[5] Sentencing decisions are left to the sound discretion of the trial court and our review of a sentencing decision is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). We employ a strong public policy against interference with the sentencing discretion of the trial court and indulge in a presumption that the sentencing court acted reasonably. ***Id.*** A discretionary determination will be sustained if demonstrably made and if based upon the facts of record and in reliance on the appropriate and applicable law. ***Id.***

[5] Although McGrath's notice of appeal is labeled as an appeal from the order denying his motion for sentence modification, the parties' briefs address the merits of the underlying sentence itself. We do not deem the limiting language of the notice of appeal as barring the parties or us from addressing the merits of the underlying sentence. McGrath's modification motion was timely brought pursuant to WIS. STAT. § 973.19(1)(a). In ***State v. Meyer***, 150 Wis. 2d 603, 605-08, 442 N.W.2d 483 (Ct. App. 1989), this court held that a motion for sentence modification under this statute is a necessary prerequisite for review of the underlying sentence.

¶11 The trial court must consider three primary factors in fashioning a sentence: the gravity of the offense, the character and rehabilitative needs of the offender, and the need for public protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight given to each factor is left to the discretion of the sentencing court. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶12 The record in this case demonstrates a proper exercise of sentencing discretion. This was McGrath's third OWI conviction. WISCONSIN STAT. § 346.65(2) prescribes a range of punishments for violations of WIS. STAT. § 346.63(1). Punishment for a third violation includes a fine between $600 and $2000 and a sentence of thirty days to one year. Section 346.65(2)(c). Although at the upper limit, McGrath's sentence fell within the statutory parameters.

¶13 Moreover, the trial court clearly examined the three primary sentencing factors. The court considered that this was the third drunk driving conviction for McGrath, an admitted alcoholic; that he already had been in jail on at least one prior occasion for drunk driving; and that instead of being home with his family on the date in question, he was out drinking at night in another city. The court heard and addressed the evidence of McGrath's steady employment, his commendable military service, his "very compelling" family circumstances, and his efforts to overcome his alcoholism. But ultimately, the court concluded that these factors did not outweigh McGrath's failure to have grasped the seriousness of his actions despite past convictions, and the need to impart that lesson to McGrath. Finally, the court focused on the need for public protection, observing that the sentencing matrix was designed to address the "terrible statistics" of alcohol-related accidents and arrests in Walworth county.

¶14 McGrath submits that, in view of his extenuating personal circumstances, the trial court should have exercised its authority under WIS. STAT. § 973.03(4) to order home confinement with electronic monitoring. He asserts that "the court's complete disregard of other sentencing alternatives … would work an extreme and bitter hardship on [McGrath] and his family far in excess of the danger to society he created at the time of his arrest."

¶15 We disagree. McGrath's attorney raised the prospect of home monitoring at the sentencing hearing, but the trial court rejected it, giving several reasons. The court first explained that a home detention program does not exist in Walworth county. More importantly, the thrust of the court's sentencing decision was the need to impress upon McGrath the gravity of his actions, the potential for tragic consequences, and the court's responsibility to protect the public from those who, despite prior convictions, persist in drinking and driving.

¶16 Moreover, nothing in WIS. STAT. § 973.03(4), the statute on which McGrath relies, requires counties to implement electronic monitoring home detention programs. Instead, the statute simply offers this sanction as an alternative to a county jail sentence. And McGrath does not argue on appeal whether the home monitoring statute, WIS. STAT. § 302.425(4),[6] might provide any such authority. *See* ***Waushara County v. Graf,*** 166 Wis. 2d 442, 453, 480 N.W.2d 16 (1992) (court of appeals is not bound to consider issues not presented to it).

[6] WISCONSIN STAT. § 302.425(4) provides that the Department of Corrections "shall ensure that electronic monitoring equipment units are available, pursuant to contractual agreements with county sheriffs … throughout the state on an equitable basis."

¶17 Finally, McGrath argues that use of the sentencing matrix violates his rights under the Sixth Amendment to the U.S. Constitution, which guarantees the right to a trial by jury in criminal cases. This argument is based on McGrath's refusal to submit to a breath test. The matrix provides for a maximum sentence where a third time OWI offender refuses such a test.[7] McGrath contends that his sentence is based on a fact that was neither admitted by him nor found by a jury: whether or not he wrongfully refused to take the standard sobriety tests.

¶18 In support, McGrath looks to ***Blakely v. Washington***, 542 U.S. 296 (2004), and ***United States v. Booker***, 543 U.S. 220 (2005). In ***Blakely***, which involved state criminal statutes, the Supreme Court confirmed its holding in ***Apprendi v. New Jersey***, 530 U.S. 464, 490 (2000) that, pursuant to the Sixth Amendment right to a jury trial, any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. ***Blakely***, 542 U.S. at 301-04. The ***Blakely*** holding was applied to federal mandatory sentencing guidelines in ***Booker***. ***Booker***, 543 U.S. at 228-29. There, due to the mandatory guidelines, Booker's punishment was increased beyond the statutory limit based on facts not admitted by Booker or found by a jury. ***Id.*** at 226-29. The Court concluded that the guidelines were unconstitutional in part, and further held that the appropriate remedy was excision of the portions of the guidelines making them mandatory. ***Id.*** at 226-27, 244-45.

[7] The sentencing matrix is not part of the appellate record. We rely upon McGrath's description of its provisions.

¶19 The concern raised in ***Blakely*** and ***Booker***—using an insufficiently proved fact to increase a penalty beyond the statutory maximum—is not implicated here. The sentencing court considered McGrath's refusal to submit to a chemical test only in determining the length of sentence *within the statutory limits, not to exceed them*. This court recently has held that the Sixth Amendment is not implicated when a sentence falls within the statutory limits. ***State v. Montroy***, 2005 WI App 230, ¶23, ___ Wis. 2d ___, 706 N.W.2d 145, *review denied,* 2006 WI 3, ___ Wis. 2d ___, 708 N.W.2d 694 (WI Nov. 11, 2005) (No. 04-3249-CR) (No. 04-3250-CR).

Conclusion

¶20 McGrath's arguments fail. The sentencing court plainly acknowledged the discretion afforded by the matrix, considered the appropriate factors, and sentenced within the statutory limits. The court did not misuse its sentencing discretion. Moreover, McGrath's sentence is not governed by ***Blakely*** or ***Booker***.

By the Court.—Order affirmed.

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