COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1124-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES F. MCCLUSKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] James McCluskey appeals the judgment of conviction for obstructing an officer contrary to WIS. STAT. § 946.41(1)[2] and the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g).

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

resulting sentence of six months in the county jail and a fine plus costs of $6,274. He contends the trial court erroneously exercised its discretion in imposing this sentence because it improperly took into consideration an unproven and unrelated alleged crime and because the sentence is so excessive as to "shock public sentiment and violate the judgment of reasonable people." We conclude the trial court did not consider any improper factors, the sentence is not excessive, and the trial court properly exercised its sentencing discretion. We therefore affirm.

DISCUSSION

¶2 McCluskey was initially charged with operating a vehicle involved in an accident resulting in the death of a person and failing to remain at the scene of the accident in violation of WIS. STAT. § 346.67(1)(a), (b) and (c), a class D felony.[3] The accident occurred on January 5, 1998, in Juneau County and resulted in the death of a passenger, Harland Decorah. The complaint alleged that McCluskey stated the following. On that day he was driving with three passengers and swerved to miss a fox, driving into a ditch. He told the occupants he was going to get some help and walked about one and one-tenth mile to the home of a Robert Scharping. Scharping wanted to take McCluskey to the hospital because of injuries McCluskey had on his head. McCluskey did not want any treatment for his injuries. He was feeling dizzy and told Scharping that he would not be able to go back to the accident scene and asked Scharping to go and make sure everyone was all right. When Scharping got to the scene no one was in the car so Scharping returned to his home. Scharping returned to the accident scene again and this time

[3] The penalty for violating WIS. STAT. § 346.67(1) when the accident involves death to a person is a fine of not more than $10,000 or imprisonment of not more than five years or both. *See* WIS. STAT. § 346.74(5)(d).

the car was gone. McCluskey did not report the accident that day because he thought a report had been made since the car was gone. However, he reported the accident the next afternoon.

¶3 The complaint also alleged that an officer from the Juneau County Sheriff's Department came upon the vehicle in the ditch with the three passengers on January 5, 1998, at approximately 2:52 a.m. He called an ambulance which conveyed two of the passengers to the hospital. One of those two, Harland Decorah, stated that his tooth hurt and he would go to the hospital to get it checked out. Decorah stated they had been sitting in the vehicle for at least an hour and a half before an officer arrived. A "head CT" performed at the hospital showed bleeding in Decorah's brain. He was taken to University of Wisconsin Hospital for further treatment and died on the afternoon of January 6, 1998.

¶4 The State and McCluskey entered into a plea agreement whereby the State moved to amend the single charge in the complaint and information to two separate charges: a violation of WIS. STAT. § 946.41(1), obstructing an officer, a class A misdemeanor, and a violation of WIS. STAT. § 346.62(2), "Reckless driving."[4] Under the agreement McCluskey was to enter a no contest plea to the

[4] WISCONSIN STAT. § 346.62(2) provides:

> (2) No person may endanger the safety of any person or property by the negligent operation of a vehicle.

WISCONSIN STAT. § 346.62(1)(c) provides:

> "'Negligent' has the meaning designated in s. 939.25(2)."

WISCONSIN STAT. § 939.25 provides:

> (1) In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another, except that for purposes of

(continued)

two amended charges, and on the reckless driving charge, the State was to recommend a civil forfeiture including costs of $332. On the obstructing charge there was no agreement on a recommended sentence; both parties were to argue their sentence recommendation independently. The factual basis for the obstructing charge, the prosecutor explained and defense counsel agreed, was in the affidavit portion of the criminal complaint on file; further, McCluskey stipulated that in an interview with Detective Mark Strompolis on February 9, 1998, he provided false information to that detective as to whether he had been drinking at the Brown Bar prior to the accident. As part of the plea colloquy the court ascertained that McCluskey understood the maximum penalty on the obstructing charge was a $10,000 fine and nine months in jail or both. The court accepted the pleas and proceeded to sentencing.

¶5 At the beginning of the sentencing portion of the hearing the court allowed Decorah's sister to speak over defense counsel's objection. Defense counsel argued that the circumstances of the accident were not relevant to the obstruction, which occurred on February 9 after the accident. The prosecutor contended that the circumstances of the accident in which Decorah died were relevant to the obstruction charge because that charge stemmed from the accident and, thus, the circumstances of the accident were relevant to the proper sentencing considerations of McCluskey's personality, behavior, need for rehabilitation, and

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> ss. 940.08 (2), 940.10 (2) and 940.24 (2), "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to an unborn child, to the woman who is pregnant with that unborn child or to another.
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> (2) If criminal negligence is an element of a crime in chs. 939 to 951 or s. 346.62, the negligence is indicated by the term "negligent" or "negligently".

history of taking responsibility for his actions. Decorah's sister expressed her view that the county was taking her brother's death too lightly in allowing McCluskey only to be fined. In her view her brother was left in the car for three hours because McCluskey did not want to report he was driving drunk.

¶6 The prosecutor then argued that the court should withhold sentence on the obstructing charge and place McCluskey on probation for two years, requiring as a condition of probation that he serve sixty to ninety days in the Juneau County Jail and pay the cost of the action. In his argument the prosecutor explained that the plea agreement was reached because one of the other passengers, who was a necessary witness for the State, was not located until the day of trial. The prosecutor noted that although this was McCluskey's first offense, the fact that he had left the scene of the accident with three people in the car, in addition to giving false information to the officer about his consumption of alcohol prior to the accident, was "a sign of a deeper rooted problem in failing [to] take responsibility." The prosecutor emphasized that the investigation was serious because it involved the death of a person, and providing false information in this context was very different from doing so in an investigation of a speeding ticket or some minor offense. The prosecutor also indicated that McCluskey might have an underlying problem with alcohol in that he was drinking at the Brown Bar before the accident and denied to the officer that he was drinking.

¶7 Defense counsel argued that a fine was the appropriate sanction for the obstruction charge. He reiterated the objection to considering the circumstances of the accident in the sentence on this charge; however, since the circumstances of the accident had been addressed over his objection, he informed the court that the defense's view was that there was insufficient evidence to convict McCluskey of the original charge. Counsel asserted had there been a trial,

McCluskey would have testified that Decorah indicated to him (McCluskey) that he was not injured and Decorah indicated to the officer that he was okay but had a toothache; it was not until Decorah had been in the hospital for a number of hours that even the doctors realized he had a problem. Also, there would have been testimony at a trial on the original charge that McCluskey himself was significantly injured in the accident: he had a head injury, suffered a concussion, and was dazed and confused at the time. Defense counsel also emphasized that despite McCluskey's injuries he walked to Scharping's house and told him that other passengers were in the car.

¶8 With respect to the circumstances of the obstructing charge, defense counsel informed the court that one of the passengers in the vehicle told Detective Strompolis on January 19 that she was with McCluskey and he was drinking alcohol at the Brown Bar, so that conversation had already occurred when, two weeks later, McCluskey denied drinking alcohol at the Brown Bar. Detective Strompolis also heard from the bartender at the Brown Bar that McCluskey had been drinking there. For these reasons, defense counsel contended, the impact of the false information on the investigation was very limited, and this mitigated the seriousness of the crime, although counsel acknowledged that because the false statement occurred in the investigation of a death, it was "more aggregious [sic]."

¶9 Defense counsel emphasized that McCluskey was sixty-four years old, had no prior convictions, no traffic tickets within the last ten years, had been employed for twenty-five years with one employer, and had serious medical problems. McCluskey submitted a letter from a physician which specified McCluskey's health problems and concluded that "jail time with its associated long periods of inactivity would put Mr. McCluskey at an unacceptable risk for

vascular injury to his right leg."[5] Defense counsel stated that McCluskey was remorseful over having given false information and had taken responsibility, as exemplified by getting an alcohol assessment. McCluskey submitted a letter reporting the results of this assessment—that the alcohol use profile "showed only barely above the normal range" and the tester was not recommending alcohol treatment at this time.

¶10 With respect to the reckless driving offense, the court ordered McCluskey to pay a forfeiture and costs of $332 as agreed to by the parties. With respect to the obstructing charge, the court explained that it had to consider the gravity of the offense, the character of the offender, and the need for protection of the public. The court stated that it did not see this charge as a "minimum type" offense because McCluskey obstructed the investigation of an accident in which somebody died, and it was not relevant to the gravity of the offense whether the officer had other information that contradicted the false information McCluskey gave. In the court's view McCluskey provided information to avoid responsibility.

[5] The letter also stated:

> He [McCluskey] has recently undergone a vascular by-pass procedure in his right leg because of extremely poor arterial circulation. He requires frequent and extended periods of ambulation during the day to encourage and maintain circulation through the graft as well as his native circulation. He is on blood thinner on a daily basis and requires monitoring on weekly or every other week basis. Extended periods of sedentary activity put him at risk for failure of his new by-pass graft. Failure of the graft puts this gentleman at risk for significant arterial vascular insufficiency to the bottom half of his right leg. He would be at potential risk for tissue loss and possibly amputation. Certainly it would be to his benefit to maintain ad-lib activity.

¶11 The court continued:

> I think it is serious even if it is a misdemeanor, probably not appropriate for the court to imply the death of Mr. Decorah in view of the plea agreement reached here, on the other hand I don't think, in my thinking, this court is not able to entirely get out of it's mind and understands the background why he came up with this plea agreement.

¶12 The court also commented on the character of McCluskey, reviewing the testimony on his age, health problems, lack of a prior criminal record "[not] even a traffic one," and the alcohol assessment indicating no serious alcohol problem.

¶13 In considering the protection of the public, the court stated that this involved several things. One aspect was rehabilitation, but given McCluskey's age this was "probably not a major issue." However, another aspect of public protection, the court explained, was the need to punish McCluskey for his conduct to deter others from engaging in the same type of conduct. The court stated that it had considered the district attorney's arguments regarding probation, and the reasons given by defense counsel why McCluskey was not an appropriate candidate for probation. The court agreed that probation was not appropriate but felt that punishment was appropriate. The court then imposed the sentence of six months in the Juneau County Jail, with Huber privileges to allow for the medical "treatment he may need for his medical conditions," and a fine of $5,000 plus costs.

DISCUSSION

¶14 The State argues that we should not consider McCluskey's appeal because he did not first bring a motion for modification in the trial court as

required by WIS. STAT. § 973.19 and ***State v. Meyer***, 150 Wis. 2d 603, 608, 442 N.W.2d 483 (Ct. App. 1989). McCluskey replies that, during sentencing, he made the same objection to the trial court that he is now making on appeal regarding consideration of the circumstances of the accident and, having thus previously raised the issue, a postconviction motion is unnecessary under WIS. STAT. § 974.02(2). That statute provides "an appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are … issues previously raised." Alternatively, McCluskey argues that even if § 974.02(2) does not apply, a sentence may be challenged on appeal absent a prior motion to the trial court given compelling circumstances, citing ***State v. Norwood***, 161 Wis. 2d 676, 468 N.W.2d 741 (Ct. App. 1991). According to McCluskey the compelling circumstances are that he is an elderly man with health problems and will be at risk in jail.

¶15 We will assume without deciding that we may properly consider McCluskey's appeal even though he did not file a postconviction motion, and we will address his arguments on the merits.

¶16 We review a trial court's sentence for an erroneous exercise of discretion. *See* ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). We presume that the sentence is reasonable, and the burden is upon the defendant to show there is some unreasonable or unjustifiable basis for the sentence. *See* ***Elias v. State***, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980). We do not substitute our preference for a particular sentence simply because we would have decided differently. *See* ***McCleary***, 49 Wis. 2d at 281. Rather, we recognize the strong public policy against interfering with a trial court's sentencing decision. *See* ***Elias***, 93 Wis. 2d at 281. The rationale for this deferential standard of review is that the trial court has the advantage in considering all relevant factors, including the

opportunity to observe the defendant. *See* ***Cheney v. State***, 44 Wis. 2d 454, 469, 171 N.W.2d 339 (1969).

¶17 The primary factors a court must consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need for public protection. *See* ***McCleary***, 49 Wis. 2d at 274-76. The court may also consider, among other things, the defendant's criminal record; history of undesirable behavior patterns; personality, character and social traits; results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; rights of the public and length of pretrial detention. *Cf.* ***State v. Iglesias***, 185 Wis. 2d 117, 129, 517 N.W.2d 175 (1994).

¶18 Although all relevant factors must be considered, the sentence may be based upon any one or more of the three primary factors. *See* ***Anderson v. State***, 76 Wis. 2d 361, 368, 251 N.W.2d 768 (1977). The trial court determines how much weight to give each factor. *See* ***State v. Spears***, 147 Wis. 2d 429, 446, 433 N.W.2d 595 (Ct. App. 1988). However, an erroneous exercise of discretion may be found when the court relies upon factors which are totally irrelevant or immaterial to the type of decision being made. *See* ***Elias***, 93 Wis. 2d at 282.

¶19 McCluskey first contends that the trial court based its sentence for the obstructing offense on a presumption that he was criminally liable for Decorah's death, and this is an improper factor because McCluskey's liability was not proved and it is irrelevant to the obstructing offense. In support of his contention that the court based its sentencing decision on this presumption, McCluskey points to the fact that the court permitted Decorah's sister to speak and

to the comments the court made on Decorah's death in explaining its sentencing decision. We conclude the record does not support McCluskey's contention that the court based its sentencing decision on an assumption of McCluskey's criminal liability for Decorah's death.

¶20 First, we do not agree that permitting Decorah's sister to speak indicates that the trial court assumed McCluskey was criminally liable for her brother's death and based its sentencing decision on that assumption. The record shows that Decorah's sister was present, she indicated that she wished to speak, and the court allowed her to do so in spite of McCluskey's objection. Because one of the charges to which McCluskey was pleading no contest was endangering the safety of another by the negligent operation of a vehicle, WIS. STAT. § 346.62(2), and because her brother died from injuries he received in the accident that occurred when McCluskey was negligently operating the vehicle, it was not improper for the court to allow her to speak. Her comments did not explicitly address the sentence the court should impose on either of the amended charges, but conveyed her objections to the prosecutor's decision to amend the initial charge. Her comments do indicate that she held McCluskey responsible for her brother's death, but it does not automatically follow that the court either agreed with her on that point or took that into account in its sentencing decision. We therefore look to the court's comments to determine if and how Decorah's death was a factor in its sentencing decision.

¶21 The court's comments on Decorah's death begin with the court's accurate factual statement that the obstructing charge related to McCluskey's false statement "regarding the consumption of alcohol at a bar prior to the accident which resulted in the death of Mr. Harland Decorah." The court went on to explain its view that the obstructing charge was serious because the investigation

concerned an accident that resulted in someone's death. Considering Harland Decorah's death in this context and for this purpose is not improper: the gravity of the offense is one of the three primary factors the court is to take into account, and the nature of the investigation in which McCluskey provided false information is an appropriate component of the gravity of the offense of obstructing an officer by providing false information.

¶22 McCluskey focuses on the court's comments that "in my thinking, this court is not entirely able to get [the death of Mr. Decorah] out of its mind…." However, this statement, read in context, does not indicate that the court is holding McCluskey criminally liable for Decorah's death and is imposing a heavier sentence for that reason; rather the court's comments, read as a whole, show the court recognized it is not appropriate to do this. It *is* appropriate, however, to consider Decorah's death in the manner and for the purpose the court did: rather than cooperate in the investigation of an accident that occurred when McCluskey was driving and resulted in the death of a passenger, McCluskey provided false information about his drinking before the accident.

¶23 We also conclude that the trial court did not erroneously exercise its discretion in its consideration of the three primary sentencing factors and their application in this case. A reasonable court need not accept McCluskey's characterization of the obstructing charge and could reasonably view it as a serious offense because the investigation concerned an accident that resulted in someone's death. The court could also reasonably decide that the fact that the officer was able to obtain correct information about McCluskey's drinking from other sources does not make his lying to an officer less serious. With respect to McCluskey's character, the court did consider all the positive information—his lack of prior criminal record and traffic violations, his advanced age, his steady employment

and lack of a serious alcohol problem. However, the circumstances of the obstructing charge—that McCluskey was driving when an accident occurred that resulted in the death of a passenger and then lied about his drinking before the accident to an officer who was investigating the accident—reflected negatively on McCluskey's character, showing an effort to evade responsibility for his conduct. The court's evaluation of the factor of the need for public protection was also reasonable. The court recognized that public protection was composed of several aspects, and the one most relevant to the court in this case was to punish McCluskey for his conduct in order to deter others from engaging in the same type of conduct.

¶24 In addition to considering the three primary factors, the court also considered McCluskey's health problems. The jail term with Huber privileges is designed to allow McCluskey to receive any treatment he may need for his medical conditions.

¶25 McCluskey's argument that his sentence is excessive is, at bottom, a request that we substitute our evaluation of the various factors for that of the trial court. However, that is not our role. The trial court considered the three primary factors, and it is for that court to determine how much weight to give relevant factors. *See* ***State v. Spears***, 147 Wis. 2d at 446. The trial court did not rely on irrelevant or immaterial factors. The sentence it imposed was below the maximum. We conclude McCluskey has not met his burden of showing that there is an unreasonable or unjustifiable basis for the sentence.

By the Court.—Judgment affirmed.

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