COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1623-CR **Cir. Ct. No. 02CF000419**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER M. SMEJKAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Roger Smejkal appeals a judgment of conviction for operating an automobile without the owner's consent and a denial of his post-conviction motion for sentence modification. He argues the trial court erroneously exercised its discretion by sentencing him to the maximum sentence and that the sentence is prejudicially based on inaccurate information. We affirm.

BACKGROUND

¶2 On May 16, 2002, Smejkal was asked by his employer, Arrow Moving Systems, to drive from Appleton to Milwaukee to deliver packages to a company. The employer gave Smejkal permission to use its vehicle until 5 p.m. to make this delivery. Smejkal left Appleton around 9:45 a.m.

¶3 Later that day, Arrow learned Smejkal never delivered the packages. When Arrow attempted to contact Smejkal by calling a cell phone that was in the employer's vehicle, an unknown person answered the phone and stated that he or she just purchased the cell phone from Smejkal for $50. By 5 p.m., Smejkal had not returned.

¶4 At approximately 5:30 a.m. the next day, the vehicle was discovered returned in Arrow's parking lot, but the cell phone and two dollies were missing. Smejkal later admitted that he took the vehicle to Milwaukee, but instead of delivering the packages, he bought and then used cocaine. Smejkal denied selling the cell phone or the dollies for money to buy drugs, but did admit that he did not return the vehicle by the required time.

¶5 On June 4, the State charged Smejkal in Outagamie County with operating a motor vehicle without the owner's consent and misdemeanor theft of moveable property. The theft charge was eventually dismissed, and on August 13, Smejkal pled no contest to the other charge.

¶6 On June 13, Smejkal was sentenced on a misdemeanor theft of moveable property in Oconto County that he pled guilty to three months earlier. In that case, Smejkal took his then fiancée's vehicle to Milwaukee without her permission. The State charged him with operating a motor vehicle without the

owner's consent, but Smejkal later pled guilty to a reduced charge of misdemeanor theft of moveable property. The court sentenced Smejkal to eighteen months' probation with conditions that included an AODA assessment and any other counseling as determined by the Department of Corrections.

¶7 On August 20, Smejkal submitted a urine sample and denied drug use. The urine sample tested positive for high levels of cocaine. Over two weeks later, on September 5, Smejkal was ordered to submit another sample, and, again, it tested positive for high levels of cocaine. On September 13, Smejkal signed an alternative to revocation agreement whereby he admitted he consumed cocaine prior to both urine analyses. As part of the alternative to revocation agreement, he submitted yet another urine sample which also tested positive for high levels of cocaine. Smejkal was arrested shortly thereafter.

¶8 On October 4, Smejkal faced sentencing on the charge underlying this appeal. Based primarily on Smejkal's character, as evidenced by a lengthy criminal history and his ongoing drug dependency problems, and the need to protect the public, the trial court sentenced him to the maximum penalty: five years' imprisonment, comprised of two years' initial confinement followed by three years' extended supervision. Smejkal's postconviction motions for sentence modification were later denied, and this appeal follows.

DISCUSSION

¶9 Smejkal first argues the trial court erroneously exercised its discretion by sentencing him to the maximum sentence. Citing ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971), Smejkal claims a maximum sentence is "reserved for a more aggravated breach of the statutes." He maintains that since the circumstances of this case are not aggravated the maximum sentence

is unduly harsh and excessive. *See* ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). We disagree.

¶10 Sentencing is a discretionary decision left to the circuit court. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). We will not disturb a sentence unless there has been an erroneous exercise of discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). The primary factors the circuit court should consider at sentencing are the gravity of the offense, the character of the offender, and the need for protection of the public. ***State v. Smith***, 207 Wis. 2d 258, 281-82 n.14, 558 N.W.2d 379 (1997). The circuit court can base a sentence on any of the three primary factors after considering all relevant factors. ***Spears***, 227 Wis. 2d at 507-08.

> A trial court exceeds its discretion as to the length of the sentence imposed "only where the sentence 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."

Thompson, 172 Wis. 2d at 264 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)).

¶11 After considering all of the primary factors, the court based its sentence primarily on Smejkal's character and the need to protect the public. As the trial court noted, Smejkal has a long list of prior convictions spanning the last twenty years. Significantly, when Smejkal committed this offense he was awaiting sentencing on a similar offense in Oconto County. While the charge in Oconto County was only a misdemeanor theft of moveable property, it involved a similar factual predicate: Smejkal took the vehicle of another without the owner's permission.

¶12 But the trial court was most troubled by Smejkal's cocaine addiction. In addition to Smejkal's repeated urine samples containing high levels of cocaine, he admitted using his employer's car to obtain cocaine in Milwaukee. Moreover, Smejkal apparently had treatment available to him sometime in July 2002 (in connection with the Oconto County case), but failed to use it.

¶13 As a result, the trial court imposed the maximum sentence. In light of Smejkal's background and his current drug problem, we cannot conclude the sentence shocks public sentiment concerning what is right and proper under the circumstances.[1] Therefore, Smejkal's sentence is not excessive.

¶14 Smejkal next claims the trial court based its sentence on inaccurate information. A defendant has a constitutional due process right to receive a sentence that is based upon accurate information. ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). Whether a defendant has been denied the due process right to be sentenced based on accurate information is a constitutional issue presenting a question of law that we review de novo. ***State v. Coolidge***, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993). A defendant alleging a sentencing decision is based on inaccurate information must prove by clear and convincing evidence both that the information was inaccurate and that the trial court relied on it. ***State v. Groth***, 2002 WI App 299, ¶22, 258 Wis. 2d 889, 655 N.W.2d 163. If a defendant establishes this, the burden shifts to the State to prove the error was harmless. ***Id.*** Although Smejkal did not object during

[1] Smejkal also argues that when a trial court imposes a maximum, or near-maximum, sentence it must state its reasons why the sentence is appropriate. *See* ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Even if ***McCleary*** places an additional burden on the sentencing court, the record nevertheless supports Smejkal's sentence. *See* ***id.*** at 281 (appellate court's duty to search the record to determine whether the sentence can be sustained).

sentencing on the grounds of inaccurate information, we consider his argument in the interests of preserving the integrity of the sentencing process. *See* ***id.***, ¶23.

¶15 Smejkal first points out the trial court stated that given the recency of this case to the Oconto County case it was possible Smejkal had some kind of a scheme where he would steal vehicles from employers in order to fuel his drug problem. We agree with Smejkal that there is no evidence of this scheme. In the Oconto County case, Smejkal apparently took his girlfriend's car, not an employer's car, without permission. Moreover, in the Oconto County case, there were only allegations of drug use.

¶16 However, Smejkal has not shown that the trial court relied on its statement. *See* ***id.***, ¶22. In fact, the record indicates the court briefly speculated about a supposed scheme merely as a precursor to highlighting the severity of Smejkal's admitted drug dependency problem. With this being the case, we are not persuaded the trial court relied on this information in sentencing Smejkal.

¶17 Smejkal also complains the court relied on inaccurate statements in the pre-sentence investigation report. The PSI detailed Smejkal's continued drug use while on probation for theft of moveable property in Oconto County. After Smejkal tested positive for high levels of cocaine on two separate occasions, he signed an alternative to revocation that required AODA treatment. As part of the agreement, Smejkal was required to submit a urine sample and, like the prior two samples, this one also tested positive for cocaine. Based upon this third consecutive positive test, Smejkal was arrested and, thus, did not begin the AODA treatment. The PSI writer later concluded, "[Smejkal] refuses to end his criminal behavior even when he stands on the brink of having his probation revoked."

¶18 Smejkal claims this conclusion is inaccurate, given that he was never afforded an opportunity to comply with the alternative to revocation on account that he was arrested for violating his probation. We agree the PSI writer's conclusion is technically inaccurate.

¶19 At sentencing, the trial court stated, "Treatment has been available to you, and yet you haven't availed yourself of that. Apparently nothing in either the probation system nor the community could help you stop violating the law." Smejkal asserts that this statement proves the court relied on the PSI writer's inaccurate conclusion. We disagree. While the PSI writer's conclusion is inexact, the trial court's observation is nevertheless accurate. As indicated above, Smejkal apparently was presented with AODA treatment in July of 2002, but did not use it. It was only after he faced probation revocation in connection with the Oconto County case, which occurred for his continued cocaine usage, that he finally agreed to AODA treatment. Nevertheless, the court correctly observed that Smejkal previously had treatment available to him and did not use it, and that probation had not prevented him from violating the law, as evidenced by his continued cocaine use. Accordingly, the trial court's statement was not premised on inaccurate information.

By the Court.—Judgment and order affirmed.

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