

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2302-CR

Cir. Ct. No. 2008CT189

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD W. CASTLEBERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Richard Castleberry appeals a circuit court judgment convicting him of operating a motor vehicle with a prohibited alcohol

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

concentration of 0.158, as a second offense, in violation of WIS. STAT. § 346.63(1)(b). The issue is whether the circuit court erroneously exercised its sentencing discretion.

¶2 Sentencing decisions are afforded a strong presumption of reasonability because the circuit court is best situated to consider the relevant factors and the demeanor of the defendant. *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. As Castleberry points out, however, the sentencing record must show the basis for the court's exercise of discretion. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971); *see also Gallion*, 270 Wis. 2d 535, ¶¶3-4. Discretion implies a process of reasoning, not unfettered decision-making. *See Gallion*, 270 Wis. 2d 535, ¶3. The primary factors to consider are the gravity of the offense, the offender's character, and the public's need for protection. *State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992).

¶3 At Castleberry's sentencing, the State argued for a sentence consistent with Sixth Judicial District guidelines.² Castleberry argued for a more

² The guidelines derive from authority granted to the chief judge of each judicial district under WIS. STAT. § 346.65(2m)(a), which provides:

In imposing a sentence under sub. (2) for a violation of s. 346.63(1)(am) or (b) or (5) or a local ordinance in conformity therewith, the court shall review the record and consider the aggravating and mitigating factors in the matter. If the amount of alcohol in the person's blood or urine or the amount of a restricted controlled substance in the person's blood is known, the court shall consider that amount as a factor in sentencing. The chief judge of each judicial administrative district shall adopt guidelines, under the chief judge's authority to adopt local rules under SCR 70.34, for the consideration of aggravating and mitigating factors.

lenient sentence, asserting, among other things, that he had a preliminary breath test (PBT) of 0.11 that was taken closer to the time he was driving than his blood draw and a subsequent result of 0.17, that he provided a sufficient breath sample, that his prior offense was more than five years old, that he was stopped for an expired registration instead of “bad driving,” that he was cooperative, that his performance on the field sobriety tests was consistent with his PBT result, that he had already completed his alcohol assessment and a driver’s safety plan, and that his prognosis with respect to treatment was determined to be “good.”

¶4 The circuit court adopted the State’s sentencing recommendation, stating:

All right, based upon review of the information, the Court is going to impose a fine and costs of \$957, revoke operating privileges for a period of 14 months, direct that Mr. Castleberry enroll in and attend a state-approved assessment program at his own expense if not already completed, enrollment to be within two weeks, and I will sentence him to 20 days in the Sauk County Jail with Huber privileges, the first 48 hours to be served without work release, and that will be consecutive. I’m not satisfied there are appropriate reasons to deviate from the guidelines.

¶5 Castleberry argues that the circuit court failed to state on the record the material factors that influenced its decision. Castleberry also argues that the court erroneously treated the guidelines as presumptive, thereby failing to adequately consider the three primary sentencing factors. I am not persuaded.

¶6 Although the circuit court’s expressed rationale at sentencing was exceedingly brief and far from optimal, it is nonetheless apparent to me that the court made a considered decision that took into account the three required factors. First, it is readily apparent that the court considered the guidelines because it stated that it saw no reason to deviate from the guidelines. Consideration of the

guidelines necessarily includes consideration of the factors that the guidelines take into account. Castleberry concedes that the guidelines take into consideration the gravity of the offense. And, by not responding to the State's argument on the topic, Castleberry effectively concedes that the guidelines also take into account the need to protect the public. See *Fischer v. Wisconsin Patients Comp. Fund*, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 (argument asserted by the respondent and not disputed by the appellant in reply brief may be taken as admitted). Second, it is also clear that the court considered all of Castleberry's factual assertions, at least some of which relate to each of the three primary factors.

¶7 Castleberry also seems to argue that the circuit court could not reasonably impose the sentence it did. I disagree. Although it is true that some of Castleberry's factual assertions may reasonably be viewed as mitigating factors, it is also true that some of his assertions are reasonably viewed as aggravating factors. For example, Castleberry's reliance on his comparatively low PBT result and on the fact that he was stopped for a registration violation might reasonably be viewed as minimization of his conduct or as a failure to take responsibility for that conduct.

¶8 In sum, Castleberry fails to make a persuasive argument that the circuit court erroneously exercised its sentencing discretion. Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

