COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP646-CR **Cir. Ct. No. 2011CF73**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEOPOLDO R. SALAS GAYTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and ELLEN R. BROSTROM, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Leopoldo R. Salas Gayton appeals the judgment entered after he pled no contest to homicide by intoxicated use of a car and operating without a valid license, causing death. *See* WIS. STAT. §§ 940.09(1)(a),

939.50(3)(d), 343.05(5)(b) & 939.51(3)(a).[1] He also appeals the circuit court's denial of his motion for postconviction relief. He argues here that the circuit court: (1) did not consider the proper factors in connection with his sentence; and (2) did not sufficiently explain why he should pay a DNA surcharge, *see* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. We affirm.

I.

¶2 Gayton killed thirty-four year old, Corrie Damske, when he drove his car onto the freeway going the wrong direction in order to evade police. Gayton did not have a driver's license, and had been convicted two other times for driving without a license. Gayton admitted that he had drank at least twelve beers while he was driving, tossing each empty can out the window. Gayton drove the wrong way for at least a mile on the freeway, first scraping another car that had pulled onto the shoulder to avoid a head-on crash, before crashing head-on into Damske. Gayton had immigrated illegally to the United States from Mexico almost fourteen years earlier.

¶3 At the sentencing hearing, two people spoke on behalf of the victim. First, Damske's mother, Sharon Huala, told the circuit court:

- about the "pain and agony in losing a child especially in a tragic manner as this one."
- "It is tearing the very heart out of myself and my family and has left us with an absence so profound that nothing again in our lives would

[1] The Honorable Dennis Cimpl handled the trial and sentencing. The Honorable Ellen R. Brostrom decided the postconviction motion.

ever be able to replace the emptiness and unimaginable loss that we feel."

- That "Mr. Gayton … has taken a mother from her young daughter" and "It has been devastating for [Damske's ten-year-old] little girl."

- "Your Honor, I know that there is nothing that will ever bring my daughter back. But I do ask that the judgment would be a fair one, and one that will perhaps give others pause before they get behind the wheel. Mr. Gayton made a choice, a choice to live for years in this country without citizenship, a choice to drive without a valid license after being stopped twice by police, a choice again to [e]lude police by not stopping, driving drunk and going the wrong way on the expressway. And all of these choices that he made ultimately claimed the life of my daughter."

- "[O]ur family ha[s] been given a life sentence."

¶4 Damske's best friend, Michele Friedman, told the circuit court:

- "[A]s much as her death hurts me, my pain is nothing compared to the tremendous sorrow by her daughter, [] a daughter who will never see her mother again."

- "The image of [Damske] taking her last painful breath on I-94 crushed in her car will haunt us all forever."

- "[T]he lives of everyone who loved [Damske] were irreparably damaged by the selfish, irresponsible [and] illegal act of the defendant."

- "[W]hat does a man who killed her in exchange for easy drink and selfish and irresponsible conduct deserve?"

- "Killing [Damske] was not his first act of lawlessness. It was just the one of a series of times for which he was caught. He had no intentions of complying with any of the laws in this country, and that was proven when his feet hit U.S. soil as an illegal immigrant. At the time of this homicide, he had no license, no insurance and no intention of respecting the law that governs our country."

- You "have the power in this case to not only issue a stiff sentence but also make a strong statement about the tragedy and pain caused by drinking and driving. Again, you are the voice for the dead, but you are not only [Damke's] voice, you are the voice for the thousands of people that lost their lives to drinking and driving every year."

- "Please give him every hour of prison he deserves and let him sit behind bars for as long as the law allows. To give a sentence of anything less than the maximum would be a horrible injustice to those who loved [Damske] so dearly, especially her daughter."

¶5 Patricia Laffrenier, the mother of Gayton's girlfriend, spoke on his behalf, telling the circuit court that:

- "He is a good man. He's good to people. He helps people out."

- He changed her daughter. "She got saved. He got her into church. He was into church, and he helps people."

- Gayton's "relapse[] after three and a half years of sobriety" happened because of a disagreement with his girlfriend, with whom he was "madly, passionately in love."

¶6 Gayton's lawyer told the circuit court:

- That Gayton was sincerely "deeply remorseful."
- He has "an almost completely clean criminal record."
- "[H]e has always worked and contributed positively to the community."
- "[H]e has never received or applied for any help from the government, government aide or any other community resources."
- After using drugs and alcohol, he "found sobriety for a long period of time prior to this incident. He told me how he is dedicated his life to following God and ultimately helping others in the community by finding peace, spirituality and sobriety."
- "He became very involved in a local program to help others get away from the life of drinking and drugs."
- "He has become extremely involved in his local church, and he continues to have support from the people in the community who know him best."

¶7 The circuit court listed the goals of Gayton's sentence:

- "One of the goals is restitution. In this case, that was very easy. As in most cases, it's very easy. It's $11,075."

- "The other goals are punishment, deterrence. That means sending a message" "that you just can't get behind a wheel of [a] car, 4,000 pounds, a 4,000 pound weapon, if you're intoxicated without suffering consequences."

- "Then the last goal is rehabilitation, and that's somewhat hampered" because "I don't know if they are going to deport you."

¶8 Next, the circuit court looked at required sentencing factors. First, it talked about "the serious nature of the crime":

> A young woman is dead, 34 years old, beautiful, out on the first day of the year driving. Minding her own business and tragically taken away from us.
>
> You were driving drunk the wrong way on the freeway. There was some indication that you were afraid that you were going [to] be [] stopped for driving.
>
> ….
>
> The fact that you didn't have a driver's license entered into it, the fact that you were driving the wrong way, the fact that you were speeding, the fact you went a mile, the fact that [you] didn't know, didn't even know that you were driving, that enters into it, because that makes what you did that much worse.
>
> And you were drunk. … you had a couple of beers at home, and you had 12 beers in your car. You were driving around throwing beer cans out of the car.
>
> ….
>
> Look around in the courtroom, four televisions. We've got four major television stations, four cameras in this courtroom, because the community wants to know what happens to you. They want to know what happens to somebody who takes a car, a weapon, and drives drunk and kills somebody. That's the message that I have to get out to the community.

> … [I]f I had one wish, what I would ask is that the television stations say, you drive drunk, first time, second time, third time, fourth time, fifth time, you go to prison.

¶9 The circuit court addressed deterrence noting that it hoped the sentence would make "everybody in this community" stop, think, and pause before "getting behind a wheel" after drinking. The circuit court then addressed the needs of the community: "I've seen too many young people killed. Too many parents have come here and said they're tired of burying my kids." It found that Gayton did not have "intent to kill" but that he did have "intent to drive drunk." "He didn't set out to kill somebody that day, but [] did set out to drive drunk."

¶10 Finally, the circuit court focused on Gayton:

- "[Y]ou seem to be a pretty de[]cent guy."
- "You're from the nation of Mexico. You've got a fifth grade education. You're in this country for 13 and a half years, Milwaukee for two years. You've got three kids in Mexico."
- "You've apparently got a temper."
- "You've got sporadic employment, trying to better yourself. That's why you're in this country. Although, you're here illegally, it's a factor, a minor factor, but it goes to your character."
- You admit you have "a drinking problem" but you are "able to stop drinking for long periods of time intermittently."
- Your girlfriend "said you've changed and how you were good to her and her kids. He showed me a whole new world, a world I never knew. That world is his world, a world of God."

- A disagreement with your girlfriend caused you to drink.
- "You accepted responsibility. You didn't put this family through the trial, of looking at the gruesome autopsy pictures, of sitting here in this courtroom for a week listening to people describe what happened to their daughter and friend."
- Your remorse is "genuine. I see that."

¶11 The circuit court then weighed all the factors and found that Gayton had to go to prison so as to not "unduly depreciate the seriousness of what he did." "The fact that you took remorse, that you showed remorse, the fact that you've accepted responsibility does not outweigh what you did and in the matter that you did it."

¶12 When discussing rules of extended supervision, the circuit court ordered Gayton to "cooperate and participate with alcohol and drug assessment. Follow through with the recommended treatment," noting that Gayton "could have done that on his own, even as an illegal in this country [as] [t]here's plenty of places on the south side of Milwaukee that cater to Latinos that would help them with their drinking problems. He could have done it on his own. He didn't."

¶13 The circuit court ruled that Gayton would "give a DNA test, be responsible for all of the costs of this action, including a DNA surcharge. That is part of the punishment, part of the rehabilitation. The restitution will come first and then the costs."

¶14 The circuit court then sentenced Gayton to fifteen years of initial confinement followed by seven years of extended supervision on the homicide count and nine months concurrent on the driving without a license count.

II.

A. *Sentencing*.

¶15 Gayton argues the circuit court erroneously exercised its sentencing discretion by not: (1) giving a sufficient reason for imposing the maximum term of fifteen years' initial confinement; and (2) improperly relying on Gayton's alien status. We reject both contentions.

1. Reasons for fifteen-year initial confinement.

¶16 Sentencing is vested in the circuit court's discretion and it may give the various sentencing factors the weight it deems appropriate. *See* ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 750, 632 N.W.2d 112, 116. The circuit court must consider three primary factors: (1) the seriousness of the crime; (2) the defendant's character; and (3) the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 274, 182 N.W.2d 512, 518 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d 535, 565–566, 678 N.W.2d 197, 211. The circuit court must also consider victim statements "pertaining to the economic, physical and psychological effect of the crime." WIS. STAT. § 950.04(1v)(pm). "A statement from the victims about how the crime affected their lives is relevant to one of the considerations that a judge must take into account at sentencing—the gravity of the crime." ***State v. Voss***, 205 Wis. 2d 586, 595, 556 N.W.2d 433, 436 (Ct. App. 1996).

¶17 As we have seen, the circuit court explained why it imposed the fifteen-year maximum term of initial confinement. It found the maximum necessary because of the serious nature of the crime, the need to punish Gayton, and to deter others from getting behind the wheel drunk by sending a message to

others about the consequences of driving drunk. The circuit court also considered the statements of those who spoke for the victim. The circuit court applied the material factors in a reasonable way and it did not erroneously exercise its discretion.

2. Alien status.

¶18 A sentencing court may not base a sentence on a defendant's race, nationality or color. *See* ***United States v. Gomez***, 797 F.2d 417, 419 (7th Cir. 1986). A circuit court may, however, consider immigration status, *see* ***United States v. Flores-Olague***, 717 F.3d 526, 535 (7th Cir. 2013), as long as the circuit court does not make "unreasonably inflammatory, provocative, or disparaging" comments. ***United States v. Tovar-Pina***, 713 F.3d 1143, 1148 (7th Cir. 2013). In addition, the circuit court "may not impose a more severe sentence than he would have otherwise based on unfounded assumptions regarding an individual's immigration status or on his personal views of immigration policy." ***United States v. Velasquez Velasquez***, 524 F.3d 1248, 1253 (11th Cir. 2008).

¶19 As we have seen, the circuit court did not improperly rely on Gayton's status as an alien. Rather, the circuit court noted that Gayton's choice to come to the United States illegally was a "minor factor" that went to his character. The circuit court also noted that resources were available to help Gayton with his drinking problem. This was fair comment because, as the circuit court noted, Gayton's willingness to violate this country's immigration laws was a reflection of his character, although, as the circuit court also opined, it was nowhere near dispositive.

B. *DNA Surcharge.*

¶20 Gayton claims the circuit court's reason for imposing the DNA surcharge is insufficient. We disagree.

¶21 WISCONSIN STAT. § 973.046(1g) gives the circuit court the discretion to make a defendant sentenced on any "felony conviction" pay a "deoxyribonucleic acid analysis surcharge of $250." In ***Cherry***, we noted that this requires the circuit court to "do something more than stating it is imposing the DNA surcharge simply because it can." ***Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 395. To properly exercise its discretion, the circuit court must: (1) "consider any and all factors pertinent to the case"; (2) "set forth in the record the factors it considered"; and (3) state "the rationale underlying its decision for imposing the DNA surcharge." ***Id.***, 2008 WI App 80, ¶9, 312 Wis. 2d at 208–209, 752 N.W.2d at 395. ***Cherry*** set out the non-exclusive list of factors that, if appropriate, would inform the circuit court's discretion:

> (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

Id., 2008 WI App 80, ¶10, 312 Wis. 2d at 208–209, 752 N.W.2d at 396.

¶22 As we have seen, the circuit court ordered Gayton to pay the DNA surcharge as a part of his punishment and rehabilitation. Gayton never objected at sentencing that he could not pay either the restitution or the surcharge; thus the circuit court did not have an opportunity to explore the issue further. Moreover, the circuit court did note that Gayton had "sporadic employment," and Gayton's trial lawyer told the circuit court that Gayton "has always worked." Additionally,

Gayton's trial lawyer noted that Gayton was able to be self-sufficient for himself and presumably his family when he added that Gayton "has never received or applied for any help from the government, government aide or any other community resources." Thus, this case is akin to ***State v. Ziller***, 2011 WI App 164, ¶11, 338 Wis. 2d 151, 157–158, 807 N.W.2d 241, 245, where, in addition to considering the appropriate factors, the circuit court noted that Ziller "had previously been employed." This, as ***Ziller*** also opined, was sufficient to "indicate[] that he had the ability to compensate [the] victims." ***Id.***, 2011 WI App 164, ¶11, 338 Wis. 2d at 158, 807 N.W.2d at 245. Further, Gayton's period of extended supervision is in the future and it is speculative that once he is released he could not get any work and thus would be unable to pay the surcharge. The circuit court considered the appropriate applicable factors as the case was presented to it and did not erroneously exercise its discretion in directing that Gayton pay a DNA surcharge.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

¶23 KESSLER, J. (*concurring*). I write separately to call attention to an issue we are increasingly seeing in this court—appeals claiming error in sentencing based on the sentencing court's multiple referrals to a defendant's race, ethnicity, or immigration status. Based on the entirety of the sentencing transcript, I agree that the sentencing court here did not improperly rely upon Gayton's immigration status when rendering its decision; however, the court referred to Gayton's illegal status multiple times, which could lead Gayton to reasonably believe that his sentence was unduly affected by his immigration status.

¶24 While a thorough reading of the sentencing transcript indicates that the sentencing court considered the proper sentencing factors, focusing particularly on deterrence, it was not wholly unreasonable for Gayton to believe the court considered his immigration status a significant negative factor when imposing his sentence.

¶25 Sentencing courts should be cognizant that defendants may perceive judicial impropriety in sentencing when multiple comments based on race, ethnicity or immigration status are made. When the perception of bias reasonably exists, the perception of fairness suffers, to the detriment of the judicial system as a whole.