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DISTRICT II

July 19, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Racine County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1340-CR State of Wisconsin v. Todd C. Gurtowski (L.C. #2019CF682)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Todd C. Gurtowski appeals from a judgment of conviction and an order of the circuit court. Gurtowski claims the circuit court erroneously exercised its discretion in imposing a $2,800 fine plus costs as part of his sentence on his operating a motor vehicle while intoxicated (OWI), fourth offense, conviction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] For the following reasons, we affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In sentencing a defendant, whether and how much of a fine to impose are discretionary matters for the circuit court. *See* ***State v. Kuechler***, 2003 WI App 245, ¶7, 268 Wis. 2d 192, 673 N.W.2d 335 ("Sentencing lies within the discretion of the circuit court."); WIS. STAT. § 973.017(1) ("sentencing decision" includes "the amount of a fine").[2] We will not reverse the court's decision in this regard absent an erroneous exercise of discretion. ***Kuechler***, 268 Wis. 2d 192, ¶7. Our supreme court has recognized a "strong public policy against interference with the sentencing discretion of the [circuit] court and sentences are afforded the presumption that the [circuit] court acted reasonably." ***State v. Echols***, 175 Wis. 2d 653, 681-82, 499 N.W.2d 631 (1993) (citation omitted). "If the record contains evidence that the circuit court properly exercised its discretion, we must affirm." ***Kuechler***, 268 Wis. 2d 192, ¶8. "Proper sentencing discretion is demonstrated if the record shows that the court 'examined the facts and stated its reasons for the sentence imposed, using a demonstrated rational process.'" ***Id.*** (citation omitted).

When sentencing a defendant on an OWI conviction, the sentencing court may consider and refer to local guidelines applicable to prohibited alcohol concentration (PAC) convictions, but "should not apply the guidelines by rote," *see* ***State v. Jorgensen***, 2003 WI 105, ¶27, 264 Wis. 2d 157, 667 N.W.2d 318; i.e., such guidelines "are not to be robotically applied," ***Kuechler***, 268 Wis. 2d 192, ¶10. When considering whether a court has erroneously exercised its

[2] We note that the OWI statutory penalty scheme sets mandatory minimum fines depending on the facts of a particular case. Here, the statutes set a mandatory minimum fine of $600, doubled to $1,200 because Gurtowski's blood alcohol concentration was .178. *See* WIS. STAT. § 346.65(2)(am)4. (requiring $600 minimum fine for OWI fourth); § 346.65(2)(g)1. ("If a person convicted had an alcohol concentration of 0.17 to 0.199, the applicable minimum and maximum fines under par. (am) 3. to 5. are doubled."). Gurtowski asserts that under his plea agreement, the State dismissed § 346.65(2)(g)1.'s alcohol fine enhancer on the OWI fourth charge. The plea hearing transcript confirms his assertion, although the judgment of conviction does not reflect that the OWI fourth alcohol fine enhancer was read in or dismissed. The State concedes that the alcohol fine enhancer was dismissed under the plea agreement and asserts that the enhancer is often dismissed to obtain a plea.

discretion in imposing a fine as part of a sentence, "[t]here is no requirement that a court give separate reasons for imposing jail or prison time than it gives for imposing a fine. It is sufficient that, in the exercise of its sentencing discretion, the court provides reasoning." ***Id.***

Here, the circuit court noted at sentencing that Gurtowski's blood alcohol concentration (BAC) was .178—nearly nine times more than his lawful BAC limit of .02 (due to his prior OWI convictions); he was going nineteen miles per hour over the speed limit; he had "a temporary Wisconsin registration tag … that … did not list to [his] vehicle"; he "had multiple contacts with law enforcement in Illinois"; in addition to his prior OWI convictions, he had various other convictions in Wisconsin, including for "reckless use of a weapon," criminal damage to property, disorderly conduct, bail jumping, operating while revoked, and issuing worthless checks; that on one of the prior cases, his probation was revoked; and that additional criminal counts were dismissed and read in in the instant case, those being operating while revoked, possession of cocaine, and misdemeanor bail jumping. The sentencing court further considered Gurtowski's "physical, mental, emotional, or other developmental" abilities; "AODA [alcohol and other drug abuse] history"; education; and employment and family history and status. The court noted Gurtowski's history of marijuana and cocaine use, including that Gurtowski "did not believe cocaine was an issue" for him, but nonetheless "admit[ted] … to using cocaine along with alcohol the night of this offense." The court was not impressed with the presentence investigation agent's note that during his interview with Gurtowski, in the court's words, Gurtowski "made several jokes minimizing [his] use of drugs and alcohol." The court expressed concern that while Gurtowski indicated a willingness to participate in AODA treatment, he "did not feel that [he] ha[s] a problem." In issuing its sentence, the court stated that "[p]unishment, rehabilitation, protection of the community, and deterrence of others" were all factors

"implicated" in Gurtowski's sentencing. The court expressed to Gurtowski that he was a fifty-six-year-old "educated man," so he "know[s] better." The court sharply disagreed with the presentence investigation agent's suggestion of "an imposed-and-stayed sentence" because such "would seriously deminimize the very-serious nature of this crime."

Gurtowski claims that in addressing his postconviction motion challenging the fine, the circuit court revealed that it had "inappropriately used the PAC guidelines 'as the sole basis' for its decision with respect to the fine for an OWI offense." We see no error.

We recognize that the circuit court stated at the postconviction hearing that it "followed" the "recommendation" of the local sentencing guidelines. Nonetheless, considering the entirety of the record—most importantly the transcript of the actual sentencing hearing itself—the court provided more than adequate support for its reasons for the imposed sentence, including the fine. If indeed the court "followed" the "recommendation" that the local guidelines indicate corresponds to the facts of this case, it is of "no matter" because the court provided ample explanation and justification for why the facts of this case supported doing that. As we stated in ***State v. Vesper***, 2018 WI App 31, 382 Wis. 2d 207, 912 N.W.2d 418,

> [w]hether the court explicitly applied the guidelines is of no matter. It is "well settled" that the discretionary process of reasoning "must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards."

Id., ¶18 (citation omitted). We noted that it was "nearly a certainty" that the court in that case had applied the guidelines to come up with the dollar amount chosen for the imposed fine. ***Id.*** It did not, however, trouble us because "the court's colloquy appropriately discussed the sentencing objectives and relevant factors, all of which squarely supported the imposition of the $1900 fine

which, just as is the case with the applicable guideline, is both reasonable and justified." ***Id.*** The fine chosen by the sentencing court complied with the amounts set by statute, and Gurtowski makes no argument to the contrary.

Just as in ***Vesper***, here "the court's sentencing colloquy sufficiently supported the imposition of the fine and there was no need for a separate explanation. In other words, the colloquy applied equally to both the term of imprisonment and the fine." *See* ***id.***, ¶19. And as we also concluded in ***Vesper***, here "[t]he defendant has not met his burden to show that the fine is unreasonable or unjustified. The court's colloquy memorialized a reviewable and appropriate exercise of discretion for the sentence, including the fine." *See* ***id.***, ¶26. In addition, the circuit court here offered Gurtowski a new sentencing hearing where it could have provided a greater explanation of the fine it imposed. Gurtowski concedes that he rejected that option.[3]

The circuit court's sentencing comments fully support its imposition of two years of initial confinement in prison followed by two years of extended supervision, its conditions of extended supervision, and its ordered fine of "$2,800 plus court costs."

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[3] We reject Gurtowski's claim that the circuit court erroneously exercised its discretion based on the court's misstatement at the postconviction hearing that his plea included the alcohol fine enhancer. The misstatement does not change our analysis. As we have explained, the sentencing transcript reflects that the court properly exercised its discretion when it imposed the fine.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals