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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2015AP000170CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAROD D. WEAVER,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and
Denial of Postconviction Motion
Entered in the Eau Claire County Circuit Court, the
Honorable William M. Gabler, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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**CONSTITUTIONAL PROVISIONS
 AND STATUTES CITED**

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ISSUE PRESENTED

Did the sentencing court misuse its discretion by disregarding sentencing guidelines for misdemeanor operating while intoxicated offenses because it erroneously believed they did not take into account the seriousness of the offense, the need to protect the public, and the character and rehabilitative needs of the defendant?

The circuit court held that it would not be a “slave to the guidelines” because they did not take into account the seriousness of the offense, the need to protect the public and the character of the defendant. It concluded that Mr. Weaver’s offense was aggravated and imposed the maximum one-year jail sentence.

The circuit court denied Mr. Weaver’s postconviction motion seeking resentencing, saying it did not know whether the guidelines took into account primary sentencing factors, but it had exercised its broad discretionary authority in sentencing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Weaver does not request publication or oral argument.

STATEMENT OF THE CASE AND FACTS

Sharod Weaver, a 40-year-old African-American man, was charged in the Eau Claire County Circuit Court with operating while intoxicated, third offense, and disorderly conduct. The complaint was later amended to add a blood alcohol charge. (1, 13).

On the day of trial, Mr. Weaver plead guilty to the operating while intoxicated charge. (30:1-20). The court dismissed the disorderly conduct charge on the state's motion. (30:25).

At sentencing, the state recommended a "guideline sentence" of 110 days in jail, as well as a fine, license revocation, alcohol assessment and ignition interlock device. The state also noted that the court could reasonably use the aggravated guidelines, with 140 days of jail. (31:2; App. 103). Defense counsel concurred in a guideline sentence, but objected to using the aggravated guidelines. (31:3-4; App. 104-105).

The court interrupted, commenting:

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 a one-year maximum for this offense. And when we normally sentence for OWI offenses, the guidelines are cookie cutter. You know, they 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.

(31:4; App. 105).

Defense counsel responded that the court should not take into account events that occurred after the arrest for the crime, which were the basis for the dismissed disorderly conduct charge. (31:5; App. 106). Defense counsel pointed out that because of Mr. Weaver's level of intoxication, one of the arresting officers questioned whether Mr. Weaver understood what was occurring. (31:5; App. 106).

In allocution, Mr. Weaver apologized for his actions, and took responsibility for the offense. (31:6-7; App. 107-108).

After preliminary remarks, the court turned to sentencing, beginning with a comment on sentencing criteria and OWI guidelines, saying:

. . . when we impose OWI sentences, they're usually a wrought 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 have to consider those four things in this particular circumstance and not be a slave to the guidelines.

(31:8-9; App. 109-110).

The court concluded that Mr. Weaver's conduct after he was arrested was relevant to its sentence, and was aggravating. (31:9; App. 110). The court also concluded that Mr. Weaver's character was relevant, pointing out that he had ten prior convictions. (31:10; App. 111).

The court concluded that Mr. Weaver's offense was "an unusual and aggravated OWI third," and sentenced him to the statutory maximum one year in jail. (31:13, App. 114).

The court denied Mr. Weaver's request for Huber privileges, and his request for a stay pending appeal.

Mr. Weaver filed a postconviction motion alleging that the court made a mistake of law when it disregarded the OWI guidelines. The court's disregard was based on its erroneous assumption that the guidelines did not take into account the primary sentencing factors of seriousness of the offense, protection of the public, the offender's rehabilitative needs, and the defendant's character. The motion also pointed out most of Mr. Weaver's convictions, including his first OWI conviction, which had occurred 10 to 18 years earlier. He had only one felony conviction and two misdemeanor convictions during the last ten years. (18-7).

The court denied the postconviction motion, saying it did not know whether the guidelines took into account sentencing factors. It pointed to its broad sentencing discretion and its authority to consider uncharged conduct. (32:14-16; App. 118-20).

ARGUMENT

The Court Misused Its Discretion When It Disregarded OWI Sentencing Guidelines on the Mistaken Assumption That They Did Not Take Into Account Public Protection, the Seriousness of the Offense, and the Character and Rehabilitative Needs of the Defendant.

A. Introduction and standard of review.

Sentencing is a discretionary decision, requiring the court to examine the relevant facts, apply a proper standard of law, and using a demonstrated rational process, reach a

conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W. 2d 175 (1982). At Mr. Weaver's sentencing, the court erroneously disregarded the OWI sentencing guidelines on the mistaken assumption that they were not based on relevant sentencing factors. By doing so, the court erred as a matter of law.

The legislature has authorized chief judges of judicial districts to establish sentencing guidelines for misdemeanor operating while intoxicated cases. Wis. Stat. § 346.65(2m). The purpose of those guidelines is to "reduce sentencing disparity among persons who commit similar offenses." *State v. Smart*, 2002 WI App 240, 257 Wis. 2d 713, ¶ 6, 652 N.W. 2d 429. The Wisconsin Supreme Court has agreed that sentencing guidelines "in fact operate to reduce disparity within the judicial administrative districts. . . . Such guidelines do not completely eliminate the evil of sentencing disparity," but are better than no guidelines at all. *State v. Jorgensen*, 2003 WI 105, 264 Wis. 2d 157, ¶ 40, 667 N.W. 2d 318.

A court is not required to follow the sentencing guidelines. *Smart, supra*, ¶ 15. Here, however, the court completely disregarded the guidelines based on its mistake of law. Its stated belief that the sentencing guidelines "don't take into account the four primary factors of sentencing" is erroneous. As will be established below, the guidelines do take into account the seriousness of the offense, the protection of the public, and the character of the defendant.

Additionally, because the court disregarded the sentencing guidelines, it overlooked the important goals of deterrence and reducing disparity in sentencing for misdemeanor OWI offenses.

B. The guidelines are based upon the seriousness of the offense.

The OWI sentencing guidelines specifically take into account the seriousness of the offense. They create categories based on BAC level, the nature of the driving, and whether a child was in the car. Penalty differentials correlate to those categories.

The first factor in the sentencing guidelines structure is whether the person was driving dangerously or had a bad driving record. The “minimum driving” category requires “no accident” and includes minor traffic violations such as failing to signal, weaving within a lane, or a missing brake light. The “aggravated driving” category includes cases in which there was an accident, an injury, major violations, or a bad driving record. (19:2). These categories of “minimum” and “aggravated” driving are important components in defining the seriousness of the offense.

The second factor in the sentencing guidelines structure is BAC level. (19:2). It is a reasonable assumption that a person with a higher BAC level creates more danger to the public than one with a lower BAC level, and therefore the offense is more serious.

Finally, the guidelines structure creates a category for people who risk the safety of a child by driving while intoxicated with a child in the car. This category reflects the legislative judgment that a person who has a child in the car commits a more serious offense than one who does not. (19:2).

Those three categories in the OWI sentencing guidelines specifically define the “seriousness of the offense” sentencing factor in OWI cases. In Mr. Weaver’s case, he

was stopped for minimal traffic violations, he did not have a bad driving record, and he did not have a child in the car. However, his BAC level was .24. (1, 13). Therefore, with guideline recommendations ranging from 60 days in jail to 140 days in jail for an OWI 3rd offense, the recommendation was for 110 days in jail. (19:2).

The court's perception that the guidelines did not take into account the seriousness of the offense shifted the focus of the court's analysis from the OWI offense itself to Mr. Weaver's drunken, disorderly post-arrest conduct. (31:11-12; App. 112-13). Had Mr. Weaver been convicted of the disorderly conduct charge that resulted from his post-arrest conduct, the maximum penalty was 90 days in jail. (1). Instead, Mr. Weaver was sentenced to the maximum 365 days in jail.

C. The guidelines take into account the protection of the public.

Similarly, the guidelines take into account the sentencing factor of protection of the public, in several ways. In the most obvious way, the guidelines require driver license revocation in every case and ignition interlock devices in almost every case. (19:2). They provide for longer jail terms, higher fines, and longer license revocation periods as the seriousness of the offense increases. (19:2).

Also, by reducing sentencing disparity, the guidelines provide a more effective deterrent to operating while intoxicated. When judges routinely follow the guideline of imposing jail time for a second offense, for example, even with a low BAC and minimal driving irregularities, the message to the public is that they will not "get off" easily with a second offense.

In addition to general deterrence, the guidelines provide specific deterrence. A person who did not like spending ten days in jail for OWI 2nd, for example, will know that he or she faces at least sixty days in jail for an OWI 3rd.

- D. The guidelines take into account the character of the defendant.

The legislature has mandated rehabilitative programming in every OWI case by statute. Wis. Stat. § 343.30(1q)(c) requires that the court order an alcohol and drug assessment, and develop a driver safety plan. The guidelines do not specifically address rehabilitation, but by statute, a rehabilitation plan is built into every OWI 3rd offense.

The extraordinarily detailed and specific sentencing scheme for OWI offenses focuses character analysis on the offender's propensity for driving while intoxicated, and other "bad driving." The guidelines, as the Supreme Court has held, reflect the importance of avoiding disparate sentences for similar crimes; they downplay individual character judgments in order to "eliminate the evil of sentencing disparity," as much as possible. *Jorgensen*, 264 Wis. 2d 157 at ¶ 40.

- E. Because the court disregarded the sentencing guidelines, it overlooked the equally important goals of deterrence and reducing disparity in sentencing.

Racial disparity in the criminal justice system is well documented. According to Bureau of Justice Statistics and 2010 census data, African-Americans are incarcerated nationally at a rate six times greater than the incarceration rate of whites. In Wisconsin, according to the same data,

the African-American incarceration rate is almost ten times greater than that of whites. <http://www.prisonpolicy.org/graphs/raceinc.html> and <http://www.prisonpolicy.org/profiles/WI.html> (last visited April 1, 2015).

The purpose of the OWI sentencing guidelines was to eliminate disparity in sentencing, including unintentional disparity. *State v. Jorgensen, supra*, 264 Wis. 2d 157, ¶ 42. By disregarding the guidelines, the court in this case failed to take into account the important sentencing purpose of imposing similar sentences for similar crimes.

Also, the certainty of the guideline sentences serves a deterrent purpose. When a judge routinely follows the guideline recommendation to impose jail time for a second offense, for example, the message to the public and to the specific defendant, is that they will not “get off” easily with a second offense. If instead, judges routinely disregard guidelines based on their perceptions of a person’s character, a person with “good character” can expect to avoid jail time, thus reducing the deterrence effect of sentencing.

CONCLUSION

The court's decision to disregard the guidelines was based on its mistaken belief that they did not take into account the primary sentencing factors. Because the guidelines are based on the seriousness of the offense, the protection of the public, and character for bad driving, the court's belief was erroneous. As a result of the court's disregard of the guidelines, the court did not take into account the important sentencing goals of deterrence and reducing disparity in sentencing.

For these reasons, the court applied the wrong legal standard to the facts of the case at sentencing, and Mr. Weaver respectfully requests that the court order a resentencing hearing.

Dated this 7th day of April, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,985 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 7th day of April, 2015.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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