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COURT OF APPEALS  
STATE OF WISCONSIN  
DISTRICT III

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

CASE NO. 2015AP000170CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent

v.

SHAROD D. WEAVER,  
Defendant-Appellant.

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APPEAL FROM JUDGMENT OF CONVICTION AND  
DENIAL OF POSTCONVICTION MOTION IN  
EAU CLAIRE COUNTY CIRCUIT COURT  
THE HONORABLE WILLIAM M. GABLER, SR., PRESIDING

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BRIEF OF PLAINTIFF-RESPONDENT

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Meri C. Larson  
Assistant District Attorney  
State Bar No. 1006680  
Eau Claire County Courthouse  
721 Oxford Avenue  
Eau Claire, WI 54703

(715) 839-4828

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**ISSUE PRESENTED FOR REVIEW**

DID THE COURT MISUSE HIS DISCRETION WHEN HE  
SENTENCED SHAROD WEAVER?

THE COURT DECIDED: NO

**STATEMENT OF ORAL ARGUMENT AND PUBLICATION**

Oral argument should not be necessary for the prosecution of this appeal. It is expected that the parties' legal briefs will fully present and address the issue presented for appeal. Additionally, the court's decision need not be published since it is anticipated that it will be controlled by existing case law.

## **ARGUMENT**

### **THE COURT DID NOT MISUSE HIS DISCRETION WHEN HE SENTENCED SHAROD WEAVER.**

“Sentencing falls within the discretionary authority of the circuit court. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971); *State v. Eckola*, 2001 WI App 295, ¶4, 249 Wis. 2d 276, 638 N.W. 2d 903. This court has held that it ‘will not interfere with the circuit court’s sentencing decision unless the circuit court erroneously exercised its discretion.’ *State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998); *see also Eckola*, 249 Wis. 2d 276, ¶4. The circuit court erroneously exercises its discretion if 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; *State v. Hutnik*, 39 Wis. 2d 754, 763, 159 N.W. 2d 733 (1968).” *State v. Jorgensen*, 2003 WI 105, ¶12, 264 Wis. 2d 157, 667 N.W.2d 318.

#### **A. Courts Are Not Required To Follow Sentencing Guidelines.**

“The [sentencing] guidelines are not mandatory and a court may disregard them if it so chooses.” *State v. Smart*, 2002 WI App 240, ¶15, 257 Wis. 2d. 713, 652 N.W. 2d 429. Even though the court can disregard the sentencing guidelines entirely, Weaver posits that the court cannot disregard the sentencing guidelines

based on a mistake of law. He then claims the court made a mistake of law by not accepting Weaver's argument that sentencing guidelines account for all the sentencing factors. According to Weaver, the court erred by its "mistaken assumption that [the OWI sentencing guidelines] were not based on relevant sentencing factors." Weaver fails to identify the authority which supports his claim that the OWI sentencing guidelines do in fact incorporate all the relevant sentencing factors.

If Weaver's position were followed to its logical end, the court would be limited at sentencing to consideration of only those facts and circumstances surrounding the OWI offense as they apply to the sentencing guidelines. That is the opposite of what *Smart* stood for. The Supreme Court in *State v. Jorgensen* held that "[i]t is for the legislature ... to decide whether and to what extent the sentencing court's discretion should be limited." 2003 WI 105 at ¶43. While the legislature has mandated judicial districts to establish sentencing guidelines related to certain operating under the influence offenses, the legislature has not declared that all other sentencing factors must be ignored.

#### **B. Sentencing Guidelines Cannot Account For All The Sentencing Factors.**

It is clear enough that sentencing guidelines attempt to account for the seriousness of the OWI offense by incorporating the number of the offense, the level of impairment and some other aggravating factors. The severity of the

offense, however, is the only sentencing factor that is partially addressed by the sentencing guidelines. By their very nature, sentencing guidelines **cannot** account for all the varying circumstances and those sentencing factors that are particular to each individual defendant.

Weaver argues, without any supporting authority, that the OWI sentencing guidelines take into account the protection of the public and the character of the defendant. “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”.” (Appellant’s Brief at 8). There is absolutely no basis for Weaver’s assertion that character analysis is incorporated into the guidelines, or that *State v. Jorgensen*, 2003 WI 105 at ¶40 supports that conclusion. The Supreme Court said that “sentencing guidelines that allow ‘the exercise of judicial discretion while reducing variance by providing guideline sentences for similar offenders who commit similar offenses,’ are valid.” (Citation omitted.) *Id.* That was in the context of Jorgensen’s challenge to the constitutionality of the court’s application of sentencing guidelines in her case. Nothing in the case stood for the proposition that any court **must follow** its district’s sentencing guidelines while ignoring all other sentencing criteria.

Citing no legal or scholarly authority, Weaver asserts that by reducing sentence disparity, the sentencing guidelines provide a more effective deterrent to operating while intoxicated offenses. Weaver's claim that sentencing guidelines deter future criminal conduct is pure speculation. Even if it were true, it does not trump the court's discretion at sentencing.

### **C. The Court Properly Exercised Discretion in Sentencing Weaver.**

In sentencing Weaver, the court explained at length why the four primary sentencing factors did not justify a guidelines sentence. "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" (31:8).

"... I do believe that what happened the early morning hours of December 6<sup>th</sup>, 2013, are relevant in fashioning an appropriate sentence for Mr. Weaver, because what happened after Mr. Weaver was apprehended by law enforcement is aggravating." (31:9).

"In connection with the need to protect the public, I, not only have to consider the regular 110 days that we put in, but I need to address the accompanying behavior." (31:9).



“I don’t know anything about Mr. Weaver’s rehabilitative needs other than the fact that since this is a third offense drunk driving, he obviously needs some aid and assistance in connection with his alcohol consumption.” (31:10).

“And I am – I also can and do take into account Mr. Weaver’s character. Despite him voluntarily appearing and despite him being polite, the circumstances of the early morning hours of December 6<sup>th</sup>, 2013 were egregious.” (31:10).

“And I can and do take into account Mr. Weaver’s extensive criminal record that I referenced earlier. And this summary sheet of Mr. Weaver’s criminal record, as it turns out, is all in Eau Claire County. He’s got 11 prior criminal convictions, five of which are felonies. 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. So, you know, I’d say that Mr. Weaver has got ten prior convictions in Eau Claire County, many of which are certainly relevant to what happened the early morning hours of December 6<sup>th</sup>, 2013. Multiple resisting, obstructing convictions. The felony escape. The false imprisonment. The substantial battery. 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 6<sup>th</sup>, 2013 mimics this kind of violent and dangerous behavior.” (31:10-11).

The court then pointed out the facts from the probable cause section of the criminal complaint which supported his finding that Mr. Weaver has “a very aggressive and dangerous character.” (31:13). “To say that Mr. 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. And we see many of them.” (31:11-12).

“Mr. Weaver, this may be hard for you to believe, but your conduct the early morning hours of December 6, 2013, really was remarkable. And I say that not in a -- in a good way. It was remarkable in an alarming way, because you, you know, you, not only put the law enforcement officers at great physical risk, but you put yourself at great physical risk. Your conduct could have escalated to the point where you could have been hurt by the law enforcement officers.” (31:12).

In sentencing Weaver, the court explained why the maximum sentence he imposed was justified when considering all the appropriate sentencing factors.

### **CONCLUSION**

If courts have discretion at sentencing, and that discretion includes ignoring sentencing guidelines, logically it cannot be argued that a court misuses discretion when it chooses not to follow sentencing guidelines. Weaver's claim that the court erred as a matter of law, when it assumed sentencing guidelines do not incorporate all the sentencing factors, does not lead to a different result. First, because his claim is not true; and second, because there is no law that mandates courts to strictly follow sentencing guidelines. Such a requirement would eliminate, or at least severely limit, a court's discretion to consider all relevant information a court is supposed to consider at sentencing.

For all the reasons cited, the judgment of conviction and order denying post-conviction relief should be affirmed.

Dated this 21<sup>st</sup> day of May, 2015.

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Meri C. Larson  
Assistant District Attorney

MCL #1006680/jan

# CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8 pages and 1,569 words.

Dated this 21<sup>st</sup> day of May, 2015.

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Meri C. Larson  
Assistant District Attorney

MCL #1006680/jan