

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 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. 2006AP367-CR

Cir. Ct. No. 2003CT010035

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SEAN DUREL COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Sean Durel Cooper appeals from a judgment entered after he entered a guilty plea to one count of operating a motor vehicle while intoxicated (third offense), contrary to WIS. STAT. § 346.63(1)(a) (2003-

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

04).² Cooper contends that the trial court erroneously exercised its sentencing discretion with respect to the monetary sanction portion of his sentence. Because Cooper failed to file a postconviction motion raising this issue and because the trial court did not erroneously exercise its sentencing discretion, this court affirms.

BACKGROUND

¶2 Cooper pled guilty to operating a motor vehicle while intoxicated (third offense) and judgment was entered. At the sentencing hearing, defense counsel provided the court with a copy of Cooper's resume, an outline of Cooper's achievements, and confirmation that Cooper had earned JD and MBA degrees. Defense counsel also advised the court that Cooper was the Chief Executive Officer of Metropolitan Investment and Trust.

¶3 Both the State and the defense requested that the minimum fine of \$2400 be imposed. Defense counsel requested a payment plan of \$100/month. In response, the trial court expressed concern, given the professional achievements, that the \$2400 minimum fine would not adequately punish Cooper for his crime. The court engaged in a relatively long colloquy with Cooper and defense counsel about the inconsistency of demonstrating Cooper's professional achievements and then requesting the minimum fine and payment plan, which is typically imposed on individuals of much less economic means. Cooper explained this was his first year starting up his own business and he only made \$24,000. Defense counsel suggested that because of the new business, there may have been additional costs

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

and that next year Cooper may earn “six figures.” Defense counsel also asked for six to twelve months to pay whatever fine was imposed.

¶4 The trial court ruled:

All right. At this time Mr. Cooper is here for sentencing on the charge of operating a motor vehicle while under the influence of an intoxicant, third offense.... The maximum penalty is a fine of not more than eight thousand dollars and imprisonment for not more than one year or both.

I have had the opportunity to listen to the statements of counsel as well as to the statement of the defendant, and I have reviewed the various materials that have been provided by [defense counsel] that have been referred to throughout the course of the hearing.

In looking at this matter, the defendant is 34 years old. He is highly educated. He has come forward and accepted responsibility for his conduct with his plea.

He is married. He now is starting his own business. I have indicated many of the things that he has been involved in over the past several years.

In looking at the various criteria that the Court considers in terms of the Milwaukee County sentencing guidelines for operating while intoxicated, in the maximum criteria I feel that the defendant does have a substantial ability to be able to make payments on the fines, and as I have indicated, I don't think that simply the minimum fine would be appropriate.

....

[I]t is the order of the Court that you serve a term of nine months at the Milwaukee County House of Correction. That time will be with Huber privileges for employment as well as for alcohol counseling and programming, treatment programming

Additionally, I'm going to order that you pay a fine of \$3500, plus costs, assessments and surcharges. As I have indicated, I think that you're in a position that you would have substantial ability to make those payments, and I think that that needs to be more of a deterrent. Simply giving you the minimum deterrent that is going out to people that are in a far less economic strait than you are, I

think that that would not be a significant penalty to you. I think it does have to be more significant than what has been asked for in terms of the minimum.

I will allow that you can make payments on that at the rate of \$500 per month

¶5 Judgment was entered and Cooper appealed to this court.

DISCUSSION

¶6 Cooper challenges only the trial court's imposition of the \$3500 fine. He contends that the trial court relied on inaccurate information regarding his ability to pay—that the trial court relied on assumptions and inferences without any verification. This court rejects Cooper's claims.

A. Failure to file postconviction motion.

¶7 As the State points out in their response brief, Cooper waived any appeal regarding the sentence he received by failing to raise this issue in a postconviction motion in the trial court. *See* WIS. STAT. §§ 973.19, 809.30(2)(h) and 973.19(1)(a) & (b). Under these statutes, Cooper must first make a motion in the trial court. *State v. Norwood*, 161 Wis. 2d 676, 468 N.W.2d 741 (Ct. App. 1991). Cooper failed to comply with this requirement and proceeded directly to an appeal in this court. Accordingly, he has waived his right to challenge the sentence imposed by the trial court.³

³ This court also notes that Cooper did not file a reply brief to refute the arguments proffered by the State. Accordingly, he has conceded the State's contentions. *See Charolais Breeding Ranches, Ltd. v. FPC Securities, Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

B. Sentencing.

¶8 In the interest of finality, nevertheless, this court also rejects his claim on the merits. Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. *State v. Plymesser*, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court acted reasonably. *State v. Thompson*, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988).

¶9 The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

¶10 Here, Cooper contends that the trial court relied on inaccurate information—inferences and assumptions—instead of verified facts. In order to succeed on a motion for resentencing based on inaccurate information, a defendant must establish that: (1) there was information before the sentencing court which was inaccurate; and (2) the court actually relied on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶2, ___ Wis. 2d ___, 717 N.W.2d 1.

¶11 Cooper fails to establish either *Tiepelman* prong. Cooper does not submit anything to this court to demonstrate that the information provided to the court by defense counsel was inaccurate information. Cooper does not now claim that the resume and other professional information which was provided to the sentencing court was inaccurate. Rather, Cooper seems to complain that the trial court drew the wrong inferences from the accurate information. Cooper failed to

establish that the information relied on was inaccurate. Accordingly, this court cannot conclude that the trial court relied on inaccurate information.

¶12 Finally, to the extent Cooper is challenging the trial court's exercise of discretion, this court rejects that contention as well. The sentencing transcript demonstrates that the trial court addressed each of the primary factors, applied each of the facts to the OWI sentencing guidelines, and reached a reasonable determination in imposing Cooper's sentence. Based on the trial court's thorough review, it concluded that Cooper fell into the middle range of the sentencing guidelines and sentenced him accordingly.

¶13 Specifically regarding the fine imposed, this court notes that the trial court could have imposed an \$8,000 fine. It did not. Instead, it imposed a \$3500 fine. In setting this amount, the trial court noted that Cooper's resume showed he had negotiated million dollar contracts, and Cooper's background suggested that he was in a better financial situation than most defendants. The court requested that defense counsel and Cooper confirm whether Cooper did have the ability to pay more than what the minimum fine would be. Defense counsel's response was: "Mr. Cooper does indicate that he might be able to pay it off, depending on what it is, in the six months to a year." In imposing the \$3500 middle range fine, the court indicated that the minimum fine would not provide enough of a deterrent for Cooper. Based on the foregoing, this court concludes that the trial court properly exercised its sentencing discretion.

By the Court.—Judgment affirmed.

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

