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DISTRICT IV

October 8, 2013

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

2013AP19-CR State of Wisconsin v. Charles J. Blankenheim (L.C. # 2009CF217)

Before Lundsten, Higginbotham and Sherman, JJ.

Charles Blankenheim appeals a judgment sentencing him to prison following the revocation of his probation on a fifth charge of operating a motor vehicle while under the influence of an intoxicant (OWI-5th). He also appeals an order denying his motion for sentence modification. The sole issue on appeal is whether the sentence imposed was unduly harsh in

light of Blankenheim's serious medical problems.[1] After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2] We affirm.

At the sentencing hearing, the circuit court noted that the offense was aggravated because Blankenheim had a passenger in the car while he was drinking from open intoxicants and speeding on a fairly well-traveled highway at 7:30 p.m. As to Blankenheim's character, the court noted that Blankenheim had been resistant to AODA treatment; that a number of his problems, including his health problems, could likely be attributed to his drinking; and that, based upon the violations leading to his revocation, he still did not seem to care about the danger that driving drunk posed to the public. The court concluded that "the name of the game is protection of the public in this case, that's what this sentence is all about."

The court then sentenced Blankenheim to thirty months of initial confinement and thirty-six months of extended supervision, which was six months less than the maximum terms of initial incarceration and imprisonment. *See* WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)5. (classifying OWI-5th as a Class H felony) and 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony) (2007-08 Stats.).

[1] Blankenheim also sought sentence adjustment under WIS. STAT. § 973.195. He has informed us that that issue is now moot because he served the initial confinement portion of his sentence and was released on extended supervision. We conclude that the rest of the appeal is not moot, however, due to the possibility that Blankenheim's extended supervision could still be revoked.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Blankenheim moved to modify the sentence as being unduly harsh, arguing that the circuit court had not given sufficient weight to how serious Blankenheim's medical condition was. Blankenheim reiterated information that he had presented at sentencing about how he was suffering from occluded arteries in his legs that could lead to life-threatening blood clots; that he had already had two stints in his leg and needed a bypass operation; and that he had been having difficulty obtaining the medical care he needed from jail while awaiting charges.

A sentence may be considered unduly harsh or unconscionable only when 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.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). We review a circuit court's decision whether to reduce a sentence as being unduly harsh under the erroneous exercise of discretion standard, considering whether the circuit court "applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." ***Id.***, ¶30.

Here, the circuit court expressly cited the legal test set forth in ***Grindemann*** when evaluating Blankenheim's sentence modification motion. The court noted that it had been aware of Blankenheim's health problems at the time of sentencing, but did not view the sentence as unduly harsh because Blankenheim's resistance to treatment left "incapacitation as the only viable sentencing goal to protect the public."

We are satisfied that the circuit court's explanation represented a proper exercise of its discretion. We share the circuit court's view that an offender who already had five OWI convictions and refused to cooperate with the conditions of his probation represented a serious

risk to the safety of the public, and that a sentence near the maximum was not so disproportionate to the offense committed as to shock public sentiment. In sum, the court was not obligated to give greater consideration to Blankenheim's health than to the safety of the public.

IT IS ORDERED that the judgment after revocation and order denying sentence modification are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals