COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP56-CR **Cir. Ct. No. 2010CF282**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT F. VANDYNHOVEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Scott VanDynHoven appeals a judgment convicting him of fifth offense driving while intoxicated and an order denying his motion for resentencing. He argues: (1) the sentence of three years' initial confinement and three years' extended supervision was excessive; (2) the court

relied on inaccurate information that VanDynHoven was not interested in treatment; (3) the court gave too much weight to VanDynHoven's lack of interest in treatment; and (4) a new factor, the actual date VanDynHoven could be admitted to the Earned Release Program, justifies resentencing. We reject these arguments and affirm the judgment and order.

¶2 An officer attempted to stop VanDynHoven's vehicle because it had a malfunctioning taillight. VanDynHoven pulled into the driveway of his home before contact was made. VanDynHoven was uncooperative with police. His blood alcohol content was determined to be 0.273%, 13.65 times the legal limit set by WIS. STAT. § 340.01(46m) (2009-10).[1]

¶3 VanDynHoven pled no contest to fifth offense driving while intoxicated. On a background information form VanDynHoven prepared for the presentence investigation report (PSI) author, he checked a box indicating that he was not interested in treatment. At the sentencing hearing, the State and the author of the PSI recommended probation with jail time. They noted that the incident did not involve an accident, there was no erratic driving, VanDynHoven had completed a two-month treatment program and it had been over nine years since his last drunk driving arrest.

¶4 The court imposed the maximum sentence based on VanDynHoven's high blood alcohol level, his prior record, his failure to adequately address his alcohol problems in the community, his statement that he was not interested in treatment and does not believe he needs treatment, the need

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

to protect the public and punishment. The court described VanDynHoven as an unrehabilitated alcoholic who continues to drink and drive and be a danger to the public because rehabilitation was tried in the community and VanDynHoven did not avail himself of opportunities for treatment. The court concluded a lesser sentence would outrageously depreciate the seriousness of a fifth offense drunk driving conviction. The court made VanDynHoven eligible for the Earned Release Program after serving eighteen months of confinement, reasoning that it would give VanDynHoven motivation to complete the program and cut the confinement time by one year.

¶5 VanDynHoven filed a postconviction motion to reduce the sentence. He testified he told the presentence report author that he would be willing to go to any treatment to help with his sobriety. He said the reason he checked "No" on the questionnaire on the issue of interest in further treatment was because a counselor did not recommend further treatment. Despite this, he testified he was planning on going to further treatment once his workload lightened. He asked the court to eliminate the eighteen-month waiting period before he would become eligible for the Earned Release Program because he could not get into the program after eighteen months, but would only be put on the waiting list at that time. He also argued the sentence was unduly harsh because this was a run-of-the-mill case with no aggravating circumstances such as erratic driving or an accident. He asked the court to modify the sentence because the court relied on inaccurate information about VanDynHoven's interest in treatment and the court gave too much weight to that factor.

¶6 The trial court denied the postconviction motion, noting that VanDynHoven had every opportunity at the sentencing hearing to tell the court about his intentions to attend Alcoholics Anonymous meetings. The court quoted

from the PSI, "The defendant reported he is not interested in treatment and noted that if he watches himself and doesn't have money problems he can remain sober." The court then noted that VanDynHoven had just testified about his debt problems. The court rejected VanDynHoven's claim that he intended to get further therapy and only checked "No" on the form because a counselor did not recommend further treatment. The court also concluded VanDynHoven failed to prove that he would not get into the Challenge Incarceration Program or Earned Release Program at an appropriate time. Nonetheless, the court changed the eligibility for these programs to fifteen months.

¶7 VanDynHoven has not established that the sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A fifth-offense drunk driver with a 0.273% blood alcohol concentration constitutes a serious aggravating circumstance. When coupled with VanDynHoven's statement that he was not interested in treatment and the court's rejection of his belated, self-serving explanation for that answer, imposing the maximum sentence was fully justified.

¶8 VanDynHoven has not established by clear and convincing evidence that the court relied on inaccurate information when it imposed the sentence. *See* ***State v. Harris***, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409. Whether VanDynHoven was amenable to further treatment depends on his credibility. As the arbiter of his credibility, *see* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979), the court could reasonably find that VanDynHoven was merely making excuses and was not seeking treatment at the time of sentencing. VanDynHoven also failed to establish that the court gave too much consideration to his attitude about treatment. The weight given to each factor is left to the sentencing court's discretion. ***Ocanas***, 70 Wis. 2d at 185.

VanDynHoven's attitude was relevant to his character, but it was not the primary reason for the sentence. The court focused on VanDynHoven's extreme level of intoxication and the need to protect the public.

¶9 Finally, the court properly partially denied the "new factor" motion because VanDynHoven failed to prove by clear and convincing evidence that he would not be promptly admitted to the Earned Release Program after he served fifteen months in prison. *See* ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. The court indicated it had experience with people who have gotten into the program relatively quickly. VanDynHoven's counsel conceded, "That's correct. It could be. It could be right away and it could be in six months to a year." The court faulted VanDynHoven for presenting no evidence from the Department of Corrections to establish the timeframe. VanDynHoven's speculation does not constitute proof by clear and convincing evidence.

By the Court.—Judgment and order affirmed.

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