COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP170-CR **Cir. Ct. No. 2013CM1509**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAROD D. WEAVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed and cause remanded with directions.*

¶1 STARK, P.J.[1] Sharod Weaver appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI),

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

third offense, and an order denying his motion for postconviction relief. Weaver argues the circuit court erroneously exercised its discretion[2] when it disregarded the OWI sentencing guidelines on the mistaken assumption that they were not based on the four primary sentencing factors. We affirm.

BACKGROUND

¶2 Weaver was charged with third-offense OWI and disorderly conduct. The complaint was later amended to add one count of operating with a prohibited alcohol concentration as a third offense. It alleged that on December 6, 2013, officer Ben Hundt observed a red GMC SUV cross the centerline "for more than a second" and proceed down the two westbound lanes, "straddling the white lane dividing strips." Hundt stopped the vehicle and identified Sharod Weaver as the driver. Hundt smelled alcohol on Weaver's breath and observed that Weaver's eyes were red and glassy and his speech was slurred.

¶3 Hundt asked Weaver to perform standard field sobriety tests. Given the cold temperatures, Hundt offered to administer the tests at the police station, but Weaver replied, "Fuck that." Hundt first administered the horizontal gaze nystagmus test (HGN). Weaver repeatedly interrupted Hundt and yelled, "Hurry up, bitch" while Hundt was explaining the test to Weaver. During the test, Hundt observed "all six clues on the HGN," but he had to stop testing due to Weaver yelling "Man, hurry the fuck up!" and "How fucking long is this?" Hundt next attempted to administer the "walk and turn test." Weaver "refused to stand in the

[2] Weaver uses the phrase "misuse of discretion"; however, since 1992, Wisconsin appellate courts have used "erroneous exercise of discretion" to avoid unjustified negative connotations. *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992).

instructional stance" and repeatedly called Hundt a "racist bitch." Hundt determined Weaver was unwilling to complete further testing and arrested Weaver for OWI.

¶4 Hundt transported Weaver to a hospital for a blood draw. At the hospital, Sergeant O'Malley attempted to speak with Weaver, but Weaver "began to scream" and stated, "Suck my dick, bitch!" Weaver continued to call the officers "racist, faggots, and 'his bitches'" and also stated, "I'm going to get you. You're going to be my priority." Weaver further told the officers, "I'll kill you three times over" and "I swear if I see one of you off-duty by yourself, nothing will save ya'll." When a laboratory technician attempted to speak with Weaver about the blood draw, Weaver stated, "Suck my dick, bitch!"

¶5 At some point, Weaver asked to use the restroom; however, due to Weaver's threats and "aggressive behavior," O'Malley felt it was unsafe. When back in the squad car Weaver began to spit at the officers through the screen in the squad car. Even after the plastic partition of the squad car was closed, Weaver continued to spit at the partition. A report from the State Laboratory of Hygiene later showed Weaver had a blood ethanol content of .240 g/100mL.

¶6 On the day of trial, Weaver pled guilty to third-offense OWI. The court dismissed the remaining two counts.

¶7 At sentencing, the court noted the local OWI guidelines, which in Weaver's case provided for a jail sentence of 110 days, or 140 days if the court

followed the aggravated guidelines.[3] However, the court ultimately departed from the guidelines in imposing Weaver's jail sentence. In particular, the court indicated that the guidelines "don't take into account the four primary factors of sentencing: the seriousness of the offense, the need to protect the public, the offender's rehabilitative needs, and the character of the defendant." The court further explained, "based upon the probable cause portion of the Criminal Complaint and the Amended Criminal Complaint ... I should maybe take those [factors] into account." After considering the four factors, the court sentenced Weaver to the statutory maximum of one year in jail. The court followed the guidelines in imposing $3,014[4] in fines, costs, and surcharges, plus an additional $32 charge for the blood draw; revoking Weaver's license for thirty months; and requiring an ignition interlock device to be installed in Weaver's vehicle for eighteen months once he is eligible to drive again.

¶8 Weaver filed a motion for resentencing or, in the alternative, for modification of his jail sentence to that provided by the guidelines, or to a six-month jail term. The circuit court denied the motion, and Weaver now appeals.

DISCUSSION

[3] WISCONSIN STAT. § 346.65(2m)(a) authorizes the chief judge in each judicial district to adopt these guidelines, which are to take into consideration aggravating and mitigating factors. The current version of the Tenth Judicial District OWI Guidelines is available on the Wisconsin Court System website at http://www.wicourts.gov/publications/fees/docs/d10owi.pdf (last updated Jan. 1, 2014).

[4] The circuit court ordered Weaver to pay the amount of $3,014. This is the amount provided by the guidelines for fines, surcharges and costs. The judgment of conviction in the record provides for fines, forfeitures and costs totaling $2,996. Therefore we remand the cause to the circuit court to determine if there is an inconsistency and, if necessary, correct the amount due for fines, surcharges and costs.

¶9 Circuit courts have significant discretion in fashioning a sentence. ***State v. Jorgenson***, 2003 WI 105, ¶22, 264 Wis. 2d 157, 667 N.W.2d 318. We will not disturb a sentence unless the court erroneously exercised its discretion. ***State v. Travis***, 2013 WI 38, ¶16, 347 Wis. 2d 142, 832 N.W.2d 491. A court erroneously exercises its discretion "when the exercise of discretion is based on an error of law." ***State v. Davis***, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62.

¶10 Weaver claims the circuit court erred as a matter of law by disregarding the guidelines on the mistaken assumption that the guidelines were not based on what the court considered to be the four primary sentencing factors—the seriousness of the offense, the need to protect the public, the rehabilitative needs of the defendant, and the character of the defendant. He also claims by disregarding the guidelines the court failed to consider other important sentencing factors such as deterrence and avoidance of sentencing disparity. Weaver acknowledges that the court may properly disregard the guidelines, and that guidelines are not mandatory. *See* ***State v. Smart***, 2002 WI App 240, ¶15, 257 Wis. 2d 713, 652 N.W.2d 429. However, he argues that the circuit court cannot disregard the guidelines based on an erroneous view of the law.

¶11 The parties dispute the extent to which the guidelines take into consideration the primary sentencing factors. Even assuming without deciding they do so, the court did not erroneously exercise its discretion in refusing to follow them in this case. Weaver's premise that the court misunderstood the guidelines and their relationship to the primary sentencing factors is not supported by a review of the record. Rather, the record reflects that the court acknowledged the guidelines but determined they were not appropriate in this case.

¶12 The court began Weaver's sentencing hearing by reviewing the guidelines but then noted, "You know, we have become almost slavish to the guidelines. And we forget that the guidelines are the guidelines. There's a 45 day minimum and one-year maximum for this offense." The court further explained:

> As I mentioned a few moments ago, when we impose OWI sentences, they're usually a rote endeavor. We follow the guidelines. Everybody is happy with the guidelines. But we don't consider the four primary sentencing factors of the seriousness of the offense, the need to protect the public, the rehabilitative needs of the offender, and the character of the offender.
>
> I think as I read the probable cause portion of the Criminal Complaint and the Amended Criminal Complaint, *I have to consider those four things in this particular circumstance and not be a slave to the guidelines*.

(Emphasis added.)

¶13 The circuit court discussed its justification for not following the guidelines. Regarding the need to protect the public, the court stated, "I, not only have to consider the regular 110 days [in the guidelines] that we put in, but I need to address the accompanying behavior."

> To say that ... Weaver was uncooperative both physically and verbally with the law enforcement officers that morning is an understatement. He used exceedingly foul and descriptive language, not that that's in and of itself a crime. He certainly endangered law enforcement officers and made their job more difficult in that he was physically and verbally uncooperative. He spit at law enforcement officers, according to the probable cause portion of the Criminal Complaint. He wanted to fight with one or more officers. He threatened at least obliquely the law enforcement officers all in connection with a—what I will call a simple drunk driving stop.

The court described this conduct as "remarkable in an alarming way."

¶14 The court also considered Weaver's character. In particular, the court looked at Weaver's "extensive criminal record."

> Going down the list, again, he's got a disorderly conduct, a misdemeanor theft, felony delivery of cocaine, resisting or obstructing, a felony escape, a felony failure to support, a felony false imprisonment, a felony substantial battery, another resisting and obstructing, another resisting obstructing, and, finally, an operating after revocation, which isn't any—which isn't of any significance. … These are the kinds of prior convictions that are somewhat related or they mimic or I should say Mr. Weaver's conduct the early morning hours of December 6th, 2013, mimics this kind of violent and dangerous behavior.

The court concluded, in light of the "aggravating circumstances" discussed on the record, including Weaver's blood alcohol level of .240, "for the purposes of an OWI conviction, I think it's a serious OWI conviction."

¶15 Clearly, the circuit court did not believe the guidelines adequately addressed the nature of the offense or Weaver's conduct after the traffic stop.[5] In further support of this conclusion, during the postconviction hearing, the circuit court commented that it did not know whether the guidelines took into consideration the sentencing factors; nonetheless, the circuit court explained:

> whether or not the—the guidelines take into account the need to protect the public, the person's rehabilitative needs, the seriousness of the offense, and, also, a person's character, all those things that are … in the guidelines are trumped by the observations I made on the day of sentencing. I'm not bound by guidelines.

[5] Neither party argues that the circuit court improperly considered Weaver's conduct related to the disorderly conduct charge. Under ***State v. Frey***, 2012 WI 99, ¶5, 343 Wis. 2d 358, 817 N.W.2d 436, a circuit court "may consider the dismissed charges in imposing a sentence."

Contrary to Weaver's claims, the record clearly indicates the court's decision to sentence Weaver to the statutory maximum of one year in jail was not based on a mistaken belief that the guidelines did not account for the primary sentencing factors. Rather, circumstances in this case—as in particular Weaver's unruly conduct—warranted a departure from those guidelines. The guidelines "are not mandatory, and a court may disregard them if it so chooses." ***Smart***, 257 Wis. 2d 713, ¶15. Here, the circuit court properly did so.[6]

¶16 Weaver further argues that by disregarding the guidelines, the court "failed to take into account the important sentencing purpose of imposing similar sentences for similar crimes." Citing to ***Jorgenson***, 264 Wis. 2d 157, ¶42, Weaver describes that purpose as eliminating disparity at sentencing. While that may be a purpose of the guidelines, the court here decided Weaver was not similarly situated to other third-offense OWI defendants. The court noted "this is an unusual and aggravated OWI third." The court was free to make protecting the public its primary goal in fashioning Weaver's sentence. *See* ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20 ("[The circuit court] must

[6] While neither party raised the argument, the supreme court in ***State v. Jorgenson***, 2003 WI 105, 264 Wis. 2d 157, 667 N.W.2d 318, concluded that "under the plain language of [WIS. STAT.] § 346.65(2m)(a) [(1999-2000)], the sentencing guidelines apply only to WIS. STAT. § 346.63(1)(b), not WIS. STAT. § 346.63(1)(a)." ***Id.***, ¶2. Weaver was convicted of violating § 346.63(1)(a); accordingly, following ***Jorgenson***, the guidelines did not apply to Weaver's case. While the court in ***Jorgenson*** further concluded "reference to the sentencing guidelines in a § 346.63(1)(a) case does not constitute error," ***id.***, it also noted, "[s]ince the legislature specified that guidelines were to be established for use in sentencing under § 346.63(1)(b), not § 346.63(1)(a), circuit courts should not apply the guidelines by rote to (1)(a) convictions." ***Id.***, ¶27. The court likewise explained, "because the legislature has specifically delineated the offense to which the guidelines apply, it is inappropriate for a circuit court to simply apply the guidelines as the sole basis for its sentence in a § 346.63(1)(a) case." ***Id.*** Under ***Jorgenson***, the circuit court was correct to look beyond the guidelines to the primary sentencing factors.

identify the general objectives of greatest importance, which may vary from case to case.").

¶17 We remand the cause to the trial court to determine if there is an inconsistency and, if necessary, correct the amount due for fines, surcharges and costs.

By the Court.—Judgment and order affirmed and cause remanded with directions.

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