

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 6, 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. 2006AP560-CR

Cir. Ct. No. 2005CT98

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW H. KIEFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Matthew H. Kiefer appeals the sentence he received following the entry of a judgment convicting him of operating while under the influence of an intoxicant (OWI), third offense, and the order denying his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04).

postconviction motion. He argues that the trial court erroneously exercised its discretion when: (1) at sentencing, it stated that it could not take rehabilitation into consideration; (2) the trial court was misled by the State into believing Kiefer spent only twenty-nine days in a locked and controlled drug and alcohol treatment program; and (3) he should have either been given credit for time served for the 112 days he spent in the treatment program, or have been given some consideration for the number of days spent in the facility. Because the trial court's comments regarding the lack of discretion it was given by the legislature in considering rehabilitation at sentencing must be read in context, and here, the trial court was not stating that rehabilitation was no longer a factor, but rather, was apparently lamenting the restrictions placed on sentencing OWI offenders; Kiefer was given credit for his successful completion of the program; and the record reveals the trial court was aware of the actual time Kiefer spent in treatment, and the time spent in the treatment program was not subject to presentence incarceration credit pursuant to WIS. STAT. § 973.155 (2003-04),² this court affirms.

I. BACKGROUND.

¶2 Kiefer was arrested on January 24, 2005, at approximately 2:10 a.m. after a University of Wisconsin Milwaukee (UWM) police officer saw him driving without his headlights turned on. After stopping him, the officer detected signs of intoxication. After observing Kiefer perform several field sobriety tests, the officer arrested him for drunk driving and also issued him several traffic citations.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The officer learned it was Kiefer's third arrest for OWI, and that Kiefer was on probation for a felony drug offense. As a consequence of his arrest, a VOP hold was placed on Kiefer. A personal recognizance bond was set for this offense that would convert to \$500 cash bail should the VOP hold be lifted. Pending resolution of the VOP hold, Kiefer was held at the Milwaukee County Jail for twenty-nine days. Apparently, in exchange for his voluntarily entering the NEXUS drug treatment program in Oshkosh, Wisconsin, the VOP hold was lifted after he had been incarcerated for twenty-nine days, and the \$500 bail was paid. Kiefer spent 112 days in the program and successfully completed it. Ten days after completing the treatment program, Kiefer pled guilty to the third offense OWI, contrary to WIS. STAT. § 346.63(1)(a). The traffic citations and a charge of prohibited blood alcohol concentration (BAC) were dismissed. Also, in exchange for his plea, the State agreed to recommend a sentence of six months' Huber time, twenty-four months' driver's license revocation, twelve months on the ignition interlock, and a fine of \$1200.

¶3 At sentencing, the State mistakenly told the trial court that Kiefer had spent twenty-nine days in the treatment program. During Kiefer's sentencing, the trial court remarked that:

As I've said before this morning, I've said countless other times, one of the frustrating things about sentencing drunk drivers is they tell me I'm supposed to look at rehabilitation as well as punishment as well as sending a message to the community, but the legislature's taken away my right to look at rehabilitation.

Kiefer was sentenced to five months in the House of Correction with Huber privileges, and in all other respects, the trial court followed the State's sentencing recommendation. The trial court commented:

[H]ere's what I'll do with you, Matt: Five months in the House of Correction. In effect I'm giving you credit for the 29 days. That's the best I can do for you. I think the six-month sentence is a fair one. I'll give you credit officially for the 29 days that you've done by making it a five-month sentence, but given your record I think six months is fair, so that[']s why it's five-month House of Correction....

....

You earned the credit for one month by what you did. Any less than that I think would send the wrong message to the community given your record.

¶4 Kiefer filed a postconviction motion seeking a sentence modification, claiming that a mistake occurred due to the State's comments to the trial court because the trial court's remarks suggested that it intended to give him credit for all the time spent in treatment against his jail sentence, but the reduction in the length of his jail time fell short of the time he actually spent in treatment. In his motion, he also claimed the trial court did not have the benefit of reviewing the NEXUS reports reflecting Kiefer's excellent progress. In a written decision, the trial court denied the motion.

II. ANALYSIS.

¶5 Kiefer first argues that the trial court failed to consider rehabilitation as a sentencing factor because it believed the legislature had removed rehabilitation as a factor in these cases. This court disagrees.

¶6 The appellate standard of review is limited to determining if the sentencing court erroneously exercised its sentencing discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

¶7 We have frequently recognized that the three primary sentencing factors a trial court must consider are: (1) the gravity of the offense; (2) the

character of the offender; and (3) the need for the protection of the public. *See State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). Additional factors that the trial court may take into consideration are: (1) the past record of criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character and social traits; (4) the results of a presentence investigation; (5) the vicious or aggravated nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background and employment record; (9) the defendant's remorse, repentance and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. *Id.* at 426-27. These are denominated the secondary factors, which a sentencing court may, but is not obligated to address. *See State v. Lewandowski*, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

¶8 “A defendant has a due process right to be sentenced based on accurate information.” *State v. Groth*, 2002 WI App 299, ¶21, 258 Wis. 2d 889, 655 N.W.2d 163. The defendant has the burden of proving by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. *Id.*, ¶22. Whether the sentence was based on inaccurate information that was prejudicial to the defendant is a constitutional issue that presents a question of law, which we review *de novo*. *Id.*, ¶21.

¶9 Although the trial court's comments, standing alone, would suggest the trial court believed rehabilitation was no longer a factor, a review of the entire record reflects that the trial court recognized that rehabilitation was a proper sentencing factor, and indeed, gave Kiefer credit for completing his treatment program. The trial court's remarks concerning the legislature taking away the right to consider rehabilitation in sentencing OWI offenders appears to be nothing

more than the trial court's observation that sentencing in OWI cases has become very restrictive, inasmuch as there are, among other things, mandatory minimum jail sentences.

¶10 As noted, in its sentencing remarks, the trial court stated:

[H]ere's what I'll do with you, Matt: Five months in the House of Correction. In effect I'm giving you credit for the 29 days. That's the best I can do for you. I think the six-month sentence is a fair one. I'll give you credit officially for the 29 days that you've done by making it a five-month sentence, but given your record I think six months is fair, so that[']s why it's five-month House of Correction....

....

You earned the credit for one month by what you did. Any less than that I think would send the wrong message to the community given your record.

The "what you did" the trial court was referring to was Kiefer's completion of the treatment program. The trial court was aware that the twenty-nine days Kiefer was in custody would not be eligible for sentence credit because he was technically released from bail on a personal recognizance bond on these charges when he was being held on the VOP hold. In effect, the trial court gave him a twenty-nine-day reduction for his time in jail prior to entering the drug treatment program. This was a further reduction from the State's recommendation of six months, which the State acknowledged was a reduction from its ordinary recommendation for a third offense OWI due to Kiefer's completion of the drug program.

¶11 Kiefer's contention that the trial court was misled into believing he spent only twenty-nine days in the treatment program is belied by the trial court's decision following the postconviction motion. In it, the trial court stated it "*was* aware of the length of time the defendant was in treatment" (italics in original).

The trial court noted that it had before it documentation from the agency showing the treatment dates. It also put the issue to rest by commenting: “Although some ambiguity exists in the transcript with regard to the ‘29 days,’ the court at all times was referring to the 29 days of statutory pretrial credit for time the defendant spent in custody, not in the treatment program.” Thus, Kiefer is not entitled to any additional reduction in his jail sentence because the trial court never intended to give him a day-for-day reduction for the time spent in the treatment program.

¶12 Finally, this court determines that Kiefer was not entitled to sentence credit under WIS. STAT. § 973.155(1m)³ for the time he spent in the treatment program. This sentence permits credit under the following circumstances:

Sentence credit. ... **(1m)** A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 16.964 (12) (c), as determined by the office of justice assistance under s. 16.964 (12) (i) for any offense arising out of the course of conduct that led to the person’s placement in that program.

¶13 While it is true that Kiefer was in a “substance abuse treatment program,” he voluntarily entered into it to avoid being revoked on the felony drug charge for which he was previously convicted, not in connection with the third offense OWI.⁴ Thus, Kiefer was not eligible for credit under the statute because his placement there was not “for any offense arising out of the course of conduct that led to the person’s placement in that program.”

³ WISCONSIN STAT. § 973.155(1m) was added by the legislature in 2005, and is thus not part of the 2003-04 version to which this court is otherwise citing.

⁴ Although it appears both charges came about because of a common problem – addiction.

¶14 In sum, the trial court properly exercised its discretion and considered Kiefer's rehabilitation, and determined Kiefer would get a reduction in sentence for it commensurate to the time he spent in custody while being held on a VOP hold; the trial court was aware of the actual length of time Kiefer spent in treatment; and Kiefer was not eligible for sentence credit under WIS. STAT. § 973.155(1m). Therefore, this court affirms.

By the Court.—Judgment and order affirmed.

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

