**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 3, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-0557-CR** **Cir. Ct. No. 01CF000086**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PAUL M. NIGL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Paul Nigl appeals from a judgment of conviction of two counts of homicide by intoxicated use of a motor vehicle and from an order denying his motion for postconviction relief. He argues that blood test results should have been suppressed, that he was denied the effective assistance of counsel because counsel failed to request an instruction on a lesser-included

offense, that the trial court should have granted his request for a continuance, and that the sentence is the result of an erroneous exercise of discretion. We reject his claims and affirm the judgment and order.

¶2 Two persons died as a result of a head-on collision between the vehicle in which they were traveling and a Chevy truck driven by Nigl. The accident occurred at approximately 6:30 a.m. A witness to the accident said Nigl's truck crossed the centerline and struck the other vehicle.

¶3 The first officer at the scene of the crash approached Nigl, who was sitting in the driver's seat. As Nigl spoke, the officer noticed the odor of intoxicants. Another officer also overheard Nigl inform paramedics that he had consumed two beers. Within three hours of the accident the officer requested Nigl to submit to a blood test under the implied consent law. The blood draw was taken despite Nigl's refusal. That test revealed a blood alcohol concentration of .141 percent.

¶4 Nigl first argues that the implied consent blood test result should have been suppressed because the blood draw was improperly obtained. He contends that there is no proof that the officer complied with the requirement in WIS. STAT. § 343.305(9)(a) (2001-02),[1] that upon refusal the officer shall immediately take possession of the driver's license and prepare a notice of intent

[1] WISCONSIN STAT. § 343.305(9)(a), provides in part: "If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege."

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

to revoke. The State correctly asserts that Nigl waived this issue because it was not raised with specificity in his motion to suppress the blood test results. Nigl's motion alleged that he did not knowingly refuse, that the officer failed to adequately read the informing the accused form, and that due to his medical condition, he could not effectively understand the implied consent form. An objection must be stated with specificity "so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them." ***State v. Agnello***, 226 Wis. 2d 164, 173, 593 N.W.2d 427 (1999). Nigl did not give any notice that he contested the officer's compliance with the license revocation procedures. The issue is waived.

¶5 At trial the results of a diagnostic blood test were also admitted. That draw was performed about 7:50 a.m. and the test showed a blood alcohol level of .181 and the presence of marijuana and cocaine. Nigl argues that the test result should have been suppressed because there was no probable cause supporting the subpoena to produce his medical records. *See* WIS. STAT. § 968.135. He also claims that disclosure of the result violated his expectation of privacy because no consent was obtained for the diagnostic test.

¶6 Again, the issue is waived.[2] Nigl's motion to exclude the test result from the diagnostic blood draw never mentioned the lack of probable cause or consent. Absent the specific objection, there was no necessity to develop the facts relevant to the claim and there is nothing for this court to review. The subpoena is

[2] In his reply brief Nigl urges the court to consider his claims regarding the blood test results despite waiver. We are not persuaded that any claim with respect to suppression or exclusion of the blood test results would be successful so as to require consideration to further the ends of justice. Particularly, Nigl's suggestion that the diagnostic blood draw was taken for the purpose of producing incriminating evidence is conclusory.

not even part of the record on appeal. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 212, 474 N.W.2d 753 (Ct. App. 1991) (we cannot review what is not before us).

¶7 We turn to Nigl's claim of ineffective assistance of counsel. In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.*** at ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶8 Nigl claims that trial counsel was ineffective for not requesting a jury instruction on the lesser-included offense of negligent homicide by use of a vehicle. He explains that there could be no strategy reason for counsel not to request the instruction since the instruction would have been consistent with the "fatigue defense."

¶9 Although negligent homicide by use of a vehicle is a lesser-included offense of homicide by intoxicated use of a vehicle, ***State v. Kennedy***, 134 Wis. 2d 308, 324, 396 N.W.2d 765 (Ct. App. 1986), the instruction is not automatically submitted to the jury. "'Submission of a lesser included offense instruction is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense.'" ***State v. Fleming***, 181 Wis. 2d 546, 560, 510 N.W.2d 837 (Ct. App. 1993) (quoting ***State v. Sarabia***, 118 Wis. 2d 655, 661, 348 N.W.2d 527 (1984)). Whether the evidence at trial

permits the giving of a lesser-included offense instruction is a question of law. ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989).

¶10 We conclude there was no reasonable ground in the evidence for acquittal of the greater charges of homicide by intoxicated use of a vehicle. There was no dispute that Nigl was driving and that two persons were killed as a result of the accident. Blood alcohol tests demonstrated alcohol concentration levels at .181 and .141. An expert estimated Nigl's blood alcohol concentration at the time of the accident to be between .17 and .18. The blood test also detected marijuana and cocaine. Nigl admitted he had consumed beer in the hours preceding the accident and had used cocaine ten times the day prior to the crash. The physical evidence and Nigl's admission leave no reasonable possibility that he would be acquitted on the greater offense. The lesser-included offense would not have been justified. Trial counsel's failure to request it did not prejudice the defense.

¶11 Approximately ten days before trial Nigl filed a motion for a continuance. He requested additional time to locate and retain an expert to determine the accuracy of the blood test results. The motion was taken up five days before trial. At that time trial counsel indicated that Nigl had provided an entirely different version of the accident and the defense needed additional time to investigate possible defense strategy with respect to the blood alcohol absorption curve. Trial counsel indicated that if necessary, Nigl would discharge trial counsel and seek the appointment of a public defender in order to obtain funds for an expert witness. The motion for a continuance was denied.

¶12 Nigl argues that the trial court erroneously exercised its discretion in denying the motion. The decision whether to grant or deny a continuance is discretionary and will not be reversed on appeal absent an erroneous exercise of

discretion. ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. The determination requires balancing the defendant's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice. ***Id.*** The six factors to be considered are: (1) the length of the delay requested; (2) whether the "lead" counsel has associates prepared to try the case in his [or her] absence; (3) whether other continuances had been requested and received by the defendant; (4) the convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay seems to be for legitimate reasons or whether its purpose is dilatory; and (6) other relevant factors. ***Id.*** at ¶28.

¶13 Here the trial court found that the toxicology reports were provided to the defense two months earlier, a period of time the court found sufficient to afford the defense an opportunity to obtain whatever independent testing or expert analysis was needed. The court was cognizant that the prosecution's speedy trial demand was made in the interest of the victims' families. It found it was unfair to those families to permit delay. It also found that Nigl would not be unduly prejudiced by denial of a continuance. The record demonstrates a proper exercise of discretion.

¶14 Nigl's claim that trial counsel was not prepared for the trial is based in part on claims that we have rejected regarding suppression of blood tests and the lesser-included offense instruction. The remainder of his claim that counsel was unprepared is conclusory. He does not suggest any defense or evidence that could have been developed if the continuance had been granted. Further, the request to retain new counsel was not, as Nigl claims in his brief, based on a breakdown of the attorney-client relationship. The only purpose for discharging counsel was to get funding for an expert. That too could have been explored as

soon as the defense had the blood tests. Finally, we reject Nigl's notion that it was simply impossible to prepare for trial in a three-month period. Nothing suggests that the case was complex, certainly the physical evidence and Nigl's admissions suggest otherwise. The trial court did not erroneously exercise its discretion in denying the motion for a continuance.

¶15 Two consecutive sentences comprised of thirty years' initial confinement and twenty years' extended supervision were imposed. Nigl characterizes the sentences as meaningless because he will probably be confined beyond his life expectancy. He argues that the trial court failed to set forth adequate reasons why the sentences were imposed consecutively and in a manner such that he will never live long enough to serve them.

¶16 Sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was an abuse of discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 661, 469 N.W.2d 192 (Ct. App. 1991). Appellate courts have a strong policy against interference with that discretion. ***Id.*** Thus, we begin with the presumption that the trial court acted reasonably and the appellant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. ***State v. Petrone***, 161 Wis. 2d 530, 563, 468 N.W.2d 676 (1991). "We will find an erroneous exercise of discretion when a sentence is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable persons concerning what is right and proper under the circumstances." ***State v. Setagord***, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997).

¶17 The record reflects a proper exercise of discretion at sentencing. The trial court reviewed the pertinent sentencing factors. The sentence is based on

the facts of record. In light of Nigl's prior record and that his conduct resulted in the death of two people, the sentence is not shocking so as to be excessive.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.