COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1884-CR **Cir. Ct. No. 2006CT1585**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LYNDA MARIE CONNOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Reversed and cause remanded.*

¶1 CURLEY, J.[1] Lynda Marie Connor appeals the judgment convicting her of operating a motor vehicle while under the influence of an

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

intoxicant, fourth offense, contrary to WIS. STAT. § 346.63(1)(a) (2003-04),[2] and the order denying her postconviction motion seeking resentencing. Connor argues that the trial court exceeded its authority by ordering that she serve her sentence without electronic monitoring, and erroneously exercised its discretion when it sentenced her to ten months in the House of Correction. Because the trial court does not have authority over the selection of prisoners to be electronically monitored, and because the trial court relied on inaccurate information in sentencing Connor, this court reverses Connor's sentence and remands for a new sentencing hearing.

I. BACKGROUND.

¶2 Connor, who on February 8, 2006, was driving on the expressway in Milwaukee County, was arrested at approximately 12:30 a.m. by a deputy sheriff after the deputy saw her deviate from her lane of traffic seven times. She also was driving ten miles per hour below the speed limit. When the deputy approached Connor, he detected a strong odor of alcohol and noted that Connor had slurred speech and bloodshot eyes. She was arrested for operating a motor vehicle while under the influence of intoxicants (OWI), fourth offense, and given a blood test. The result of this test was a blood alcohol content (BAC) of .259, well over the legal limit. Shortly thereafter, Connor voluntarily entered into an alcohol treatment program and successfully completed the program. Several months later, she pled guilty to the charge. At sentencing, the trial court applied the Milwaukee Circuit Court's operating while intoxicated sentencing guidelines and sentenced

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

her, among other things, to pay a fine of $2400, and to serve ten months in the House of Correction. In passing down the sentence, the trial court said: "And I am going to sentence you to ten months in the House of Correction, it will be consecutive to any other sentence, without electronic monitoring, that would unduly depreciate the seriousness of the offense." The judgment of conviction includes an entry that reads: "Court objects to Electronic Monitoring." Connor brought a postconviction motion seeking sentence modification, arguing that the trial court exceeded its authority with respect to electronic monitoring, and that the trial court erroneously exercised its discretion by not explaining its sentence. The motion was denied without a hearing. Connor now appeals.

II. ANALYSIS.

¶3 Connor contends both that the trial court erred when it objected to her being placed on electronic monitoring because the trial court has no authority over which prisoners are electronically monitored, and that it erroneously exercised its discretion when it failed to explain why a ten-month sentence was required, contrary to the spirit of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

¶4 This court first addresses the question of whether the trial court overstepped its authority when it objected to electronic monitoring. As noted, during the sentencing hearing, the trial court remarked: "And I am going to sentence you to ten months in the House of Correction, it will be consecutive to any other sentence, without electronic monitoring, that would unduly depreciate the seriousness of the offense." As a result, the judgment of conviction contained the phrase, "Court objects to Electronic Monitoring." In Connor's postconviction motion she challenged the trial court's decision to deny her the possibility of

electronic monitoring. Connor pointed out that WIS. STAT. § 302.425 grants to the sheriff, not the trial court, the authority to determine which prisoners shall be granted electronic monitoring. Additionally, Connor cited ***State v. Schell***, 2003 WI App 78, 261 Wis. 2d 841, 661 N.W.2d 503, that held that the trial court had no authority over the selection of prisoners for electronic monitoring. ***Id.***, ¶16. In its decision denying the postconviction motion, the trial court noted the holding in ***Schell***, but claimed that the holding did not apply because, in ***Schell***, the offender was serving a sentence as a condition of probation, while here, Connor was serving a sentence. The trial court also claimed that its objection to electronic monitoring was simply a "guide" to the sheriff and was not binding. The trial court was mistaken in both its reading of the statute and its interpretation of the ***Schell*** holding.

¶5 Whether WIS. STAT. § 302.425 gives the sheriff the sole authority to select persons to serve their sentences on electronic monitoring is a question of law that this court reviews independently. *See* ***State v. Isaac J.R.***, 220 Wis. 2d 251, 255, 582 N.W. 2d 476 (Ct. App. 1998).

¶6 WISCONSIN STAT. § 302.425, entitled "Home Detention Programs," directs, in pertinent part, that:

> (b) "Jail" includes a house of correction, a work camp under s. 303.10 and a Huber facility under s. 303.09.
>
> **(2)** SHERIFF'S OR SUPERINTENDENT'S GENERAL AUTHORITY. Subject to the limitations under sub. (3), a county sheriff or a superintendent of a house of correction may place in the home detention program any person confined in jail who has been arrested for, charged with, convicted of or sentenced for a crime. The sheriff or superintendent may transfer any prisoner in the home detention program to the jail.
>
> ….

(3) PLACEMENT OF A PRISONER IN THE PROGRAM. If a prisoner described under sub. (2) and the department agree, the sheriff or superintendent may place the prisoner in the home detention program and provide that the prisoner be detained at the prisoner's place of residence or other place designated by the sheriff or superintendent and be monitored by an active electronic monitoring system. The sheriff or superintendent shall establish reasonable terms of detention and ensure that the prisoner is provided a written statement of those terms, including a description of the detention monitoring procedures and requirements and of any applicable liability issues. The terms may include a requirement that the prisoner pay the county a daily fee to cover the county costs associated with monitoring him or her. The county may obtain payment under this subsection or s. 302.372, but may not collect for the same expenses twice.

….

(4) DEPARTMENTAL DUTIES. The department shall ensure that electronic monitoring equipment units are available, pursuant to contractual agreements with county sheriffs and county departments, throughout the state on an equitable basis. If a prisoner is chosen under sub. (3) or a juvenile is chosen under sub. (3m) to participate in the home detention program, the department shall install and monitor electronic monitoring equipment. The department shall charge the county a daily per prisoner fee or per juvenile fee, whichever is applicable, to cover the department's costs for these services.

(5) STATUS. (a) Except as provided in par. (b), a prisoner in the home detention program is considered to be a jail prisoner but the place of detention is not subject to requirements for jails under this chapter.

….

(6) ESCAPE. Any intentional failure of a prisoner to remain within the limits of his or her detention or to return to his or her place of detention, as specified in the terms of detention under sub. (3), is considered an escape under s. 946.42 (3) (a).

This statute gives no authority to trial courts to determine which prisoners are to be electronically monitored, and indeed, directs that the sheriff or a superintendent of a house of correction make that determination.[3]

¶7 Any question as to the authority conferred on the sheriff by the statute is answered by the ***Schell*** holding. In ***Schell***, this court stated that the separation of powers doctrine between the judiciary and the executive branch dictates that sentencing courts may not direct which prisoners in the sheriff's custody may be electronically monitored:

> Whether a circuit court sentences a defendant to prison or imposes probation, "the adversary system has terminated and the administrative process, vested in the executive branch of the government, directed to the correctional and rehabilitative processes of the parole and probation system has been substituted in its place." *Id.* at 650. Part of this administrative process is the sheriff's authority to manage the county jail. *See, e.g.*, WIS. STAT. § 59.27(1) (sheriff has duty to take charge of persons sent to county jail). WIS. STAT. § 302.425 is part of this authority. By precluding the sheriff from releasing Schell on home monitoring, the trial court substantially interfered with the sheriff's power.

Schell, 261 Wis. 2d 841, ¶16. Thus, it is clear that once the trial court has sentenced an offender to jail, whether as a condition of probation or otherwise, the decision of who is to be electronically monitored is the sheriff's call. Indeed, the authority given the sheriff to place any person in home detention is broad, as it includes anyone "who has been arrested for, charged with, convicted of, or sentenced for a crime." Further, the trial court, despite its insistence that its

[3] WISCONSIN STAT. § 973.03 does, however, give the sentencing court the authority to sentence an offender to detention either at home or another place designated by the court, but only in "lieu of a sentence of imprisonment to the county jail."

prohibition of electronic monitoring found in the judgment of conviction was a "guide" to the sheriff, failed to modify the language of the judgment of conviction to reflect its non-binding nature. In this court's view, language such as that found in the judgment of conviction invites disaster because it places the burden on the sheriff to distinguish between orders that appear mandatory and are mandatory, from those that appear mandatory, but are actually advisory. Consequently, this court concludes that the trial court exceeded its authority when it ordered that Connor serve her sentence without electronic monitoring.

¶8 This court next addresses Connor's contention that the trial court erroneously exercised its discretion by not explaining why Connor needed to be incarcerated for ten months.

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶9 The primary sentencing factors are the gravity of the offense, the need for public protection, and the character of the offender. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The trial court's obligation is to consider the primary sentencing factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***id.*** at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d

243 (Ct. App. 1994). Further, ***Gallion*** instructs the trial court to provide "an explanation for the general range of the sentence imposed." ***Id.***, 270 Wis. 2d 535, ¶49.

¶10 In addition, the Milwaukee County Circuit Courts have fashioned sentencing guidelines for persons convicted of OWI. This court will take judicial notice of the guidelines. While the guidelines do not require any particular sentence, one of the purposes behind the guidelines is that "relative consistency will help ensure justice for offenders, victims and the community." The guidelines for fourth offense operating while intoxicated list several recommendations depending on eight factors. The suggested sentences are divided into three categories: mitigated, intermediate, and aggravated. With respect to the length of a jail sentence for fourth offense OWI, the mitigated range suggests incarceration between 60 and 365 days (two months to one year), the intermediate range suggests a term between 150 and 365 days (five months to one year), and the aggravated range lists a term between 210 and 365 days (seven months to one year).

¶11 One of the factors is "blood alcohol level." In assessing the factors found in the guidelines, the trial court found that Connor's BAC of .259 was an aggravated factor. As to the factor "concerning the conduct of the offender since the offense," the trial court appeared to believe that was a mitigated factor, as the trial court noted that Connor had entered a treatment program voluntarily and was doing well in it. The trial court described the factor entitled "consequences of offense to defendant" as being in the intermediate range. Also, the trial court determined that Connor's cooperation with law enforcement, and the fact that there was no accident, were mitigated factors. The trial court also found that the "time, manner, and location of the incident" would place Connor in the

intermediate range. Finally, the trial court determined that Connor's driving record was an aggravated factor.

¶12 In sum, then, the trial court found three mitigated factors, two intermediate factors, and two aggravated factors. Nevertheless, the trial court sentenced Connor to ten months in jail out of a possible twelve-month maximum.

¶13 This court has concerns over the trial court's assessment of Connor's driving record, which the trial court determined was an aggravated factor because she had three previous OWIs. First, a person who stands charged with fourth offense operating while intoxicated will always have three previous convictions. While the trial court declared this an aggravated factor, it would appear the guidelines for fourth offense would have already taken into consideration that there were would be three previous convictions. Additionally, Connor had no criminal record except for her OWI convictions, and did not have any other traffic violations. Clearly, under the guidelines, her record would qualify as a mitigated factor because, according to the guidelines, to qualify for either the intermediate range or the aggravated range, she would have had to have had a "[p]oor driving record, or minor or dated criminal record," or a "[v]ery poor driving record, previous OWIs at short intervals, previous OWI-related OAR/OAS, or moderate to severe criminal record." Thus, the trial court's determination that her driving record placed her in the aggravated range was in error.

¶14 Moreover, although the trial court earlier in the sentencing proceeding correctly recited the blood test results as being a BAC of .259, in announcing that Connor's driving record was an aggravated factor, the trial court stated that her blood alcohol result was a BAC of .29. Thus, it appears that the

trial court's mistaken belief that her blood alcohol test result was a BAC of almost .30 influenced the trial court's decision on the length of the jail term.

¶15 "A convicted offender does not have a constitutional right to a particular sentence available within a range of alternatives, but the offender does have a right to a fair sentencing process—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Because the trial court miscalculated the factor touching on Connor's criminal and traffic record, and because the trial court incorrectly stated Connor's blood test results, the trial court erroneously exercised its discretion, requiring this matter to be remanded for resentencing. Accordingly, we reverse the sentence and remand for proceedings consistent with this opinion.

By the Court.—Judgment and order reversed and cause remanded.

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