COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-3278-CR &
98-0684-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES PODLEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and JEFFREY A. CONEN, Judges. *Affirmed.*

FINE, J. James Podlewski pled guilty to operating an automobile while under the influence of an intoxicant, as his second such offense within a five-year period. *See* §§ 346.63(1)(a) & 346.65(2)(b), STATS. The penalty for this crime is a fine of not less than $300 nor more than $1,000, and incarceration for not less than five days nor more than six months. Section 346.65(2)(b). The trial court

sentenced Podlewski to a ninety-day period of incarceration, with work-release privileges. Podlewski claims that this sentence violates his Eighth-Amendment right to be free of "cruel and unusual" punishments. We affirm.

Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably. ***State v. Lechner***, 217 Wis.2d 392, 418, 576 N.W.2d 912, 925 (1998). The primary factors considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. ***Elias v. State***, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). Assuming that, in light of ***Harmelin v. Michigan***, 501 U.S. 957, 962–994 (1991) (except in capital-punishment cases, Eighth Amendment does not contain proportionality component) (Scalia, J., announcing judgment of Court in an opinion, the parts of which discussing proportionality were joined in by one other justice), proportionality is still a consideration in an Eighth-Amendment analysis, *see* ***State v. Babler***, 170 Wis.2d 210, 487 N.W.2d 636 (Ct. App. 1992) (proportionality analysis of whether sentence violates Eighth Amendment survives ***Harmelin***), a sentence passes Eighth-Amendment muster if it is not "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice," ***State v. Paske***, 163 Wis.2d 52, 69, 471 N.W.2d 55, 62 (1991) (quoted source and internal quotation marks omitted). This analysis boils down to either 1) whether the sentence is "so excessive, under the circumstances, that it shocks the conscience of the public," or 2) whether the sentence is an otherwise erroneous exercise of the trial court's discretion. ***Id.***, 163 Wis.2d at 69–71, 471 N.W.2d at 62–63. Stated another way, if the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it 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." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Police officers found Podlewski slumped over the steering wheel of his car. According to the State's recitation of the facts at sentencing, Podlewski was clearly drunk, and he pled guilty to the crime of operating an automobile under the influence of an intoxicant.[1] A three-month sentence on work-release, which is half the maximum possible penalty established by the legislature, does not shock the conscience. Moreover, the trial court considered all of the appropriate factors: Podlewski's character, his work history, his danger to the community as reflected by his prior convictions (he had been convicted of a third operating-a-car-under-the-influence-of-an-intoxicant, but the conviction predated the ten-year counting period set by § 346.65(2)(c), STATS.), and the seriousness of the crime. Undoubtedly, Podlewski would have been happy if the trial court had accepted his attorney's recommendation that he serve only forty-five days confined to his home. He has not, however, pointed to anything in the record that remotely suggests that the trial court erroneously exercised its discretion in sentencing him to ninety days on work release.[2]

By the Court.—Judgment and order affirmed.

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

[1] The transcript of the plea hearing is not part of the appellate record.

[2] This appeal is essentially frivolous, and appears to have been undertaken merely to delay the inevitable start of Podlewski's sentence. *See* § 969.01(2)(b), STATS. ("In misdemeanors, release [on bail] shall be allowed upon appeal.").