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DISTRICT IV

October 17, 2014

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

2013AP2385-CR State of Wisconsin v. Quintin E. Jackson (L.C. # 2012CF345)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Quintin Jackson appeals a judgment convicting him of a seventh offense operating a motor vehicle while under the influence of an intoxicant, and an order denying his postconviction motion for plea withdrawal or resentencing. 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).[1] We affirm.

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

First, Jackson seeks to withdraw his plea on the ground of ineffective assistance of trial counsel, arguing that his attorney should have filed a suppression motion challenging evidence gathered by a warrantless blood draw. The State concedes that the blood draw in this case would most likely be deemed unconstitutional under the recent decision by the United States Supreme Court in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013) (potential dissipation of blood alcohol levels does not constitute a per se exigent circumstance sufficient to provide an exemption from the warrant requirement). However, in ***State v. Reese***, 2014 WI App 27, 353 Wis. 2d 266, 844 N.W.2d 396, this court determined that the suppression of warrantless blood draws executed in this state prior to ***McNeely*** is not required because officers could rely in good faith on the prior bright line rule in Wisconsin that the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw. ***Reese***, 353 Wis. 2d 266, ¶¶17-22. ***Reese*** controls here.

Alternatively, Jackson seeks resentencing on the ground that the circuit court did not adequately explain why it found him ineligible for the Substance Abuse Program (SAP). Under the SAP, an inmate who successfully completes a treatment program approved by the Department of Corrections will have the remaining confinement portion of his or her bifurcated sentence converted into extended supervision. WIS. STAT. § 302.05(3)(c)2. The circuit court is required to decide, as part of the exercise of its sentencing discretion, whether a person receiving a bifurcated sentence is eligible for the program. WIS. STAT. § 973.01(3g). However, the court is not required to make separate findings or explanations for its eligibility determination. Rather, the court's overall explanation of the sentence imposed—including any applicable program eligibility determination—must be supported by reference to the standard sentencing factors, *i.e.*, the nature and gravity of the offense; the character and rehabilitative needs of the offender; and

the need to protect the public. ***State v. Owens***, 2006 WI App 75, ¶¶8-9, 291 Wis. 2d 229, 713 N.W.2d 187.

Here, the court imposed a sentence of four years of initial confinement and two-and-a-half years of extended supervision, along with standard costs, license revocation, ignition interlock, and AODA assessments and treatment for a seventh OWI offense. The sentence followed the State's recommendation and totaled about two thirds of the ten-year maximum imprisonment term Jackson faced, and was to be served consecutive to other sentences Jackson was already serving. The court also stated that it had "made a finding that Mr. Jackson is not eligible for programs." At the postconviction hearing, the court clarified that its comment on eligibility was meant to be a reference to the fact that the court had previously found that Jackson was not eligible for programs in an earlier OWI case, and that nothing had changed.

Jackson makes a persuasive argument that the court's comment about its prior ineligibility finding was insufficient to incorporate the court's reasoning on that point from the sentencing hearing in the earlier case, because the transcript of that hearing was outside the record for this case. We also agree with Jackson that it is not inherently inconsistent to find a defendant eligible for SAP even when imposing a lengthy sentence, because that could provide additional incentive for a defendant to complete treatment while still protecting the public if treatment fails. Nonetheless, we are satisfied that the statements the court did make at the sentencing hearing in this case addressed all of the relevant sentencing factors and adequately explain and support the court's imposition of four years of initial confinement without SAP eligibility.

As to the gravity of the offense, the court observed that someone with Jackson's level of intoxication could not possibly have control of his vehicle while driving; that Jackson's behavior was extraordinarily dangerous; and that it was just luck that Jackson hadn't injured someone. As to Jackson's character, the court noted that Jackson had at least thirty-eight prior convictions, demonstrating that he had not taken responsibility for his actions or changed his behavior in response to prior contacts with the justice system, and that he represented a continuing danger to society. The court emphasized that, unlike many others who may commit OWI offenses largely due to alcohol problems but do not normally commit other crimes, Jackson's criminal history included both violence against people he knew and theft and robbery involving strangers. The court concluded that the protection of the public was the overriding sentencing factor in this case, and that "we're only safe as long as you're locked up." Finally, the court stated that, in its view, Jackson's conduct actually warranted a longer sentence than that recommended by the state, but that the court was "going to resist [its] own instincts that [Jackson] really need[ed] more time as a way of deterrence for [him] specifically" in order to acknowledge Jackson's entry of a plea.

Taken together, the court's comments do not leave us in any doubt as to why the court denied SAP eligibility. It is plain that the court did not consider Jackson an appropriate candidate for SAP both because his behavior was not driven solely by substance abuse problems, and because he had failed to take advantage of multiple prior opportunities to change his behavior. It is also clear that the court considered four years of initial confinement to be the minimum amount of time necessary to address the seriousness of Jackson's current offense and continuing course of conduct.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals