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DISTRICT II

February 13, 2013

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

2012AP199-CR

State of Wisconsin v. Curtis D. Hawkins (L.C. #2010CF304)

Before Brown, C.J., Reilly and Gundrum, JJ.

Curtis Hawkins appeals from judgments convicting him on his no-contest pleas of two counts of homicide by negligent operation of a motor vehicle and two counts of reckless driving causing bodily harm and great bodily harm. He also appeals from an order denying his postconviction motion challenging his sentence. 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). We affirm.

The criminal complaint was the factual basis for Hawkins' no-contest pleas. The complaint alleged that Hawkins drove his truck into vehicles stopped on the highway due to

traffic congestion caused by a traffic diversion. A message board warned of the upcoming diversion, lane closing signs appeared at intervals of one-mile, one-half mile and 1000 feet before the upcoming diversion. A deputy was able to see stopped vehicles at the impact point from one-half mile away. Other drivers reported that they saw the warning signs and the stopped vehicles. Hawkins never slowed before he crashed into the stopped vehicles. He was travelling in excess of the speed limit, and he was operating outside of his allowed operating hours. Two people were killed, and two people were seriously injured. The circuit court imposed consecutive and concurrent sentences amounting to five years of initial confinement and five years of extended supervision.

Postconviction, Hawkins challenged his sentences because the circuit court did not consider a risk reduction sentence and erroneously imposed the \$250 DNA surcharge. The court found that Hawkins did not ask for a risk reduction sentence at sentencing, and the court was not required to address it without a request. The court was also satisfied that the sentencing transcript revealed a basis to impose the DNA surcharge. Hawkins renews his challenges on appeal.

On appeal, Hawkins argues that the circuit court should have considered a risk reduction sentence. Before its repeal, WIS. STAT. § 973.031 (2009-10)¹ provided that a court “may order the person it sentences to serve a risk reduction sentence” if appropriate and “the person agrees to cooperate in an assessment of his or her” risk factors and agrees to participate in programming

¹ All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. Hawkins was sentenced in July 2011. Effective August 3, 2011, the legislature repealed risk reduction sentences. 2011 Wis. Act 38, §§ 13, 92.

or treatment. Hawkins cites no authority for his claim that the circuit court should have considered a risk reduction sentence in the absence of a request to do so. Because the risk reduction sentence statute has been repealed, we need not decide whether the circuit court had such a duty.

Setting aside Hawkins' claims about a risk reduction sentence, we conclude that the circuit court properly exercised its sentencing discretion. The record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Hawkins. The court considered the manner in which Hawkins operated his truck, the circumstances under which the crimes occurred, and that Hawkins falsified his operating hours log. The court found that the failure to impose prison "would unduly depreciate the seriousness of what he's done here and send an inappropriate message to both Mr. Hawkins and the community." In fashioning the sentence, the court considered the seriousness of the offenses, Hawkins' character and history of prior offenses, 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 weight of these factors was within the circuit court's discretion. *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112.

We turn to Hawkins' challenge to the \$250 DNA surcharge. At sentencing, the circuit court imposed the surcharge without specifying its reasons for doing so.² Postconviction, the

² The circuit court properly required a DNA sample because Hawkins was convicted of felonies. WIS. STAT. § 973.047(1f).

circuit court found that the sentencing transcript revealed a basis for imposing the DNA surcharge. We agree.

Whether to impose the surcharge under WIS. STAT. § 973.046(1g) was discretionary with the circuit court. *State v. Ziller*, 2011 WI App 164, ¶9, 338 Wis. 2d 151, 807 N.W.2d 241, *review denied*, 2012 WI 45, 340 Wis. 2d 544, 811 N.W.2d 820. In *Ziller*, we held that a review of the sentencing record revealed a proper exercise of discretion and a consideration of the standards for imposing the DNA surcharge. *Id.*, ¶11. We stated that a circuit court was not required to use “magic words” in imposing the DNA surcharge, *id.*, ¶13, or “explicitly describe its reasons for imposing” the surcharge, *id.*, ¶12. We held that Ziller did not establish that imposing the DNA surcharge was unreasonable. *Id.*

Hawkins argues that the circuit court did not offer any rationale for imposing the surcharge or consider his ability to pay the surcharge. We do not agree that the record is so lacking. The record reveals that Hawkins had a history of steady employment, and he planned to resume working once he was able to do so. The court noted that many of the victims’ expenses would be covered by Hawkins’ employer’s insurance policy. The court found that Hawkins had a history of taking responsibility for his family. This record supports the decision to impose the DNA surcharge because Hawkins could pay it. Making Hawkins responsible for the DNA surcharge was also consistent with the court’s assessment of Hawkins as a person who has taken responsibility in other aspects of his life. Hawkins has not established that the DNA surcharge was unreasonable in this case.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals