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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

Case No. 2010AP387-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY K. NIELSEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POSTCONVICTION RELIEF,
ENTERED IN THE CIRCUIT COURT FOR RACINE
COUNTY, THE HONORABLE FAYE M. FLANCHER,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

The State of Wisconsin, plaintiff-respondent, does not request oral argument or publication of this Court's decision and opinion. The briefs-in-chief fully discuss the single issue raised on appeal and fully develop the relevant theories and legal authorities on each side. Well-

established rules of law compel rejection of defendant-appellant Gregory K. Nielsen's challenge to the circuit court's exercise of sentencing discretion.

ARGUMENT

THIS COURT SHOULD UPHOLD THE CIRCUIT COURT'S EXERCISE OF SENTENCING DISCRETION.

Nielsen appeals from a judgment and postconviction order entered after he pleaded no contest to a charge of homicide by intoxicated use of a vehicle (18; 39). *See also* Wis. Stat. § 940.09(1)(a). As part of the plea agreement, the circuit court dismissed a habitual criminality enhancer on this charge (37:8). Also as part of the plea agreement, the circuit court dismissed and read-in an additional charge of resisting or obstructing an officer, and dismissed outright a charge of homicide by use of a vehicle while having a prohibited alcohol concentration (18; 37:8-9).

Nielsen faced a maximum twenty-five-year sentence on the homicide by intoxicated use of a vehicle charge (16:2). *See also* Wis. Stat. §§ 940.09(1)(a), and 939.50(3)(d). He received a fifteen-year sentence, bifurcated into nine years of confinement and six years of extended supervision (18).

Nielsen complains that the circuit court failed to adequately explain its choice of sentences. At a postconviction hearing, the circuit court denied Nielsen's postconviction motion for sentence modification (25; 40:6-11). Nielsen's arguments should fare no better in this Court, for the reasons presented below.

Sentencing is left to the discretion of the circuit court, and this Court follows a strong policy of non-interference with a circuit court's exercise of that discretion. *State v. Hall*, 2002 WI App 108, ¶ 9, 255 Wis. 2d 662, 648 N.W.2d 41.

A sentencing court must consider the gravity and nature of the offense, the character and rehabilitative needs of the defendant, and the need for public protection. *Id.* ¶ 7. The court may also consider other relevant factors:

[T]he defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; and, the needs and rights of the public.

State v. Thompson, 172 Wis. 2d 257, 264-65, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted).

A circuit court properly exercises its sentencing discretion when it considers the facts of record in light of the primary and secondary sentencing factors and reasons its way to a rational, legally sound conclusion. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Stated otherwise, “a good sentence is one which can be reasonably explained.” *Id.* at 282 (quoted with approval in *Hall*, 255 Wis. 2d 662, ¶ 5). *See also State v. Gallion*, 2004 WI 42, ¶ 49, 270 Wis. 2d 535, 678 N.W.2d 197 (requiring circuit courts to explain “the general range of the sentence imposed.”)

The explanation required by *Gallion*, “is not intended to be a semantic trap for circuit courts.” *Id.* ¶ 49. The requirement “is also not intended to be a call for more

‘magic words.’” *Id.* Indeed, the supreme court appears to have anticipated just the sort of argument that Nielsen makes on appeal. The *Gallion* court stated:

We are mindful that the exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed.

Gallion, 270 Wis. 2d 535, ¶ 49.

Notwithstanding *Gallion*’s rejection of the idea that a circuit court must explain the particular sentence chosen, as opposed to the “general range” of the sentence imposed, other defendants have made arguments similar to Nielsen’s. They have not been successful:

Klubertanz asserts that *Gallion* requires that the circuit court must explain why it imposed three years of imprisonment. The circuit court did explain why it imposed a term of imprisonment rather than probation, and the term it chose was relatively short. *Gallion* does not require that it explain why it imposed three years as opposed to one or two.

State v. Klubertanz, 2006 WI App 71, ¶ 22, 291 Wis. 2d 751, 713 N.W.2d 116.

Distilled to its core, Ziegler’s argument that the trial court did not explain the reasons for the ten-and-one-half-year period of confinement is really one that augurs for mathematical precision in sentencing, a proposition that *Gallion* expressly disavows. Instead, *Gallion* requires “an explanation for the general range of the sentence imposed.” *Gallion*, 270 Wis. 2d 535, ¶ 49, 678 N.W.2d 197. The trial court’s sentencing remarks well satisfy this requirement.

State v. Ziegler, 2006 WI App 49, ¶ 34, 289 Wis. 2d 594, 712 N.W.2d 76.

We also reject Russ' implicit argument that a sentencing court must explain with mathematical precision why it chose the specific number of years. The court did not have to explain why twelve years would not do and why fifteen would.

State v. Russ, 2006 WI App 9, ¶ 17, 289 Wis. 2d 65, 709 N.W.2d 483.

We understand [Fisher] to assert that the court should have explained with specificity the comparative weight it ascribed to each factor and exactly how these factors translated into a specific number of years.

We hold that Fisher is not entitled to this degree of specificity.

State v. Fisher, 2005 WI App 175, ¶¶ 21-22, 285 Wis. 2d 433, 702 N.W.2d 56.

The circuit court's explanation for Nielsen's sentence easily passes muster. The court considered the primary sentencing factors and identified with particularity the reasons why Nielsen received the sentence imposed.

With respect to the gravity of Nielsen's offense of conviction, the circuit court noted:

I fully understand that from the perspective of the victim's family that it wouldn't be unreasonable to wish that there was a death penalty for this kind of a case. You lost forever a son, a brother, a cousin, and so those sentiments are understandable, and from the perspective of the defendant's family I fully appreciate pleas for some kind of leniency.

I want everyone to know, most specifically Mr. Nielsen, that this is a kind of sentencing that I spend a tremendous amount of time considering, because I have to be satisfied that I am not only following the law, but that when I go to bed I'm satisfied that I have made a decision which I'm comfortable with.

So in addition to reading all these materials, I've listened carefully to statements today, and believe me, please be assured that I have spent a considerable amount of time thinking about this case and what would be fair and appropriate under all the circumstances.

There's no doubt that this was a horrible, horrible accident and Mr. Nielsen, it was an accident that should have been prevented. You were 20 years old at the time of this accident. You had not attained the legal age of drinking and yet you had a .13 blood alcohol concentration.

Quite honestly, whether you had a rolling stop or whether you completely blew the stop sign doesn't matter. It doesn't matter, because the end result is the same, and a young man from a loving family was killed as a result of your driving that evening.

(37:37-38).

The circuit court then considered Nielsen's character and found that, on balance, it was less than impressive. On the plus (or at least neutral) side of the equation, the court noted that Nielsen has supportive, law-abiding parents; that Nielsen has a high school equivalency degree; that he has some employment history; that he has been diagnosed with a bipolar condition; and that by virtue of his apology to the victim's family during

his sentencing allocution, he appeared “sincerely remorseful for your actions that evening.” (37:41).¹

The circuit court also noted Nielsen’s many negative character issues. The court noted that between 2006 and the date of the accident, Nielsen’s under-aged drinking had accelerated (37:40). It noted that Nielsen initially was not honest with police either about the fact that he had been drinking on the night in question, or that he had a passenger in the vehicle (37:38). The court noted Nielsen’s adult criminal record, which included convictions for battery and burglary (37:38-39). The court noted Nielsen’s history of untruthfulness while on supervision (37:39-40).

The circuit court also focused on the need for public protection. The court sensibly concluded that “it is imperative that our community be protected from drunk drivers, especially under-aged drunk drivers.” (37:41).

The court considered Nielsen’s rehabilitative needs. The judge told Nielsen that

¹ At the postconviction hearing, the circuit court reevaluated its take on Nielsen’s sincerity, noting:

as I gave my [sentencing] decision, I literally saw Mr. Nielsen pretty much decompensate before my eyes and that same respectful, remorseful demeanor quickly changed. In the end Mr. Nielsen leaves the Court stating, quote: Man, that’s fucked up, end quote. . . .

Hindsight is 20/20 and the only thing that I question now, as I review the sentencing transcript, is truly whether anything Mr. Nielsen said that day to the victim’s family was indeed heartfelt at all, whether indeed he is remorseful at all.

(40:9-10).

in the past you have minimized your alcohol use and abuse, and I think you need treatment for that and you have to understand, Mr. Nielsen, that the fact that you have been incarcerated now for a significant period of time and the fact that you haven't been using alcohol doesn't mean that you don't need treatment.

(37:41).

The court considered the need for deterrence. “It is imperative,” the court stated, “that this Court does send a message to under-aged people who are thinking they are going to get into a car and drive without any culpability” (37:42).

Thus, the circuit court thoroughly examined the relevant sentencing factors. The court provided a complete explanation for the sentences it imposed. It discharged its requirements under Wisconsin sentencing law.

Nielsen complains that the trial court “did not explain in any terms how it arrived at nine years of initial confinement,” and that the court “did not explain how the sentence promoted the court’s sentencing objectives” (Nielsen Brief at 9-10).

Not true. The State respectfully submits that Nielsen simply refuses to see that which he does not want to see. As the circuit court’s sentencing comments made clear, Nielsen received a twenty-five-year sentence because he has a history of criminal behavior and has failed at the corresponding opportunities for rehabilitation, and because he drove drunk while underage and killed someone—the type of behavior that poses an unreasonable threat to the health and safety of the citizens in his community. The sentence imposed appears wholly justified by Nielsen’s dangerous, criminal behavior.

CONCLUSION

The judgment of conviction should be affirmed.

Dated this 11th day of August, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,799 words.

Dated this 11th day of August, 2010.

Mark A. Neuser
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of August, 2010.

Mark A. Neuser
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