COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3182-CR **Cir. Ct. No. 2005CF6772**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. SHILBAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 PER CURIAM. Michael T. Shilbauer appeals from a judgment of conviction for criminal trespass, operating a vehicle without the owner's consent, fleeing from an officer, and bail-jumping, and from a postconviction order summarily denying his motion for a redetermination of his eligibility for the

Challenge Incarceration and Earned Release Programs (collectively referred to as "Programs"). The issue is whether the trial court erroneously exercised its discretion in merely declaring that Shilbauer was ineligible for those Programs at the conclusion of its sentencing remarks. We conclude that it is unnecessary for the trial court to restate its reasons for determining a defendant's ineligibility for the Programs when its overall sentencing rationale also justifies its ineligibility determinations. Therefore, we affirm.

¶2 Shilbauer pled guilty to criminal trespass to a dwelling, taking and driving a vehicle without the owner's consent, fleeing from an officer, and misdemeanor bail-jumping, for an incident where he unlawfully entered his former girlfriend's home (despite being subject to a no-contact order against this woman), took her keys and drove away in her vehicle without her consent, and fled from the police. At that time, Shilbauer's driver's license had been suspended for his third conviction for driving while intoxicated. The State recommended a six-year aggregate sentence comprised of two three-year periods of initial confinement and extended supervision. Shilbauer's counsel recommended a two-year aggregate period of initial confinement followed by a four- to five-year term of extended supervision. The trial court imposed a nine and one-half-year aggregate sentence, comprised of a four and one-half-year period of initial confinement and a five-year period of extended supervision. At the conclusion of the trial court's sentencing remarks, it told Shilbauer that he would "not be eligible for the Challenge Incarceration Program or the Earned Release Program." Shilbauer moved for postconviction relief, contending that the trial court's summary denial of his eligibility for these programs constituted an erroneous exercise of discretion. The trial court summarized its reasons for denying eligibility, stating that they were "fully supported" by the record. Shilbauer appeals.

¶3 On appeal, Shilbauer renews his challenge to what he characterizes as the trial court's summary denial of his eligibility for the Programs.[1] Shilbauer acknowledges that the trial court properly exercised its discretion in imposing sentence; his criticism is that the trial court did not engage in a separate independent analysis, demonstrating the linkage between its rationale and its determination of his (in)eligibility. *See* ***State v. Gallion***, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197.

¶4 In determining eligibility for the Programs, WIS. STAT. subsections 973.01(3g) (earned release) and (3m) (challenge incarceration) (amended Apr. 20, 2006) each use the identical phrase "the [trial] court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible [for the respective] program … during the term of confinement in prison portion of the bifurcated sentence," to describe the trial court's responsibility. We have previously held that "the statute [does not] require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the [Program eligibility] determination." ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187.

¶5 Eligibility for these programs is discretionary, applying the same criteria as those considered when imposing sentence. *See* ***State v. Steele***, 2001 WI

[1] Both the Challenge Incarceration and Earned Release Programs allow an eligible inmate, who successfully completes either program, to be released early from prison to extended supervision. *See* WIS. STAT. §§ 302.045(1) (2005-06) and (3m); 302.05(3)(c)2. (amended July 27, 2005). The time remaining on the confinement portion of the inmate's sentence is then converted to extended supervision so only the confinement portion is reduced, not the total sentence. *See* §§ 302.045(3m) (2005-06); 302.05(3)(c)2. (amended July 27, 2005).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

App 160, ¶¶8-11, 246 Wis. 2d 744, 632 N.W.2d 112. The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court assigns to each factor is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶6 The trial court repeatedly referred to this incident as "a highly aggravated situation, in particular the driving." Shilbauer was "speed[ing] at or about 70 miles an hour, maneuver[ing] around traffic, through traffic, disregard[ing] … traffic signals," which heightened the risk of injury or death during rush hour.

¶7 The trial court addressed Shilbauer's character, by describing his history as "one criminal case after another for the last twenty years," explaining that the longest period without any criminal cases was when Shilbauer was in prison. The trial court was not optimistic about Shilbauer's prospects for rehabilitation because there have been "numerous [failed] attempts … to assist [him] in rehabilitating from substance abuse and alcoholism." In fact, the trial court rejected probation as an option because of "the lengthy history of attempt and failure here with respect to substance abuse, it was clear or almost guaranteed that this was not a probation situation."

¶8 The trial court's principal consideration, however, was its obligation to protect the community from Shilbauer and the effects of his "twenty-year alcohol problem." In reiterating the damage and injuries Shilbauer caused, the trial court described his actions as demonstrating "a total disregard for the safety of the community."

¶9 The trial court summarized its analysis of Shilbauer and his conduct as "enough is enough." The trial court

> think[s] what's clear here is that [Shilbauer] ha[s] been indulged on numerous occasions with opportunities and attempts, and this is based on [his] prior record, a significant call for punishment, and also frankly based on the concerns that [the trial court] ha[s] with respect to the safety of the community, and [Shilbauer's] long history of failure with respect to substance abuse issues.
>
> Based upon that, those facts, the Court does find that any rehabilitation must take place within a confined setting. Probation would both unduly depreciate the seriousness of these offenses and also place the community at further risk.

¶10 The trial court did not reiterate its reasons for denying Shilbauer eligibility for the Programs. The trial court's reasoning links the sentencing considerations to its determination of Shilbauer's ineligibility. Although the Earned Release Program in particular, is designed to provide treatment for inmates with substance abuse problems (characterized by WIS. STAT. § 302.05 as the Wisconsin Substance Abuse Program), completion of either program also results in an early release from initial confinement. *See* WIS. STAT. §§ 302.045(3m)(b); 302.05(3)(c)2. (amended July 27, 2005). Shilbauer urged the trial court to impose a shorter (two-year) term of initial confinement and a lengthier (four- or five-year) term of extended supervision; the trial court rejected that recommendation. The trial court was very concerned that Shilbauer did not seem to appreciate the aggravating factor that he had committed these offenses after his driving privileges had been revoked. It emphasized that, despite repeated treatment attempts, Shilbauer had a twenty-year history of alcohol abuse. Most significantly, however, was the trial court's concern for the protection of the community.

¶11 The trial court reiterated its previous exercise of discretion when its eligibility determinations were challenged by postconviction motion.

> After considering the defendant's long criminal record, his inability to conform his conduct on probation (which resulted in revocation), opportunity after opportunity to obtain treatment for his substance abuse, his violent nature, the seriousness of the offenses, the need for punishment, deterrence and the absolute need for community protection, the court did not feel that the defendant was an appropriate candidate for either program and [that it] was within its discretion to deny eligibility. On the basis of this record, the denial of eligibility for either program was fully supported.

¶12 The trial court's exercise of sentencing discretion, and its rendition of that exercise in its postconviction order, demonstrated the link between the facts of the incident to its decision not to allow Shilbauer the potential privilege of an early release from confinement. The trial court had numerous reasons for declining Shilbauer eligibility for the Programs that necessarily offered him opportunities for early release from confinement. The trial court's overall sentencing rationale supports its ineligibility determinations. To require the trial court to reiterate its remarks made moments earlier with specific reference to ineligibility for the Programs is not necessary pursuant to WIS. STAT. § 973.01(3g) and (3m) (amended Apr. 20, 2006) or ***Owens***. *See* ***Owens***, 291 Wis. 2d 229, ¶9.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.