COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2678-CR **Cir. Ct. No. 98 CT 843**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK E. RAHOI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Mark E. Rahoi appeals from a judgment entered after he pled guilty to operating a motor vehicle while intoxicated (fifth offense), contrary to WIS. STAT. § 346.63(1)(a) (1999-2000). He also appeals from an order denying his postconviction motion seeking sentence modification.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

Rahoi claims the sentence imposed was unduly harsh and excessive. Because the trial court did not erroneously exercise its sentencing discretion when it imposed sentence, this court affirms.

BACKGROUND

¶2 On February 4, 1998, Rahoi was arrested for operating a motor vehicle while under the influence of an intoxicant (OWI). It was his fifth offense. While this case was pending, Rahoi was again charged with OWI—fifth offense, which was a felony. On May 1, 2002, Rahoi entered a guilty plea on the felony OWI and was sentenced to five years, with two and one-half years of confinement.

¶3 On June 12, 2002, Rahoi pled guilty on the instant charge and was sentenced to twelve months, consecutive to any other sentence. Judgment was entered. In September 2002, Rahoi filed a motion to modify his sentence, which was denied. He now appeals.

DISCUSSION

¶4 Rahoi contends that the trial court erroneously exercised its discretion by failing to provide the rationale for imposing the maximum potential sentence, and that the sentence imposed was unduly harsh. This court disagrees.

¶5 There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. ***Id.*** A trial court's sentence is reviewed for an erroneous exercise of discretion. ***Id.***

¶6 When imposing sentence, a trial court must consider three primary factors: the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. ***State v. Setagord***, 211 Wis. 2d 397, 416, 565 N.W.2d 506 (1997). The sentencing court may also consider additional factors, including

> the defendant's criminal record, history of undesirable behavior patterns, personality and social traits, results of a presentence investigation, the aggravated nature of the crime, degree of culpability, demeanor at trial, remorse, repentance and cooperativeness, educational and employment history, the need for close rehabilitative control and the rights of the public.

State v. Lewandowski, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

¶7 Finally, the length of the sentence imposed by a trial court will be disturbed on appeal 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶8 This court has reviewed the sentencing transcript and cannot conclude that the trial court erroneously exercised its discretion in this case. The record reflects that the trial court considered each of the primary factors. The trial court noted that it was struggling with the sentence to impose because, although some of the factors fell into the "medium range," others fell into the higher end. In particular, the trial court indicated that a fourth offense OWI merits a ten-to-twelve month sentence. In the instant case, although charged as a fifth offense, this OWI was really a *sixth* offense. As a result, the trial court imposed the maximum sentence of twelve months. This was a reasonable decision, and will not be disturbed by this court.

¶9 Moreover, the sentence imposed does not satisfy the ***Ocanas*** standard of being "unduly harsh" or excessive. Rahoi argues that a six-month sentence would have been sufficient. This court is not persuaded. This was the sixth time that Rahoi was convicted for OWI. His blood alcohol count was .169 percent when he was stopped for this offense. He tumbled out of the car and attempted to flee from the officer. Despite the trips to the courthouse and the House of Correction as a result of his repeated OWI offenses, Rahoi continued to drive under the influence. As noted in the sentencing transcript, he has a serious alcohol problem that needs to be addressed. Based on the foregoing, sentencing him to twelve months instead of six months is not shocking to public sentiment.

By the Court.—Judgment and order affirmed.

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