COURT OF APPEALS
DECISION
DATED AND FILED

January 03, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP570-CR **Cir. Ct. No. 2003CF5161**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON T. HOLTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Brandon T. Holtz pled no contest to fleeing from a police officer, as a habitual criminal. *See* WIS. STAT. §§ 346.04(3), 346.17(3)(a) and 939.62 (2003-04). The circuit court sentenced Holtz to five years of imprisonment, comprised of three years of initial confinement and two years of

extended supervision. Holtz filed a postconviction motion for sentence modification, arguing that the court erroneously exercised sentencing discretion. The circuit court denied the motion. Holtz appeals. We affirm.

Background

¶2 In the early morning hours of September 6, 2003, a Milwaukee police officer saw a westbound car run the red light at the intersection of Glenview Avenue and W. Wisconsin Avenue. The car crossed the center lane and veered back into the westbound lane, striking the curb. The officer activated his car's siren and emergency lights in the 8600 block of W. Wisconsin Avenue. The car did not pull over. Rather, it continued westbound, frequently weaving into the oncoming traffic lane and almost striking the curb on the north side of Wisconsin Avenue. The car sped up and slowed down as it continued westbound. When the car reached the intersection of W. Wisconsin Avenue and Mayfair Road, it disregarded the controlling red flashing stoplight and continued through the intersection into a gasoline station parking lot. The car nearly struck a person who was working on a car in the parking lot before coming to a rest against a fence.

¶3 The officer identified the driver of the car as Holtz. Holtz appeared incoherent. He was unsteady on his feet and his speech was slurred. The officer observed a "bong" in the car which smelled strongly of marijuana. Holtz's blood alcohol content tested as 0.00. Subsequently, a sample of Holtz's blood was drawn to be tested for controlled substances. There were two passengers in the car, both eighteen-years-old at the time.

¶4 Holtz was charged with fleeing, as a habitual criminal. The repeater allegation derived from a 1999 felony conviction in Washington county for the manufacture or delivery of LSD. He was also charged, in a separate case, with

operating a motor vehicle while revoked (OAR). While these matters were pending, Holtz was charged with another count of OAR and felony bail jumping.

¶5 All of the charges were resolved at the same time. Pursuant to a plea agreement, Holtz pled no contest to the fleeing charge, guilty to the two OAR charges, and the State moved to dismiss the felony bail jumping charge.[1] The State made a "global" sentencing recommendation of two years of initial confinement, followed by three years of extended supervision. Holtz was sentenced immediately after entering his pleas.

¶6 In its sentencing remarks, the State discussed the allegations of the criminal complaint, informing the court that Holtz admitted to being under the influence of "GHB" or "Liquid G" at the time. The State told the court that the drug was "new," and therefore, Holtz's blood was not tested for its presence. The State addressed Holtz's conduct since the September 6, 2003 incident, informing the court that Holtz had been late for a court appearance and that the second OAR arose from an incident in which Holtz "ended up blowing a .18 and he was drunk." Because of those violations, Holtz was charged with felony bail jumping. The State also informed the court that because Holtz had tested positive for marijuana use while on court-ordered monitoring, his bail was increased, and when he could not post bail, he was incarcerated pending resolution of the charges.

¶7 The State acknowledged that several letters of support from family and friends had been sent to the court, and suggested that the letters might have

[1] Holtz is not appealing the OAR matters.

given Holtz "the impression that what he has done … would be slightly excusable as a mistake."

¶8 Finally, the State addressed Holtz's criminal record. It described Holtz's prior Washington county conviction as a "sweet deal" because three other drug-related charges were dismissed at the time and he received a lenient sentence. The State noted that none of the supportive letters "acknowledge" Holtz's prior drug use or dealing. The State recommended prison time because of Holtz's continued drug use and the danger posed to others during the fleeing.

¶9 After the State's recommendation, Holtz's attorney made his sentencing recommendation and Holtz's mother addressed the court. Holtz then made his allocution. At the conclusion of Holtz's allocution, the court asked the assistant district attorney whether she was aware of a "DV disorderly conduct" conviction of December 17, 2003 arising from a November 5, 2003 incident involving Holtz's fiancée. The assistant district attorney replied that she "had no idea" about the conviction. Similarly, Holtz's attorney told the court that he "was not aware" of that conviction.

¶10 The court then engaged Holtz in a colloquy about the disorderly conduct conviction. Holtz admitted that he and his fiancée "got into an argument" two months after the fleeing incident. The court asked Holtz why he did not tell his lawyer and Holtz replied, "[a]t the time I didn't think that it was going to matter on this case." The court then asked Holtz whether he "figure[d] if [he] kept it quiet long enough [the court] would just let it pass by?" Holtz replied, "no," and he apologized. The court informed the parties that he had "pop[ped]" Holtz's

name into his computer because "something d[id]n't feel right" and he had discovered the disorderly conduct conviction.[2]

¶11 The following exchange then took place:

> THE COURT: You know what – and I don't hold this against [defense counsel] – I'm sure he isn't really pleased now because it doesn't make him look very good. I'm not holding it against him because I know he didn't know about it and I know [he] is a good lawyer. If he would have known about it, he would have let me know, but that hurts his reputation in his eyes with the Court.
>
> THE DEFENDANT: Yes, your honor.
>
> THE COURT: So how is he supposed to sit here and represent you when you are lying to him and not telling the whole truth, you tell me that?
>
> THE DEFENDANT: It would be hard for him, your Honor.
>
> THE COURT: Because I have sat in his position and had clients who have lied to me when I did defense work, and I know that ticked me off more than a client who thought they were going to pull something over on me and try to hide something.
>
> THE DEFENDANT: Yes, your Honor, I had no intention of trying to hide this.
>
> THE COURT: Well, if you had no intention of not hiding this, then you would have told someone about it – including your lawyer – and at that point he could have decided whether he wanted to make me aware of that or whether he was ethically required to do that and you could have discussed that. Maybe he was ethically required to do that.
>
> THE DEFENDANT: Yes, your Honor.

[2] Presumably, the circuit court searched the electronic court records maintained by the Consolidated Courts Automation Project (CCAP).

> THE COURT: And then maybe I wouldn't be holding it against you, but what I am holding against you at this point is that you didn't bother to tell him that you were playing games with everything, and you are playing everybody with this game. You are playing me, you are playing your lawyer, you are playing your family, you are playing your girlfriend, you are playing your kid, you are playing everyone, and you think you are going to win.
>
> You got everyone so hoodwinked in this thing that I have letters here saying you are the next coming and that you are the greatest thing on earth, and if for some reason you are being persecuted it is because you are in Milwaukee county and not Washington county.
>
> THE DEFENDANT: I never meant it to be that way with my lawyer.
>
> THE COURT: I understand the letters are here to support you, and I'm not in my way downplaying the letters, but you have all this garbage going on and you have all these people hoodwinked.
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Including your parents. I understand that your mother and father love you and they want to do the best they can do to support you, but you are playing games with them too, you are not up front with them. This whole discussion is not meant to disparage at all your parents, because they are the victims involved in this.
>
> The bottom line, Mr. Holtz, is if you mentioned something to your lawyer about this he would have mentioned this to me and the circumstances surrounding it – whatever the circumstances were – may very well have been a nonissue. … But the fact that you didn't and the fact that you didn't discuss it with him even or bring it up, in my mind at this point just shows a continuation of your character of how you are playing everyone.

The court then proceeded to impose sentence and its further remarks will be set forth below.

Discussion

¶12 On appeal, this court's review of sentencing is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***Id.***, ¶18 (citation omitted). "[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Id.*** (citation omitted). The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Id.***, ¶23 (citation omitted).

¶13 "Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant and any other applicable, aggravating or mitigating factors. ***Id.***, ¶40 n.10.

¶14 Holtz argues that his sentence was unfair. He contends that the circuit court "focused more" on the undisclosed disorderly conduct conviction than on the fleeing offense. Holtz argues that the court unfairly punished him for

not telling his attorney or the court about the conviction. Holtz likens his sentencing to ***Rosado v. State***, 70 Wis. 2d 280, 234 N.W.2d 69 (1975), a case in which the sentencing court was faulted for "directly punishing" the defendant for an incident that took place in Puerto Rico. ***Id.*** at 290. He also argues that the court "unfairly caricatured and mischaracterized" the supportive letters and describes the court's comments regarding the letters as "an extended flight of hyperbole." Finally, Holtz contends that the court "let his sense of personal victimization interfere" with the exercise of sentencing discretion. Because the record reflects an appropriate exercise of sentencing discretion, we reject Holtz's contentions.

¶15 The court identified the three primary sentencing factors—the seriousness of the offense, the defendant's character, and the need to protect the community. The court first discussed the offense. The court acknowledged that a lengthy high-speed chase in which stoplights were run and accidents caused would be more serious, but it described this offense as "one of the most serious fleeing cases I have seen at slow speeds."[3] The court noted that Holtz "failed to stop for a police officer," was "significantly under the influence of drugs" and was "barely able to stand." The court noted that Holtz was "bouncing off curbs" and that his two underage passengers were drunk.[4] The court hypothetically questioned whether Holtz had given them the alcohol but did not directly ask lest Holtz "incriminate [him]self on other charges."

[3] The highest speed alleged in the criminal complaint was forty-five miles per hour.

[4] The passengers' intoxication is not alleged in the criminal complaint. However, Holtz did not dispute the State's description of their intoxicated condition at sentencing.

¶16 The court then turned to Holtz's character. The court noted that Holtz had been released on pretrial bail but had violated the conditions of release. The court stated that Holtz's conduct indicated that he "really d[id]n't care at all" and that Holtz "talked a good game" but was "trying to play everyone." The court stated that it did not "see a whole lot of remorse" apart from the entry of a plea. The court considered Holtz's prior record, including the prior drug conviction and the disorderly conduct conviction. The court noted that the latter conviction violated the conditions of bail in this case. The court stated that Holtz's failure to tell anyone of that matter precluded it from being considered during the plea negotiations and that the State could charge Holtz with felony bail jumping if it deemed additional charges were appropriate.

¶17 Lastly, the court considered the need to protect the public. The court stated that it appeared that Holtz "could care less about anyone" and would "do whatever [he was] going to do." Therefore, the court concluded that "significant punishment" was needed.

¶18 Contrary to Holtz's appellate argument, the court considered the circumstances of the fleeing offense at length. Although the court discussed the disorderly conduct conviction prior to imposing sentence and considered it as part of Holtz's prior criminal record, by no means did the court "focus more" on that offense than on the offense for which it was imposing sentence. Understandably, Holtz does not argue that the court could not consider the disorderly conduct offense, and we see no error in the court's consideration of the offense.

¶19 Holtz's reliance on ***Rosado*** is misplaced. In that case, the supreme court concluded that "the only reasonable inference" that could be drawn from the sentencing record was that the court imposed sentence "not only for the crime of

which [the defendant] was convicted, but for the events which occurred in Puerto Rico." ***Id.*** at 290. In that case, a sentencing that extended over two days "was largely taken up" with a Puerto Rico incident, "[v]ery little was said about the crime charged," and the court expressly imposed sentence for the defendant's "course of conduct." ***Id.*** at 290-91. As discussed above, the record in this case is markedly different.

¶20 Holtz's other arguments also fail. The court did not punish Holtz for not telling the court or his attorney about the incident. Rather, the court faulted Holtz for an overall lack of candor and for not taking responsibility for his conduct. In a similar fashion, the court's comments regarding the supporting letters, that is, its assessment that Holtz had "hoodwinked" his family and friends, were not error. The court expressly stated it was not "downplaying" the letters. The court merely was drawing attention to the contrast between the character of the person described in the letters and the character of the person who fled from the police while under the influence of drugs. The court's comments were supported by the record and constituted fair comment on Holtz's character. Finally, the court's reference to its experiences as a defense attorney did not stem from a sense of "personal victimization" but rather related to an attorney's inability to fully represent a defendant's best interests when the defendant is less than forthcoming. In sum, the record shows that the sentencing court properly exercised its discretion when sentencing Holtz.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.