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**DISTRICT II**

October 2, 2013

*To*:

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP112-CR State of Wisconsin v. Algis L. Viliunas (L.C. #2011CF549)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Algis L. Viliunas appeals from a judgment of conviction and an order denying his motion for postconviction relief. Viliunas contends that he is entitled to a reduction in the length of his sentence because the sentence was unduly harsh and excessive. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the judgment and order of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

Viliunas was convicted following a jury trial of battery to a peace officer, attempting to flee or elude a traffic officer, resisting an officer, operating a motor vehicle while intoxicated (fifth offense), and operating a motor vehicle with a prohibited alcohol concentration (fifth offense). The charges stemmed from allegations that Viliunas was driving while intoxicated and failed to pull over for a police officer. Viliunas subsequently proceeded past a "road closed" sign and into a highway construction zone where a crew was working and operating machinery. Eventually, when the officer located Viliunas at his residence, Viliunas resisted arrest and hit the officer in the face.

For his crimes, the circuit court sentenced Viliunas to an aggregate sentence of six and one-half years of initial confinement and seven years of extended supervision. Viliunas filed a motion for postconviction relief requesting a reduction in the length of his sentence. The circuit court denied the request. This appeal follows.

On appeal, Viliunas contends that he is entitled to a sentence reduction because the sentence was unduly harsh and excessive. He notes that he has never previously been to prison or placed on probation. He further notes that his prior record mostly involved traffic offenses.

Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion.[2] ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to

[2] At times in their briefs, the parties use the phrase "abuse of discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase with "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

"[T]o properly exercise its discretion, a circuit 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. The primary sentencing factors that a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***Ziegler***, 289 Wis. 2d 594, ¶23. The weight to be given to each sentencing factor is within the discretion of the court. ***Id.***

A circuit court may modify a defendant's sentence when it concludes the sentence was "unduly harsh or unconscionable." ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. Whether a defendant's sentence is "unduly harsh or unconscionable" is a discretionary determination for the circuit court. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). We will uphold a discretionary determination if the record provides a basis for the circuit court's decision. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

Here, the record reveals that the circuit court's sentencing decision had a "rational and explainable basis." ***Stenzel***, 276 Wis. 2d 224, ¶8. Furthermore, when imposing its sentence, the court considered the gravity of the offenses, Viliunas' character, and the need to protect the public. ***Ziegler***, 289 Wis. 2d 594, ¶23. Under the circumstances of the case, which were aggravated by Viliunas' behavior throughout the event (i.e., eluding police, driving through a

highway construction zone while intoxicated, resisting arrest, and hitting a police officer),[3] the sentence cannot be described as "unduly harsh or unconscionable." Accordingly, we are satisfied that the circuit court properly exercised its discretion in sentencing Viliunas and denying his request for a sentence reduction.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*

[3] The circuit court described the case as "one of the more aggravated drunk driving fifths" that it had seen.