COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP320-CR
2009AP321-CR

Cir. Ct. Nos. 2007CT2147
2007CT2534

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN C. HEFTE,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed.*

¶1 BRIDGE, J.[1] John Hefte appeals from judgments of conviction for operating while under the influence of an intoxicant (OWI), third and fourth

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

offenses, contrary to WIS. STAT. § 346.63(1)(a). Hefte was sentenced to a combined total of 270 days in jail with Huber privileges for all but the first thirty days of his sentence. Hefte complains that the circuit court erred in denying him Huber privileges during the first thirty days of his sentence. He argues that the denial of Huber privileges for that period of time was clearly erroneous because the court followed a preconceived policy of sentencing, that policy being a "desire to keep defendants off of electronic monitoring." He also argues that the denial of Huber privileges during that time period violated the separation of powers in that it interferes with the "sheriff's authority to place [a defendant] on home monitoring." We affirm.

BACKGROUND

¶2 Following a traffic stop on May 13, 2007, Hefte was charged with OWI, third offense, and operating a motor vehicle with a prohibited alcohol concentration (PAC), third offense, in violation of WIS. STAT. § 346.63(1)(b). His blood alcohol content at the time of the stop was 0.233. Following another traffic stop on July 11, 2007, Hefte was again charged with OWI and PAC. His blood alcohol content on that date was 0.236. Hefte ultimately plead no contest to OWI third and fourth offenses.

¶3 The circuit court sentenced Hefte to ninety days in jail with Huber privileges for all but the first thirty days of his sentence for his third offense OWI conviction, and, running consecutively to that sentence, 180 days in jail with Huber privileges for his fourth offense OWI conviction.

¶4 Prior to imposing the sentences, the court took note of the seriousness of Hefte's offenses, including the time of day each offense occurred, his level of alcohol, and the quality of his driving, as well as the risk of harm he

put others in on each occasion. The court also observed, however, that the time period between his second OWI offense and his third and forth offenses was extensive; that Hefte had accomplished many things during his life; and that Hefte had contributed to society and had the potential for continuing to do so in the future. The court then stated:

> This is possibly the first case I've seen where I'm comfortable or at least I'm willing to—comfort is not the right word. I'm not comfortable—where I'm willing to take the risk with the Electronic Monitoring Program that the sheriff is so supportive of. This may be the appropriate case for that to be used. I usually am very reluctant to rely on that. But there is the opportunity if it is properly implemented to monitor the one problem here, and that's drinking. That's the only problem. It is a big one, but it is the only problem.

It ruled, however, that Hefte was:

> not eligible for Huber, not a minute of Huber for 30 days. After that 30 days, I order that you are eligible for full Huber. I think what that means is that you will be eligible and very likely released on electronic monitoring. I have always tried to limit that, but in this case, I see no reason to.

Hefte appeals.

DISCUSSION

CIRCUIT COURT'S SENTENCING DISCRETION WITH RESPECT TO HUBER PRIVILEGES

¶5 Hefte contends that the circuit court did not exercise appropriate discretion in denying him Huber privileges during the first thirty days of his jail sentence. He argues that the court's denial of Huber privileges during that time period was clearly erroneous because the sentence reflected the court's "preconceived [sentencing] policy against Huber release in a certain situation"—

that policy being the trial judge's "desire to keep defendants off of electronic monitoring."

¶6 Sentencing lies within the sound discretion of the circuit court and our review on appeal is limited to whether the court's discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "'[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.***, ¶18. To obtain relief on appeal, the defendant bears the burden of showing "some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992), *overruled on other grounds by* ***State v. Greve***, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

¶7 The question of whether a defendant should be granted or denied Huber privileges lies within the circuit court's authority. *See* WIS. STAT. § 303.08(1). A court may not, however, deny Huber privileges based on a "preconceived policy of sentencing that is 'closed to individual mitigating factors.'" ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996).

¶8 In ***Ogden***, the circuit court denied a defendant's request after sentencing for Huber privileges for the purpose of providing child care to her children because, "[m]y reason has always been I do not allow [Huber privileges for] normal child care." ***Id.*** at 572. The supreme court reversed the circuit court's denial of Huber privileges, concluding the court's decision was made before the defendant's request was made and that "[a] judge's decision whether to grant Huber privileges should not be predetermined," but should instead be based on the court's determination of whether Huber release is appropriate in light of the

individual circumstances of the case before it. ***Id.*** at 573. The court went on to explain, however, that its decision should not be read as holding "that a trial judge is prohibited from entertaining general predispositions, based upon his or her criminal sentencing experience, regarding when a certain type of sentence is appropriate." ***Id.***

¶9 Unlike ***Ogden,*** the record in this case does not demonstrate that the court's denial of Huber privileges during the first thirty days of Hefte's sentence was predetermined. Hefte suggests that the court's denial of Huber privileges stemmed from a preconceived sentencing policy of keeping defendants "off of electronic monitoring." This court, however, sees nothing in the record demonstrating that the court sentenced Hefte in accordance with such a preconceived sentencing policy. To the contrary, statements by the court at sentencing reflect the court's belief that although it is not generally predisposed to the use of electronic monitoring, the court believed the use of electronic monitoring was appropriate in Hefte's case and that it recognized that electronic monitoring would likely be implemented. We conclude that the court exercised appropriate sentencing discretion in this matter.

SEPARATION OF POWERS

¶10 Hefte contends that the circuit court's failure to award him Huber privileges for the first thirty days of his sentence violated the separation of powers in that the absence of Huber privileges interferes with the sheriff's authority to place prisoners on home monitoring under WIS. STAT. § 302.425(2).[2] Hefte

[2] WISCONSIN STAT. § 302.425(2) provides:

(continued)

interprets the court's statements regarding electronic monitoring as reflecting the court's dislike of the program, and the partial denial of Huber privileges as the court's "clear intent" to prevent the sheriff from granting him electronic monitoring during that time period. Hefte likens what he views as the court's "clear intent" to ***State v. Schell***, 2003 WI App 78, 261 Wis. 2d 841, 661 N.W.2d 503, wherein the circuit court attempted to preclude the defendant from home monitoring by amending its original judgment to so provide, and ***State v. Galecke***, 2005 WI App 172, 285 Wis. 2d 691, 702 N.W.2d 392, wherein the circuit court attempted to preclude the defendant from home monitoring by ordering that the defendant decline home detention as a condition of probation or, alternatively, withdrawing the court's permission that the defendant serve his jail time in a different county if the defendant refused to decline home detention.

¶11 We do not construe the statements made by the court at sentencing as a "clear intent" to prevent the sheriff from granting Hefte electronic monitoring during a portion of his sentencing. As this court observed above, the circuit court indicated that Hefte's situation is one where electronic monitoring might be appropriate and it went so far as to suggest that electronic monitoring is likely. The court also noted that although it "always tried to limit" electronic monitoring, it saw no reason to do so in this case. Thus, the court was receptive, if not encouraging, of electronic monitoring for Hefte. The fact that the court denied

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> SHERIFF'S OR SUPERINTENDENT'S GENERAL AUTHORITY. Subject to the limitations under sub. (3), a county sheriff or a superintendent of a house of correction may place in the home detention program any person confined in jail who has been arrested for, charged with, convicted of or sentenced for a crime. The sheriff or superintendent may transfer any prisoner in the home detention program to the jail.

Huber privileges for the first thirty days of Hefte's sentence does not reflect an intent to prevent electronic monitoring, as was the case in ***Schell*** and ***Galecke.*** Rather, it indicates that the court believed that a denial of Huber privileges for thirty days was necessary to punish Hefte for what the court characterized as "aggravated offenses," and to protect the public. Accordingly, we conclude that the court's denial of Huber privileges for the first thirty days of Hefte's sentence does not interfere with the Sheriff's jail oversight responsibilities.

CONCLUSION

¶12 For the reasons discussed above, we affirm the judgments of conviction.

By the Court.—Judgments affirmed.

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