

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2010AP1956-CR

Cir. Ct. No. 2009CF2447

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN KEITH ELLINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Kevin Keith Ellinger appeals a judgment of conviction, entered upon his guilty plea, to operating a motor vehicle while intoxicated as a seventh offense. He also appeals an order denying his postconviction motion for sentence modification. Ellinger argues that the circuit

court erroneously exercised its sentencing discretion. We reject this argument and affirm the judgment and order.

¶2 While driving in an office building parking lot, Ellinger struck an unoccupied parked car. When a witness and the car's owner confronted Ellinger, Ellinger told them that he had insurance and admitted having a couple of drinks. Police were called. Ellinger voluntarily submitted to a blood draw; his blood-alcohol concentration was .11%.

¶3 Ellinger pled guilty to operating a motor vehicle while intoxicated as a seventh offense. The circuit court sentenced him to three years' initial confinement and four years' extended supervision. The court also recommended that the Department of Corrections place Ellinger at the Wisconsin Resource Center, where he would be able to receive specialized mental health treatment. The court ordered Ellinger to serve his sentence consecutive to four years of revocation time previously imposed on his fifth and sixth OWI convictions. Ellinger's postconviction motion for resentencing was denied, and he appeals.

¶4 Sentencing is committed to the circuit court's discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *See State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the circuit court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised. *See id.* at 418-19.

¶5 In its exercise of discretion, the circuit court is to identify the objectives of its sentence, including but not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others.

Gallion, 270 Wis. 2d 535, ¶40. In determining the sentencing objectives, we expect the court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court’s discretion. *Id.* The amount of necessary explanation of a sentence varies from case to case. *Gallion*, 270 Wis. 2d 535, ¶39.

¶6 Ellinger’s general complaint is that the sentence is “excessive and unduly harsh” because the circuit court failed to consider mitigating factors like Ellinger’s treatment needs, and that the court failed to fulfill its sentencing obligations because it did not consider Ellinger’s character or properly explain the length of its sentence. From these errors, it follows for Ellinger that the court erred in denying his postconviction motion.

¶7 Our review of the record satisfies us that the circuit court properly exercised its sentencing discretion. It is clear the circuit court was concerned with protecting the community, deterring Ellinger, and facilitating his rehabilitation. The court stated that driving while intoxicated is serious and can result in death to both the offender and innocent bystanders. The court considered that Ellinger was likely to be a danger on extended supervision, and was “uncomfortable with him in the community.” It observed that Ellinger “just can’t stop drinking and driving” and cannot control himself when he does drink.

¶8 It is clear that the mitigating factors Ellinger claims the court ignored¹ are the factors that the court relied on when recommending his placement at the Resource Center. The court did observe that Ellinger had serious mental health and alcohol issues, as well as physical health problems, like liver damage from excessive alcohol consumption.

¶9 It is clear that Ellinger's failure to learn any lessons from prior convictions explains the current seven-year sentence. The court commented that Ellinger had taken responsibility for his actions by entering a plea, but that his record was "horrendous." The court also noted that shorter sentences in earlier cases had no deterrent effect on Ellinger's behavior.

¶10 While Ellinger appears to believe the court's sentencing rationale should have taken more time and been more specific, the sentence is the product of a proper exercise of discretion. Accordingly, the circuit court was justified in denying the postconviction motion seeking to modify the sentence.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

¹ Counsel asserts, on page fifteen of the main brief, that "The transcripts reveal *no mention* of Mr. Ellinger's character." (Emphasis added.) Upon review of the sentencing transcript, we disagree with this assertion. While we might simply point out that the court is not required to specifically delineate a transition to consideration of a defendant's character, counsel has also represented, on page ten of the main brief, that "The court *cast his character in a negative light[.]*" (Emphasis added.) Counsel's representations are inherently contradictory: the circuit court could not have cast his character in a negative light if it made no mention of that character.

