COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2009

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. 2008AP2412-CR **Cir. Ct. No. 2006CF2509**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK L. SPANGLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham JJ.

¶1 PER CURIAM. Mark Spangler appeals a judgment of conviction and an order denying his motion for postconviction relief. Spangler was convicted of three counts of injury by intoxicated use of a vehicle, and three counts of hit and run – great bodily harm. Spangler argues the convictions arising from two

counts of hit and run violate double jeopardy because the three victims were all passengers in the same vehicle. Spangler also argues the circuit court erroneously exercised its sentencing discretion. We reject Spangler's arguments and affirm.

¶2 Spangler was driving while under the influence of intoxicants northbound on Interstate 39 in the City of Madison at approximately 1:00 p.m., when his vehicle crossed the median, launched over the guardrail, and collided head-on at freeway speeds with an oncoming van occupied by the Hodkiewicz family. The Hodkiewicz vehicle was sent spinning, crashed into a third vehicle and eventually came to rest against a guardrail.

¶3 Spangler was pulled from his vehicle by several drivers who stopped to render assistance. Spangler was bleeding from a gash on his face. He asked to use Danielle Salber's cell phone, and after using it, asked if he could keep it. Salber told Spangler she needed her phone back and Spangler again asked if he could keep the phone for half an hour to call his wife. Spangler then fled from the scene without returning the cell phone. Another witness to the accident, Christopher Shaw, later observed Spangler hitchhiking on Portage Road approximately one block from the accident scene. Shaw recognized Spangler as being the individual pulled from the vehicle. Shaw told his girlfriend to call police, and that he would drive Spangler to a location where police could contact his vehicle.

¶4 As law enforcement approached, Spangler exited the vehicle and began walking towards the officers saying, "Fine, you got me, arrest me." Trooper Miller of the Wisconsin State Patrol smelled a very strong odor of intoxicants on Spangler's breath and observed Spangler's eyes were red and his pupils were dilated. Miller escorted Spangler to Meriter Hospital, where he asked

Spangler to submit to field sobriety tests. Spangler responded, "I don't gotta do nothing. Take me to jail." After Spangler refused to submit to a chemical test of his blood, a blood draw was performed which indicated an alcohol concentration of .217%.[1]

¶5 As a result of the accident, Scott Hodkiewicz and his wife, Mona, were removed from the scene by Medflight and ambulance to U.W. Hospital. Scott sustained a ruptured spleen that had to be removed, a bruised liver, a ruptured small intestine, a ruptured bladder, fractured right and left ankles, fractured right and left elbow, fractured shoulder, dislocated shoulder, compound fracture of the left femur, fractured nose and fractured right and left heels. The complaint indicated Scott required approximately ten surgeries since the accident and more were scheduled. Mona sustained multiple injuries, including a bruised pancreas that was hemorrhaging internally, a fractured elbow, and fractured spinal vertebrae. Their daughter Alexa sustained a separated shoulder, which required surgery to place a pin in the shoulder, and a fractured elbow. Two other children in the van received scrapes and bruises.

¶6 Spangler was charged with eleven criminal violations, including three counts of injury by intoxicated use of a vehicle – great bodily harm; three counts of hit and run – great bodily harm; operating a motor vehicle while intoxicated – 5th offense, hit and run – attended vehicle; two counts of bail jumping, and operating after revocation. An Information alleged the same charges as well as counts of injury by intoxicated use of a vehicle (prohibited BAC) –

[1] A can of beer was found in the center console of Spangler's vehicle.

great bodily harm, and one count of operating a motor vehicle with a prohibited alcohol concentration – 5th and subsequent offense.

¶7 Following a plea agreement, Spangler was sentenced to ten years' initial confinement and five years' extended supervision consecutively on each of the three hit and run charges. Spangler also received seven and one-half years' initial confinement and five years' extended supervision on each of the three injury by intoxicated use charges, to be served concurrent to each other and the hit and run charges. In total, Spangler received thirty years' initial confinement and fifteen years' extended supervision, consecutive to a reconfinement sentence he was serving at the time.

¶8 Spangler filed a postconviction motion, seeking to vacate two counts of hit and run, and to modify his sentence. The circuit court denied Spangler's motion in a written decision. Spangler now appeals.

¶9 Spangler argues the filing of multiple charges of hit and run for the single act of fleeing the scene of an accident involving multiple victims violates double jeopardy prohibitions against multiplicitous charges. In ***State v. Hartnek***, 146 Wis. 2d 188, 430 N.W.2d 361 (Ct. App. 1988), we rejected the same challenge Spangler raises here. In that case, we concluded the failure to stop and render aid to multiple victims of a single accident may result in multiple charges without multiplicity defects arising. *See* ***id.*** at 191.

¶10 Spangler concedes ***Hartnek*** decided the issue contrary to his position in the present case. However, Spangler contends our analysis was "fatally flawed," and asks us to overrule ***Hartnek***. We have, however, no authority to overrule or modify our earlier decision. *See* ***State v. Walker***, 2007 WI App 142,

¶30, 302 Wis. 2d 735, 735 N.W.2d 582 (citing ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997)).

¶11 Spangler next contends the circuit court misused its discretion by imposing an unduly harsh and excessive sentence. Spangler argues his sentence was unduly harsh and excessive for three reasons: (1) the court improperly emphasized the severity of the offense and the need to protect the public while not giving enough consideration to other factors; (2) sentencing Spangler to consecutive terms is excessive and was done without specific explanation; and (3) other offenders similarly situated have received less imprisonment. We reject these contentions.

¶12 We adhere to "a consistent and strong policy against interfering with the discretion of the trial court in passing sentence." ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. It is not the role of the appellate court to substitute its judgment for that of the circuit court. ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1972). A sentence will only be deemed harsh or unconscionable where it is "so excessive and unusual and so disproportionate to the offense committed 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). Moreover, a sentence authorized by law is presumptively neither harsh nor excessive. ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

¶13 Here, the court highlighted the fact that Spangler had nineteen prior convictions, which did not take into account any convictions for operating after revocation. The court noted at least six of Spangler's probations were revoked due to repeated consumption of alcohol, and that Spangler had been involved in

multiple alcohol treatment programs, but failed three of them. The court found striking that, "in spite of all this … you continue to engage in this truly frightful, dangerous behavior."

¶14 Further, the court emphasized the fact that, following the accident, Spangler fled the scene, attempting to evade responsibility. The court also noted that Spangler "schemed and connived, you fraudulently purchased a motor vehicle." The court referred to Spangler's life as a "tread mill of alcohol and criminality." The court stated:

> The community at this point cannot wait and it cannot take the chance that you've finally gotten it because your history demonstrates that you're dangerous…. And I think all in all, I have to conclude that your actions demonstrate that you won't change….
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> ….
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> … [T]he only way to protect society now in my opinion is to prevent you from being able to drink alcohol on the road, to get behind the wheel of a motor vehicle….
>
> ….
>
> … The only way I can protect society is to lock you up.

¶15 Nothing in the court's exercise of sentencing discretion was erroneous. The court considered the proper factors, including Spangler's character, the seriousness of the offenses and the need to protect the public. *See* ***Ocanas***, 70 Wis. 2d at 185. The weight to be given to each of the factors was within the circuit court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). The court identified the objectives of the sentence imposed, the facts related to the objectives, and sufficiently explained its rationale. The record contains more than ample justification for the sentence imposed.

¶16 We also reject Spangler's argument that, "After reviewing sentencing data on all of the TIS-II sentences imposed in Dane County involving injury or death resulting from drunk driving, as well as hit-and-run cases involving injury or death, it becomes apparent that the defendant's sentence was disproportionately severe compared to similarly situated offenders." Wisconsin recognizes the importance of "individualized sentencing." *See* ***Gallion***, 270 Wis. 2d 535, ¶48. Spangler fails to provide record citations indicating the data he references on appeal was raised before the circuit court but, regardless, it is neither feasible, nor required under ***Gallion***, for trial judges to essentially come up with their own sentencing guidelines by surveying other purportedly similar cases and then imposing a sentence consistent with those cases.

By the Court.—Judgment and order affirmed.

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