COURT OF APPEALS DECISION DATED AND FILED

March 9, 2010

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. 2009AP1331-CR

Cir. Ct. No. 2007CF6262

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDDIE LYNN KECK,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Eddie Lynn Keck appeals from a judgment of conviction entered upon his guilty pleas to two counts of homicide by intoxicated

use of a vehicle. *See* WIS. STAT. § 940.09(1)(a) & (1c)(b) (2007-08).[1] He also appeals from an order denying his postconviction motion. The sole issue is whether the trial court erroneously exercised its sentencing discretion. We conclude that the trial court properly exercised its sentencing discretion. We, therefore, affirm.

I. BACKGROUND.

¶2 Based on allegations set forth in the complaint, on December 25, 2007, an officer from the Franklin Police Department responded to a report of a personal injury accident. Barbara Kitchen was found at the scene, lying injured on the ground near a vehicle, and was transported to Froedtert Hospital, where she was pronounced dead shortly thereafter. Gary Kitchen was also found at the scene inside a parked pickup truck and was pronounced dead at the scene. Following an investigation, officers concluded that the Kitchens' vehicle had been legally parked on the side of the road and that the damages to the vehicle were consistent with being hit by another vehicle that had crossed the center line.

¶3 On December 26, 2007, the Franklin Police Department received a phone call from Keck's girlfriend, informing them that she believed the driver from the accident the night before was located at her residence. An officer responded to the residence, assessed the damage to the van parked behind the residence, and took statements from Keck, his girlfriend, and his employer.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Keck informed the officer that after drinking at a local tavern, he left, driving his employer's work van, and hit what he thought was a mailbox. Keck did not stop to see what he had hit. As referenced by the trial court during Keck's sentencing hearing, Keck was driving his employer's work van to avoid the interlock system that had been previously placed on his own vehicle. Bartenders at the tavern later confirmed that Keck had been drinking the evening of the accident and that he appeared to be intoxicated before he left to drive home. After hitting what he thought was a mailbox, Keck continued to his girlfriend's residence, where he parked the vehicle and spent the night. Keck further explained to the officers that he had heard about the accident on the news and informed his girlfriend that he may have been involved, and, as a result, they agreed to contact the police.

¶5 On June 23, 2008, Keck pled guilty to two counts of homicide by intoxicated use of a vehicle. *See* WIS. STAT. § 940.09(1)(a) & (1c)(b). Pursuant to the plea agreement, the State agreed to dismiss, but read in for sentencing purposes two additional counts of failure to comply with duty upon striking an occupied or attended vehicle resulting in death. *See* WIS. STAT. §§ 346.67(1) & 346.74(5)(d). The agreement further provided that "the [S]tate w[ould] recommend that the defendant be sentenced to a very substantial period of imprisonment and to a very substantial period of initial confinement and extended supervision, leaving the exact length to the wisdom and discretion of the Court." The State declined to take a position on whether the trial court should impose the sentences concurrently or consecutively to one another.

¶6 At the sentencing hearing, the State, pursuant to its plea agreement, recommended that "[Keck] be sentenced to a very substantial period of imprisonment." The trial court imposed consecutive sentences of thirty years on

the two counts, each count consisting of eighteen years of initial confinement and twelve years of extended supervision. Keck filed a postconviction motion seeking a new sentencing hearing, which the trial court denied. Keck now appeals.

II. ANALYSIS.

¶7 Sentencing lies within the trial court's discretion, and our review is limited to considering whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court erroneously exercises its discretion when it imposes a sentence "on the basis of clearly irrelevant or improper factors." ***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." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We defer to the trial court's "great advantage in considering the relevant factors and the demeanor of the defendant." ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶8 A trial court is required to consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.***

¶9 At Keck's sentencing hearing, the trial court properly considered the requisite sentencing factors and was, therefore, not considering factors that were "clearly irrelevant or improper." *See* ***Gallion***, 270 Wis. 2d 535, ¶17. The trial court accurately took into consideration "the nature and gravity of the offense," stating: "What could be more extreme than taking the lives of two individuals who were there to celebrate their Christmas, and certainly a time of peace and

joyousness and turn it into an absolute calamity and tragedy because [Keck was] selfish." The trial court, further assessing the nature of the offense, pointed out that Keck made "a deliberate choice" in deciding to drive his employer's vehicle to avoid the interlock system that had been placed on his vehicle. The trial court also correctly took into consideration Keck's character when it discussed his extensive criminal background, stating:

> [Keck's] criminal conduct over the years certainly shows [his] character. And it shows it to be one of aggravated offenses from being a party to a homicide to being in possession of weapons and drugs, having numerous OWI convictions and then completely flaunting the law besides obviously the case before the court of [Keck's] history of driving, 12, 13, whatever the number is of operating after revocations.

See ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record is evidence of character). Finally, as required under the law, the trial court considered the need to protect the public in its sentencing determination, stating that it held Keck to be "a danger to the community … placing everybody in this community and the [S]tate in jeopardy."

¶10 The trial court must also "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." ***Gallion***, 270 Wis. 2d 535, ¶40. The exercise of sentencing discretion, however, "does not lend itself to mathematical precision." ***Id.***, ¶49. Therefore, the trial court is not required to explain "the precise number of years chosen." ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. Rather, the trial court must only provide "an explanation for the general range of the sentence imposed." ***Gallion***, 270 Wis. 2d 535, ¶49. Further, "where a court decides to impose sentences consecutively, '[t]he imposition … should be

accompanied by a statement of reasons for the selection of consecutive terms.'" ***State v. Hall***, 2002 WI App 108, ¶14, 255 Wis. 2d 662, 648 N.W.2d 41 (brackets in ***Hall***; citation omitted).

¶11 Keck contends that the trial court erroneously exercised its sentencing discretion in imposing consecutive sentences. We disagree. While Keck admits that the trial court has the discretion to impose consecutive or concurrent sentences, he contends that the trial court erred in not providing adequate reasoning or a proper explanation as to why it imposed consecutive sentences rather than concurrent. Keck specifically argues that "the [trial] court [did] not explain why sentences which were 72% of the legal maximum were needed to fulfill the goals of sentencing."

¶12 Keck contends that the trial court's sole explanation for the imposition of consecutive sentences was the court's reference to the fact that there were two victims of the offense, and he argues that this explanation alone is deficient. This interpretation of the trial court's explanation is incorrect. Although, in its decision denying Keck's postconviction motion, the trial court concluded that "[a] separate sentence for each life taken was warranted," the transcript from the sentencing hearing reflects that the trial court did not base its decision solely on the fact that there were two victims of the offense. Instead, the trial court took into consideration the requisite primary sentencing factors, as well as relevant additional factors, and was within its sentencing discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

¶13 The trial court took into consideration additional factors, such as the primary objective of punishment, the potential for deterrence, and any rehabilitative aspect sentencing may have on Keck. The trial court's discussion of

these additional factors constitutes an explanation for the trial court's imposition of consecutive sentences. In regard to the punishment aspect of sentencing, the trial court mentioned that the primary objective in sentencing Keck would be punishment "because of the tragedy and the horrific offense that [Keck] caused to the victims['] family and this community." The trial court also provided an explanation for the substantial sentence it would impose as it stated "it is going to be a certain deterrent to [Keck] because of the substantial prison sentence the court is going to impose … [and] hopefully it will be a deterrent to others."

¶14 After sentencing Keck on count one, the trial court provided an explanation as to its imposition of consecutive sentences, stating "the court is going to impose consecutive sentences for the same reasons the court imposed the first sentence and the factors taken into consideration." As the trial court had previously articulated the various factors it would take into consideration and the objectives of imposing a substantial sentence on Keck, the trial court provided a reasonable explanation for its imposition of consecutive sentences by extending that same reasoning. We are not persuaded by Keck's argument that the trial court did not provide sufficient explanation or reasoning for its imposition of consecutive sentences.

¶15 The trial court has an obligation to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The trial court properly exercised its discretion by considering the requisite primary sentencing factors and additional relevant factors in its imposition of a reasoned and reasonable sentence. The trial court is not required to explain a sentence with mathematical precision. *See* ***Gallion***, 270 Wis. 2d 535, ¶49. Moreover, we recognize that the amount of explanation needed varies from case to

case. ***Id.***, ¶39. Here, the trial court explained the various sentencing factors it took into consideration and the reason underlying its sentencing decision. That the trial court could have exercised its discretion differently does not constitute an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently). Therefore, while the trial court might have provided a lengthier or more detailed explanation, it was not required under the law to do so. *See* ***Gallion***, 270 Wis. 2d 535, ¶39.

By the Court.—Judgment and order affirmed.

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