

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 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. 2011AP1-CR

Cir. Ct. No. 2008CT975

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUSTIN M. PRZYBYLSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Dustin Przybylski seeks resentencing on his conviction for operating a motor vehicle while under the influence of an intoxicant

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

or other drug, fourth offense, contrary to WIS. STAT. § 346.63(1)(am). Przybylski claims that the circuit court did not fairly consider the recommendation of the prosecutor and the defense counsel that his sentence be served concurrently with another prison term he is currently serving. Przybylski further claims that the circuit court adopted a mechanistic approach of automatically ordering all sentences to be served consecutively, in contravention of the standard outlined in *State v. Martin*, 100 Wis. 2d 326, 302 N.W.2d 58 (Ct. App. 1981). The record reflects that the circuit court weighed appropriate, case-specific factors and explained the reasons for its sentencing decision. We reject his request for resentencing. We affirm.

FACTS

¶2 On October 17, 2008, a Wisconsin state patrol trooper stopped Przybylski for erratic driving after he observed Przybylski straddling both lanes of the highway. Przybylski told the officer that he was traveling from Milwaukee to Wausau, and the officer observed that Przybylski seemed extremely impaired. A blood sample was taken and tested positive for cocaine, marijuana, and benzoylecgonine, all of which are controlled substances.

¶3 On September 16, 2010, Przybylski pled no contest to the charge of operating a motor vehicle while under the influence of an intoxicant or other drug. Both the prosecutor and the defense counsel recommended a sentence of sixty days concurrent with another unrelated fifteen-year sentence Przybylski was then serving. The circuit court stated that it never understood the reasoning that a defendant should be granted a concurrent sentence for no reason other than the existence of another lengthy sentence, but invited the attorneys to explain why they thought it was appropriate in this case. The prosecutor and defense counsel

made their arguments, but the circuit court ultimately sentenced Przybylski to 100 days served consecutive to his fifteen-year sentence. Przybylski appeals the circuit court's determination and requests resentencing.

DISCUSSION

¶4 Ordinarily, sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of that discretion. *State v. J.E.B.*, 161 Wis. 2d 655, 661, 469 N.W.2d 192 (Ct. App. 1991). “Our review is thus conducted in light of a strong public policy against interference with the circuit court’s sentencing decision.” *Id.* A circuit court properly exercises its discretion when it considers the appropriate sentencing factors and explains its reasoning for the particular sentence imposed. *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

¶5 Przybylski claims that the circuit court adopted a mechanistic approach of automatically ordering all sentences to be served consecutively, as disallowed in *Martin*, 100 Wis. 2d at 327. A concurrent sentence was statutorily available as a sentencing alternative in the current case, *see* WIS. STAT. § 973.15(2)(a), and was recommended by both defense counsel and the State. However, after taking Przybylski’s plea and receiving the recommendation, the circuit court stated:

I’ve never understood the argument that since somebody is going to be in prison for such a long time that he shouldn’t be punished any further for anything else that he has done. And quite honestly I don’t buy into that argument.

So if you can say something to convince me when he’s driving with marijuana, cocaine and another substance in his system, straddling Highway 41, and he was arrested three months earlier for an operating while intoxicated—if you can convince me that that makes sense to give him the minimum concurrent, good luck to you.

Przybylski claims that these statements show an unwillingness to consider concurrent sentences as a sentencing option.

¶6 Przybylski likens his case to *Martin*. There, the circuit court stated that it would never grant straight probation to a person convicted of a particular offense. *Martin*, 100 Wis. 2d at 327. Probation was statutorily available as a sentencing alternative for that offense; however, the court “expressly refused to consider” it as a possibly appropriate alternative. *Id.* at 327-28. This court held that such a mechanistic approach to sentencing was not an exercise of sentencing discretion, and we remanded for resentencing. *Id.* at 327.

¶7 Here, we hold that the circuit court did not adopt a mechanistic approach to sentencing in contravention of *Martin*. The court invited argument on the issue and then weighed the relevant facts in determining an appropriate sentence. In expressing its concerns regarding a concurrent sentence, the circuit court referenced the facts of this specific case, including the substances in the defendant’s system while he was driving and defendant’s conviction on another operating while intoxicated charge three months earlier. The court stated, “I can’t come up with one reason, other than the fact he’s already in prison for 15 years, one reason that I’d go minimum and that I’d make it concurrent. There’s absolutely, positively, nothing in this record that would support that at all.” The circuit court’s comments in this case reflect its consideration of Przybylski’s record. Unlike the *Martin* sentencing court, the circuit court in this case did not say that concurrent time would not be considered, but merely focused the attorneys’ attention on what it believed was an important sentencing issue in light of the parties’ recommendation.

¶8 We further find that the circuit court looked at all of the required factors when considering a sentence: the gravity of the offense, the character of the defendant, and the need to protect the public. See *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The circuit court specifically mentioned each of those three factors and discussed why they weighed in favor of additional jail time. The court found that the driving offense was “aggravated.” It noted, “[t]wo arrests in three months most certainly is aggravated,” as was “[t]he substance in [Przybylski’s] system.” As to character and the need to protect the public, the court found that Przybylski was currently “sitting 15 years [in] confinement for three armed robberies.” It noted that Przybylski’s “prior record isn’t good at all”; he had an extensive history, including more than one drunk driving conviction. The court found that “[t]he need to protect the public exists by virtue of the drunk drivings and the other crimes.” Because the circuit court appropriately weighed the relevant factors when deciding Przybylski’s sentence, the circuit court’s decision to order 100 days consecutive to his other sentence was within its discretion.

By the Court.—Judgment affirmed.

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

