COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2309-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAURIE BEU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded.*

SNYDER, P.J. Laurie Beu pled no contest to a charge of operating a motor vehicle while under the influence of an intoxicant (OWI) in violation of § 346.63(1)(a), STATS.[1] She was sentenced to six months in the Walworth County Jail, in addition to other conditions. Beu challenges the

[1] The companion charge of operating with a prohibited blood alcohol concentration was dismissed. *See* § 346.63(1)(c), STATS.

sentence imposed with a claim that the trial court erred when it stated that it was compelled to follow the sentencing guidelines established pursuant to § 346.65(2), STATS. We agree with Beu that the record suggests that the trial court wrongly considered the guidelines as mandatory. We reverse the sentencing portion of the judgment and remand for a new sentencing.

Beu was found by Officer Kenneth R. Mulhollon in an automobile near her apartment. She was issued a citation for OWI, third offense. After a urine test showed a prohibited blood alcohol concentration (BAC), a citation for the companion charge of having a prohibited BAC was also issued.[2] Beu subsequently entered a plea of no contest to the OWI charge and the matter proceeded to sentencing.

At the sentencing proceeding, Beu's attorney outlined her significant health problems[3] and requested the court to consider "house arrest with a monitor." Counsel also noted that Beu's father had offered to pay the expenses associated with electronic monitoring if the court would allow Beu to be monitored in her home.

After hearing all of the proffered information about Beu's health problems, the court stated:

[2] Beu refused to submit to a breath test. The record indicates that a urine sample was obtained. The test of the urine sample resulted in the BAC charge.

[3] Beu had been in a serious automobile accident on July 11, 1996. Her doctor reported that at the time of the accident she was treated for "a C2 spine fracture, multiple rib fractures, intertrochanteric fracture of the left hip, and nondisplaced fracture of the ischial and pubic rami." This same doctor noted that Beu would be disabled "for a period in excess of twelve months and at this time, is in need of acute rehabilitation services for physical therapy and occupational therapy." Subsequent to the accident, Beu was diagnosed as having cancer and the resulting surgery necessitated a colostomy. According to her doctor, "Beu is ambulatory only with an assistive walker."

> The matrix is clear that for a person who refuses a test … the District Attorney's office is asking she be sentenced from the matrix as a third. I have no choice but to sentence her from the matrix. First off, it's mandated by statute, mandated by Supreme Court rule, mandated by the Second District rule, and I would be foolish if I deviated from the matrix.

The trial court also commented that "this story, of course, is replete with problems and management of Ms. Beu's multiple health problems. Of course, that's the problem for the jail. [If] [t]he jail … finds her to be unfit for service, that will be their problem. I simply must follow the matrix for sentencing here."

The trial court then sentenced Beu after finding that based on the record before it, she was in the "nonaggravated cell" of the matrix.[4] Beu now appeals.

A sentencing decision is committed to the sound discretion of the trial court. *See* ***State v. Macemon,*** 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983). We will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson,*** 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Discretion is not synonymous with decision making; rather, the term contemplates a process of reasoning. *See* ***McCleary v. State,*** 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). There should be evidence in the record that discretion was exercised and the basis for that exercise of discretion should be set forth as part of the record. *See* ***id.***

[4] The trial court sentenced her to pay a fine of $800 plus costs, for a total of $1364, and to serve six months in the county jail with Huber privileges. She was further ordered to install an interlock device on her vehicle. Beu's driver's license was revoked for thirty-six months and she was also ordered to perform forty-five hours of community service.

Beu contends that the sentence imposed, while within the guidelines of § 346.65(2), STATS., was in error because the sentencing court considered the guidelines to be mandatory. We agree. The trial court's remarks at sentencing indicate that the trial court believed it was under an obligation to follow those guidelines. Although the court was presented with information with respect to Beu's health problems and personal difficulties as providing a basis for the trial court to consider electronic monitoring rather than incarceration, the record shows that the trial court viewed Beu's health issues as simply a "problem for the jail." As such, we conclude that the trial court sentenced Beu based on its misapprehension that it was constrained by the sentencing guidelines.

Although the State argues that the transcript of the sentencing hearing shows that the trial court did consider other factors in sentencing Beu, the State also concedes that "the court did make statements regarding the sentencing guidelines as mandatory." Based on the record before us, we are led to conclude that the additional information was considered by the trial court only in relation to which "cell" of the sentencing matrix Beu should be placed.

We therefore reverse the sentencing portion of the judgment and remand for a new sentencing.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.