COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 02-2816-CR **Cir. Ct. No. 01-CF-290**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEAH B. HENSIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Reversed in part and cause remanded with directions.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 DEININGER, P.J. Leah Hensiak appeals her conviction for operating a motor vehicle while under the influence of an intoxicant, fifth offense (OMVWI–5th). She also appeals an order denying her motion for sentence modification. Hensiak claims the trial court erroneously exercised its discretion

when it imposed a near-maximum fine without articulating its rationale for doing so. We agree, vacate the imposed fine and remand for a redetermination of the fine to be imposed for Hensiak's offense.

BACKGROUND

¶2 Hensiak was charged with OMVWI–5th, operating after revocation (fourth offense), and obstructing an officer. As a result of a plea agreement, Hensiak pled guilty to OMVWI–5th, and the remaining charges were dismissed and read in at sentencing. The State also agreed it would not argue for a sentence in excess of that recommended in the presentence investigation report. The report recommended thirteen to eighteen months of confinement followed by two to three years of extended supervision and a fine of $5,100.

¶3 At sentencing, counsel for the defendant said that he did not think "a $5,100 fine [was] necessarily appropriate," and indicated that the minimum fine was $1,800 plus costs. He urged the trial court to impose "whatever fine would have a significant impact." The prosecutor advocated for the imposition of "[w]hatever [fine] the Court thinks is appropriate" but noted that "these are pretty high fines."

¶4 In determining what period of incarceration to impose, the trial court engaged in a comprehensive discussion of the principal sentencing factors: the gravity of the offense, the character of the offender, and the need to protect the public. The court specifically considered Hensiak's age, education, sporadic employment, unsuccessful treatment history, family background, and her prior criminal record. The court also considered the fact that this was her fifth conviction for OMVWI, she had a blood alcohol content of .227, she was driving on a revoked license, and she had resisted arrest. The trial court discussed the

need to protect the public from Hensiak's behavior, noting that her prior treatment efforts and a term of probation had been unsuccessful, that she had very little community support and that she therefore presented a moderate to high risk to reoffend. As to mitigating factors, the trial court recognized Hensiak's acceptance of responsibility, her acknowledgement of her need for treatment, and the fact that her previous OMVWI offenses predated the current offense by some seven years.

¶5 The trial court concluded that a sentence of probation would "unduly depreciate the seriousness of the offense" and that, although Hensiak "need[ed] the structure of confinement," "[a] long prison term [was] not needed." The court therefore elected to "go along with the low end of the recommendation" and sentenced Hensiak to thirteen months of confinement followed by thirty-five months of extended supervision.

¶6 The trial court did not link any part of the foregoing analysis to the fine it chose to impose. The court made only two comments regarding an appropriate fine in its sentencing remarks. First, after asking the prosecutor for the State's position on a fine, the court opined: "Well, let's just talk about the fines for a second. I think the fines are absurd." Later, in the midst of its discussion of Hensiak's background and treatment history, the trial court stated:

> Frankly, I think these fines are absurdly high. You know, a thousand bucks, 2,000 bucks, that's high. 5-6,000 bucks, that's absurd. But, nevertheless, they [legislators] do this. And they add multipliers and add fines every day. But, frankly, that's their decision, not mine. I'm not in the legislature. Doesn't matter what I think. You know, and I want to be fair; and I intend to be fair. But I need to apply the laws as the laws are written.

The only other mention of the fine occurred when the trial court established Hensiak's obligations while on extended supervision, which were ordered to include "paying a fine, including all costs and assessments, of $6,055."[1]

¶7 Hensiak filed a postconviction motion alleging the court had erroneously exercised its sentencing discretion by (1) approaching sentencing with a predisposition in favor of imprisonment for all OMVWI–5th convictions, and (2) by failing to state on the record why it was imposing a fine of $5,605. (See footnote 1.) The trial court denied Hensiak's motion. With regard to the amount of the fine imposed, the trial court stated:

> [T]he fine is not excessive. The Court was expressing a concern with escalating fines. Nevertheless, it is the Legislature which determines the amount of fines. In addition, there are guidelines in this District which the Court is bound to consider. In this case, the Court did consider the guidelines and in fact lowered the amount of the fine.

¶8 Hensiak appeals the judgment of conviction and the order denying postconviction relief, challenging only the amount of the fine imposed.

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[1] WISCONSIN STAT. § 346.65(2)(e) (2001-02) provides that any person convicted of OMVWI–5th "shall be fined not less than $600 nor more than $2,000." Because Hensiak's alcohol concentration was .227, however, the minimum and maximum fines were tripled. *See* § 346.65(2)(g)2. The trial court thus had statutory authority to fine Hensiak between $1,800 and $6,000, plus statutory costs and fees. The judgment of conviction indicates that the fine imposed was $5,605, which with $450 in court costs and fees resulted in a total monetary obligation of $6,055.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

ANALYSIS

¶9 There is a strong public policy in Wisconsin against appellate court interference with the sentencing discretion of a trial court, and we are to apply an equally strong presumption that the trial court acted reasonably when exercising its sentencing discretion. *See* ***State v. Perez***, 170 Wis. 2d 130, 142, 487 N.W.2d 630 (Ct. App. 1992). The presumption in favor of the sentence imposed, however, is premised on a trial court's providing an explanation for the sentence chosen. "[R]equisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." ***McCleary v. State***, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971). "'[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.'" ***Id***. at 277 (quoting ***State v. Hutnik***, 39 Wis. 2d 754, 764, 159 N.W.2d 733 (1968)).[2]

[2] *See also*, *e.g.*, ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984) ("A trial judge must articulate the basis for the sentence imposed on the facts of record."); ***State v. Stubbendick***, 110 Wis. 2d 693, 699, 329 N.W.2d 399 (1983) (requiring sentencing courts to state reasons for imposing a particular sentence); ***State v. Johnson***, 74 Wis. 2d 26, 245 N.W.2d 687 (1976) (failure to state on the record the relevant and material factors which influenced the court's decision is an abuse of discretion); ***Ocanas v. State***, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975) (recognizing that an abuse of discretion might be found where the trial court fails to state on the record the factors influencing the court's sentencing decision); ***Gaddis v. State***, 63 Wis. 2d 120, 129-30, 216 N.W.2d 527 (1974) (finding an abuse of discretion where the rationale for the sentence imposed is not articulated in or inferable from the record); ***State v. Gallion***, 2002 WI App 265, ¶8, 258 Wis. 2d 473, 654 N.W.2d 446, *review granted*, 2003 WI 16, 259 Wis. 2d 100, 657 N.W.2d 706, (Wis. Feb 19, 2003) (No. 01-0051-CR) (recognizing that Wisconsin case law requires the sentencing court to state its reasons for imposing a particular sentence); ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112 (finding that a trial court misuses its discretion when it fails to state the relevant and material factors that influenced its sentencing decision); ***State v. Kourtidias***, 206 Wis. 2d 574, 588, 557 N.W.2d 565 (Ct. App. 1996) (holding that a trial court must articulate the basis for the sentence imposed); ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996) ("The sentencing court is required to state its reasons for imposing the sentence chosen.").

¶10 We agree with Hensiak that the trial court erred by not explaining why it chose to impose a near maximum fine.[3] In contrast to its very thorough analysis of the factors influencing its decision to sentence Hensiak to thirteen months in prison and a lengthy period of extended supervision, the court did not, either explicitly or implicitly, provide any rationale for its decision to impose the fine that it did. Instead, the trial court twice opined that the fine amounts were "absurd," and then indicated its belief that the legislature compelled it to impose what it considered to be an "absurdly high" fine. The legislature, however, has set only the minimum and maximum fines for OMVWI convictions, and what fine within this range should be imposed is solely for the sentencing court to determine. *See* ***State v. Setagord***, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997) ("[W]hen the legislature has granted the sentencing court the authority to impose sentences within a certain range, the legislature has given the court discretion to determine where in that range a sentence should fall." (citation omitted)).

¶11 In short, aside from offering a critique of the statutory fine amounts and its belief that it must yield to the will of the Wisconsin legislature, the trial

[3] The record contains a document that appears to be a copy of an excerpt from the Third District sentencing guidelines for OMVWI offenses. The document is captioned "FIFTH OR SUBSEQUENT OFFENSE" and contains two grids, one labeled "Mitigating Factors" and the other "Aggravating Factors." The presentence investigation report had recommended a fine of "$5,100," which the trial court noted equated to a total fine and costs of "$6,805." (See footnote 4.) The grid for "Aggravating Factors" reflects these two numbers under the column for "Bac Level" of ".20 to .249." When it imposed Hensiak's fine, the court ordered a total fine and costs of "$6,055," which is reflected on the grid for "Mitigating Factors" in the ".20 to .249" column. The grid indicates, however, that the underlying base fine which produces that total figure is "$4,500," not the $5,605 stated as the "fine" in the judgment of conviction. (See footnote 1.) It appears that the judgment "fine" amount includes a mandatory "penalty assessment," and perhaps other similar assessments or surcharges. If so, it could be argued that the trial court did not impose a "near maximum" fine of $5,605, but a fine of "only" 75% of the maximum (4,500/6,000). The State does not, however, make this argument, conceding in its brief that the court imposed a fine of "$5,605" and arguing that the record contains sufficient facts to justify a fine that approaches but does not reach the maximum.

court offered no explanation for imposing a near-maximum (see footnote 3) fine for Hensiak's offense. As the supreme court did in ***McCleary***, we find this to be an erroneous exercise of discretion:

> The problem in the instant case arises because the trial judge failed to give his reasons why a lengthy, near-maximum sentence was appropriate. He very well and properly stated his reasons why probation was not appropriate, but gave no reason for the sentence he did impose. On its face, therefore, it appears that the sentence is the product of an abuse of discretion in that there was no delineation of any of the factors utilized by the trial judge in the exercise of discretion.

McCleary, 49 Wis. 2d at 282.

¶12 We acknowledge that when imposing sentence for a felony conviction, a court's attention, as well as that of the defendant and of counsel for both parties, will often be largely focused on the issue of probation versus incarceration, and if the latter is imposed, its length. The imposition of a fine when one is mandated is often an afterthought, as the recommendations of counsel in this case demonstrate. Both attorneys essentially told the court to do whatever it thought was right in terms of a fine. Regardless of its arguably secondary importance to all concerned, however, the imposition of a several-thousand-dollar fine is a significant sanction, and the well-established requirement for reasons stated on the record cannot simply be ignored. The explanation need not be lengthy, and a court need not restate its analysis of sentencing factors that is already of record, but some link to those factors or other rationale for setting the fine at a certain amount should be stated on the record.

¶13 In its sentencing remarks the trial court mentioned but did not explicitly relate the fine imposed to the Third Judicial District's OMVWI sentencing guidelines. The court noted in its order denying sentence modification,

however, that it "did consider the guidelines and in fact lowered the amount of the fine."[4] To the extent that the court's sentencing decision relied on the local OMVWI guidelines, it merits further comment. A sentencing court may properly consider the applicable district sentencing guidelines when fashioning a sentence for an OMVWI conviction. ***State v. Jorgensen***, 2003 WI 105, ¶27, 264 Wis. 2d 157, 667 N.W.2d 318. It is an erroneous exercise of discretion, however, for a sentencing court "to simply apply the guidelines as the sole basis for its sentence." ***Id***. Even if the trial court felt constrained to follow the local OMVWI guideline, strict adherence to the guideline without further explanation of the amount of the fine imposed also constitutes an erroneous exercise of discretion. ***Id***.; *cf*. ***State v. Martin***, 100 Wis. 2d 326, 302 N.W.2d 58 (Ct. App. 1981) (holding a preconceived policy precluding probation to be an abuse of discretion).

¶14 Even though we conclude the present record fails to demonstrate a proper exercise of discretion with respect to the fine imposed, our analysis is not ended. When a trial court fails to set forth its reasons for the sentence imposed, "we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***McCleary***, 49 Wis. 2d at 282.

[4] At the conclusion of sentencing arguments by both counsel, the court said "let's just talk about the fines for a second. I think the fines are absurd…. First of all, I have to get the right guidelines here. It looks like 6,055 as a gross number, which is less than the 6,805, which would be there under the State's recommendation." The court's reference to the "State's recommendation" was to that of the presentence investigation report author, who recommended a fine of $5,100, which with applicable costs and fees apparently totaled $6,805. (See footnote 3.) As we have noted, the prosecutor made no specific recommendation at sentencing on the amount of the fine, saying instead, "these are pretty high fines. Whatever the Court thinks is appropriate." In responding to Hensiak's postconviction motion, however, the State referred to the guidelines, attached a copy to its brief, and argued that the court "was merely following the guidelines as outlined by the third judicial district … [and] cannot be accused of violating its discretion" because it imposed a fine less than "that is in the grid for that particular charge."

"[I]t is … our duty to affirm a sentence on appeal if from the facts of the record [the sentence] is sustainable as a proper discretionary act." ***Id***.

¶15 In our review of the record, however, we find no support for the imposition of a near maximum fine, particularly in light of Hensiak's apparently grim economic circumstances. *See* ***Will v. State***, 84 Wis. 2d 397, 404-05, 267 N.W.2d 357 (1978) ("[T]he deterrent effect of a fine depends in part upon its impact on the financial resources of the offender…. [W]e encourage[] trial courts to determine the defendant's ability to pay at the time of sentencing.").[5] The presentence investigation report indicates that Hensiak was unemployed at the time of her arrest, had no other source of income, no assets, and a $5,000 hospital bill currently in collection. Hensiak was represented in the trial court by an assistant state public defender, which serves as an additional testament to her indigency.

¶16 We recognize that the court ordered Hensiak to pay the fine during her extended supervision, and it is reasonable to assume that Hensiak will then be employed and able to pay a reasonable fine over the thirty-five months of supervision ordered. Based on Hensiak's education and employment history as recounted in the presentence investigation report, however, we deem it unlikely that she will be able to obtain employment upon her release from prison that will

[5] Had the trial court provided an explanation for imposing a near-maximum fine based on proper factors, it would not necessarily have been *required* to consider Hensiak's ability to pay because she did not argue to the trial court that she was unable to pay the fine imposed. *See* ***Will v. State***, 84 Wis. 2d 397, 404, 267 N.W.2d 357 (1978). In our independent review of the record to determine whether support can be found for the fine imposed, however, we deem it appropriate to consider what the record shows regarding Hensiak's income and assets and the burden that payment of the fine will impose on her in light of other obligations she may have. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 112-13 § 18-3.16 (3d ed. 1994).

initially provide her with earnings much above the minimum wage. We also note that her conditions of supervision include the payment of "supervision fees" and participation in mental health and AODA treatment, which may preclude her working overtime or at more than one job, and which may also require at least partial payments by Hensiak for the services she receives.

¶17 We cannot independently conclude, therefore, that the record supports the imposition of a near-maximum fine.[6] We arguably possess the authority to modify the fine (*see* ***Rosado v. State***, 70 Wis. 2d 280, 291, 234 N.W.2d 69 (1975); ***McCleary***, 49 Wis. 2d at 289-91), but the parties have provided no argument in this court as to what an appropriate fine might be. Accordingly, we conclude it more appropriate to remand to the circuit court for the exercise of its discretion in imposing an appropriate fine.

CONCLUSION

¶18 For the reasons discussed above, we vacate the fine imposed in the appealed judgment and remand for a redetermination of the fine to be imposed for Hensiak's offense. Because Hensiak has not challenged the conviction itself or the terms of confinement and extended supervision imposed, the remainder of the appealed judgment is not affected by our disposition. We likewise reverse only that part of the postconviction order that denied relief from the fine.

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[6] *Cf.* ***Bartus v. Wisconsin Dep't of Health & Soc. Servs***., 176 Wis. 2d 1063, 1080, 501 N.W.2d 419 (1993) (admonishing "circuit courts of the need to establish probation conditions that will aid the offender's rehabilitation without undermining his or her sense of responsibility"); ***Huggett v. State***, 83 Wis. 2d 790, 798-99, 266 N.W.2d 403 (1978) (cautioning sentencing courts that "conditioning probation on the satisfaction of requirements which are beyond the probationer's control undermines the probationer's sense of responsibility").

By the Court.—Judgment and order reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

¶19 LUNDSTEN, J. (*concurring*). I agree with the result in this case and the reasoning of the majority, as far as it goes, but write separately to comment on the "shock public sentiment" standard we apply when reviewing sentencing discretion.

¶20 The principles of review we apply to sentencing are well established. Sentencing courts are "presumed to have acted reasonably, and the defendant can only rebut the presumption by showing an unreasonable or unjustifiable basis for the sentence in the record." ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). A sentencing court "misuses its discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one factor in the face of other contravening factors." ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. In addition:

> [A] trial court exceeds its discretion as to the length of the sentence only when 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."

Id. (quoting ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992)).

¶21 When the sentencing court fails to set forth the reasons for the sentence imposed, "we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained."

McCleary v. State, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Therefore, "it is ... our duty to affirm the sentence on appeal if from the facts of record [the sentence] is sustainable as a proper discretionary act." ***Id.***

¶22 In the usual case involving an insufficient explanation for the sentence imposed, the record supplies enough information about crime severity and the offender's history so that the reviewing court is able to determine whether the sentence imposed is one that could have been imposed exercising proper discretion or whether, instead, it is a sentence that 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." While we have seldom, if ever, concluded that the sentence imposed was not one that a reasonable judge could have imposed, that is our well-established method and the records before us normally permit us to reach a reasoned conclusion on the topic.

¶23 The problem here is the lack of information. We know the circuit court believed the fine it imposed was "absurd." We know some facts about the seriousness of the offense. It appears the fine imposed was within local guidelines for the Third Judicial District. However, we know little of Hensiak's ability to pay, or how hard the fine portion of the sentence will fall upon her. What little we do know in this regard, as explained in the majority decision, suggests it may fall unreasonably hard. Stated differently, it may be that, if the facts regarding Hensiak's ability to pay were known, the fine would "violate the judgment of reasonable people concerning what is right and proper under the circumstances."

¶24 Accordingly, I agree that the proper course in this case is to vacate the fine and remand for resentencing on that portion of Hensiak's sentence. I

write separately because I believe the majority's analysis is incomplete. Whether we agree or disagree with the wisdom of this highly deferential "shock public sentiment" approach to the review of sentencing, we are not at liberty to ignore it.