

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2007

David R. Schanker
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. 2007AP219-CR

Cir. Ct. No. 2005CF872

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. FISHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Timothy J. Fisher has appealed from a judgment convicting him upon a guilty plea of operating a motor vehicle while intoxicated, fifth or greater offense (OWI). In exchange for Fisher's guilty plea, charges of hit and run involving an attended vehicle and operating after revocation, second

offense, were dismissed and read-in, as were charges of bail jumping, operating after revocation, and theft of moveable property pending in several other cases.¹ The trial court ultimately sentenced Fisher to a bifurcated sentence of six years, consisting of three years of initial confinement and three years of extended supervision, the maximum sentence permitted for this offense. Fisher moved to modify the sentence, and the trial court denied the motion. We affirm the judgment and order denying postconviction relief.

¶2 Fisher's conviction arises from an incident on August 12, 2005, when he was stopped by the Mukwonago police for speeding and driving through a red light. During the stop, another driver drove up and informed the officer that he was following Fisher's vehicle because Fisher had hit his car and fled the scene. Fisher was subsequently arrested for OWI and the other charges that were dismissed when he entered his guilty plea. His blood alcohol concentration at the time of his arrest was .236.

¶3 The issues on appeal all relate to sentencing. Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this court follows a strong and consistent policy of refraining from interference with the trial court's decision. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76, *review denied*, 2006 WI 39, 290 Wis. 2d 22, 712 N.W.2d 897. We afford a strong presumption of

¹ A charge of operating a motor vehicle with a prohibited blood alcohol concentration, fifth or greater offense, was also dismissed.

reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant.

Id.

¶4 To properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.* It must identify the factors it considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision. *Ziegler*, 289 Wis. 2d 594, ¶23.

¶5 The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.* Other factors which may be relevant include, but are not limited to, the defendant's past record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation report (PSI); the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; and the rights of the public. *Id.* The trial court need not discuss all of these secondary factors, but rather only those relevant to the particular case. *Id.* The weight to be given each of the sentencing factors remains within the wide discretion of the trial court. *Stenzel*, 276 Wis. 2d 224, ¶9.

¶6 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.” *Gallion*, 270 Wis. 2d 535, ¶23. However, in imposing the minimum amount of custody consistent with the appropriate sentencing factors, “minimum” does not mean “exiguously minimal,” or insufficient to accomplish the goals of the criminal justice system. *State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Moreover, while the trial court must provide its sentencing rationale on the record, a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific term of confinement. *State v. Fisher*, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. *Gallion* requires an explanation but not mathematical precision. *See Ziegler*, 289 Wis. 2d 594, ¶25.

¶7 Fisher contends that the trial court erroneously exercised its discretion by considering irrelevant information and making improper remarks. He also contends that the sentence is excessive and was imposed without adequately considering mitigating factors. None of these claims have merit.

¶8 Prior to sentencing Fisher, the trial court listened to arguments from the prosecutor and defense counsel. It considered Fisher’s statement and the PSI. At the outset of its sentencing comments, the trial court correctly observed that it was required to consider the seriousness of the offense, Fisher’s background and rehabilitative needs, and the need for protection of the community. It then clearly and fully explained its rationale for imposing the maximum sentence permitted in this case.

¶9 The trial court initially discussed the seriousness of the offense, noting that it occurred in the middle of the day, that Fisher's blood alcohol level was exceedingly high, and that the victim of the hit-and-run told the PSI writer that Fisher almost hit him as he drove away after hitting the victim's vehicle. The trial court also noted that Fisher was driving without a valid license, and that these factors combined to make this an aggravated drunk driving offense. The trial court further noted that the situation was also aggravated by the fact that, as charged, this was Fisher's fifth drunk driving offense. The trial court also noted that the situation was aggravated by Fisher's behavior after this case was charged, which included incurring bail jumping charges, poor supervisory reports, drinking alcohol while placed at a Huber facility, and failing to enter into any kind of treatment for his alcohol problems.

¶10 In addition to concluding that this offense was serious and aggravated, the trial court considered Fisher's character and rehabilitative needs in determining that a maximum sentence was warranted. It considered Fisher's involvement in the read-in offense of theft of moveable property, a charge that was dismissed as part of the plea agreement. It discussed Fisher's prior criminal record, which reflected criminal activity dating back more than thirty years. While acknowledging that most of the offenses were misdemeanors and that his last drunk driving conviction was in 1998, it also noted that the pattern of criminal conduct was constant, with no significant gaps. In addition, it considered that Fisher's criminal history was related to alcohol and drug problems for which he had never received or pursued meaningful treatment. While acknowledging his love for his children, it reasonably concluded that he could not be a good parent until he became sober. Based on Fisher's chronic alcohol and drug problems, it

concluded that his rehabilitative needs were high, and that without treatment he was likely to drink himself to death or take the life of an innocent person.

¶11 The trial court also relied on these facts in describing the public's need for protection from Fisher as a "huge" factor in sentencing. It reiterated that Fisher's alcohol problems remained untreated and that, rather than seeking and pursuing treatment, Fisher had continued to engage in criminal conduct. Based on these factors, it concluded that the maximum sentence was warranted.

¶12 None of Fisher's arguments provide a basis for disturbing the trial court's exercise of sentencing discretion. Fisher complains that the trial court considered sentences it had imposed in other OWI cases, contrary to the requirement that a trial court impose a sentence to fit the particular defendant. However, it is clear from the trial court's discussion of other cases that it was merely explaining why, in contrast to those cases, the maximum sentence was warranted in Fisher's particular case. As such, it constituted an appropriate explanation of the trial court's sentencing rationale.

¶13 We also reject Fisher's argument that the trial court made unwarranted assumptions concerning Fisher's character. Fisher contends that the trial court made comments that were irrelevant and based on speculation when it stated that Fisher was a "mean" drunk who resorted to stealing to supplement his income and addictions. He also objects that, in discussing Fisher's self-employment and prior unfair trade conviction, the trial court stated that it was its "educated guess" that Fisher drank up profits and failed to complete the project because he was drunk or spending the money for material on some kind of controlled substance. In addition, Fisher contends that the trial improperly

speculated that he was a “California addict, meaning you will take anything that’s out there.”

¶14 The trial court’s comments were neither unwarranted nor improper. The agent who drafted the PSI stated that Fisher told her that “the bulk of his criminal activity was due to his problem with alcohol,” and that his battery and disorderly conduct charges were a direct result of fighting between him and his wife after they had been drinking. The agent further stated that Fisher attributed his problems with the criminal justice system to his alcoholism, and told her that, “Every spec of trouble has been caused by drinking.”

¶15 Based upon Fisher’s criminal record and his statements to the PSI writer, the trial court reasonably inferred that he became physically abusive when he drank, and that there was a connection between his business problems, thefts, and drug and alcohol use. Moreover, the PSI detailed Fisher’s admissions regarding his use of alcohol, heroin, marijuana and oxycontin, and his positive urine tests while on supervision. Based upon this information, the trial court could reasonably conclude that his drug and alcohol problems were such that he would use whatever substances were available.

¶16 We also reject Fisher’s argument that the sentence was excessive and imposed without adequate consideration of mitigating factors. To establish that a sentence constitutes an erroneous exercise of discretion because it is excessive, a defendant must show that the sentence is so excessive and unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶17 For the reasons discussed by the trial court, imposition of the maximum sentence does not shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances of this case. Moreover, as the trial court's discussion reveals, it did not ignore mitigating circumstances or positive factors. Instead, it considered and balanced the relevant factors in assessing Fisher's character. The mere fact that the trial court failed to give particular factors the weight that Fisher wished does not constitute an erroneous exercise of discretion. *See Stenzel*, 276 Wis. 2d 224, ¶16.

¶18 In reaching this conclusion, we note that the trial court discussed Fisher's remorse, but reasonably concluded that to be meaningful, an expression of remorse has to be accompanied with a demonstration that the defendant is trying to get his life in order. It reasonably concluded that such evidence was lacking here. Similarly, while Fisher alleged that he took responsibility for his actions, the trial court was entitled to conclude that his claim was entitled to little weight in light of his failure to complete alcohol and drug treatment and his continued commission of new crimes over the course of decades. The trial court also responded to Fisher's claims regarding his concern for his family, but acted within the scope of its discretion in failing to assign his contentions the weight Fisher wished.

¶19 As noted by the State, other factors cited by Fisher did not have to be deemed mitigating by the trial court. While Fisher relies on the fact that he did not cause personal injury in the hit and run, the trial court properly considered that the victim of that offense told the PSI writer that Fisher almost hit him as he drove away. Similarly, while Fisher contends that he conducted himself appropriately in court proceedings, as set forth above the trial court considered the fact that he engaged in misconduct while this case was pending. Finally, Fisher was awarded

sentence credit for the time he spent in pretrial incarceration. Contrary to Fisher's argument, his pretrial incarceration therefore does not constitute a mitigating factor warranting a reduction in the trial court's sentence.

¶20 For these reasons, no basis exists to conclude that the trial court erroneously exercised its discretion in sentencing Fisher. The order denying postconviction relief is therefore also affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

