STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP2176 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK P. HAYNES,

Defendant-Appellant.

Appeal from an Order Sentencing Defendant After Revocation Entered in the Dunn County Circuit Court, the Honorable J.M. Bitney, presiding

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BRIEF-IN-CHIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Statement on Oral Argument

The issues presented by this appeal are simple and based primarily and evidentiary and factual grounds. The issues presented can be addressed fully without the need for oral argument. This appeal does not present new legal issues or relate to a possible change of law. Therefore, oral argument is not recommended and publication is unnecessary.

Statement of the Issues

I. Whether the trial court abused its discretion in sentencing Appellant after revocation of probation?

Answered by the trial court: Not Applicable.

Summary of the Arguments

I. The trial court abused its discretion in sentencing Appellant after revocation of probation. The trial court sentenced Appellant to the maximum sentence allowed by law, ignoring the recommendations of the Department of Corrections, defense counsel, the prosecutor, and the guidelines promulgated by the Tenth Judicial District.

Statement of the Case

I. Procedural Background

The defendant-appellant, Patrick Haynes, (hereinafter Appellant) was charged with one count of Operating a Motor Vehicle While Intoxicated – 3rd Offense contrary to Wis. Stat. § 346.63(1)(a) and one count of Operating with a

Prohibited Alcohol Concentration – 3rd Offense contrary to Wis. Stat. § 346.63(1)(b). (R-2). Appellant subsequently entered into a plea agreement which resulted in a plea to Operating While Intoxicated – 3rd Offense. (R-7). The agreement called for Appellant's sentence to be withheld, for Appellant to be placed on two years of probation with 65 days jail as a condition of probation, amongst other conditions not relevant to this appeal. (R-7). The trial court adopted the recommendation. (R-9).

Appellant was subsequently revoked from this term of probation. (Sentencing Hr'g After Rev., June 26, 2015, 2:6-7). The trial court ultimately ordered 12 months jail less 89 days of credit for time served. (Sent. Hr'g After Rev. 11:14-16; R-14). Appellant now appeals this sentence.

II. Factual Background

There is a substantial factual background in the present case. However, not all facts are necessary to a determination of the issues presented in this appeal. For these reasons, the factual background will be limited to those facts necessary to a determination of the issues presented.

On April 19, 2014 Appellant was arrested for Operating While Intoxicated – 3rd offense. (Sent. Hr'g After Rev. 2:24-3:4; R-2). Appellant had struck a light pole while driving without his headlights on and without insurance. (Sent. Hr'g After Rev. 2:24-3:4).

Appellant was subsequently revoked from his probation due to new alleged criminal acts. (Sent. Hr'g After Rev. 10:3-6). Appellant also continued to use

controlled substances during probation. (Sent. Hr'g After Rev. 10:9-16). Appellant had initially blamed his wife for the initial driving infraction that contributed to the revocation. (Sent. Hr'g After Rev. 9:14-19).

Appellant is currently being prosecuted for the alleged criminal acts that were part of the revocation decision. (Sent. Hr'g After Rev. 4:25-5:1).

The State made no specific recommendation to the trial court regarding sentencing; instead reiterating both the recommendation of the Department of Corrections and the 10 Judicial District Guidelines. (Sent. Hr'g After Rev. 2:18-3:2). The Department of Corrections recommended a sentence range from 6-9 months. (Sent. Hr'g After Rev. 2:19-20). Appellant's trial counsel recommended that the court adopt the 10th Judicial District Guidelines for the offense level and alcohol concentration, and at the aggravated guideline due to driving behavior. (Sent. Hr'g After Rev. 4:10-17).

Prior to imposing sentence, the trial court summarized the facts pertaining to the sentence. The trial court highlighted that Appellant was intoxicated, driving without headlights on, without insurance, that Appellant hit a pole and did not stop, had open containers of alcohol in the vehicle, and was looking at his phone while driving. (Sent. Hr'g After Rev. 7:9-25). The trial court then reviewed Appellant's rehabilitation needs focusing on Appellant's failure on probation, that Appellant initially blamed his wife for the accident, that Appellant has other charges pending and that there were some questionable alcohol readings while on probation. (Sent. Hr'g After Rev. 9:10-10:16). Finally, the trial court discusses

what it perceives as a strong need to protect the public. (Sent. Hr'g After Rev. 11:1-12). Based on these things, the trial court imposes the maximum jail term of one year. (Sent. Hr'g After Rev. 11:13-16; R-14).

Argument

I. Standard of Review

"Sentencing is a matter of trial court discretion." State v. Owen, 202 Wis. 2d 620, 645 (Ct. App. 1996). "When considering a challenge to a sentence after revocation [the court] review[s] both the original sentencing and the sentencing after revocation 'on a global basis, treating the latter as a continuum [sic] of the first.'" State v. Reynolds, 2002 WI App 15 ¶ 8 (quoting State v. Wegner, 2000 WI App 231, ¶ 7).

II. The trial court abused its discretion when it imposed the maximum sentence under the law.

Appellant was convicted of Operating While Intoxicated – 3rd Offense. (R – 2, 9, 14). The minimum penalty for said offense is a $600 fine and 45 days in jail, while the maximum penalty is a $2000 fine and 1 year in jail. Wis. Stat. § 346.65(2)(am)3. Under the law governing OWI offenses, the chief judge for each district is to create a set of sentencing guidelines for OWI offenses. Wis. Stat. § 346.65(2m)(a). The 10th Judicial District promulgated sentencing guidelines based on prior offenses, blood alcohol concentration and whether there was aggravating factors. These guidelines called for a sentence of 140 days in jail for Appellant's

blood alcohol concentration, aggravated driving and prior offenses. (App. Appendix – 3).

Under the legislative scheme relating to OWI offense guidelines, the chief judge is allowed to consider aggravating or mitigating factors when crafting the guidelines. The chief judge did make certain considerations and incorporated those factors. They include blood alcohol concentration, property damage, issues with license status (e.g. operating while suspended at time of arrest), amongst other factors. The factors for consideration in the 10th Judicial District are fully recited at the end of the guidelines table. (App. Appendix – 3). Notably, criminal history is not a regularly considered factor under the 10th Judicial District guidelines. The guidelines, along with the listed aggravating and mitigating factors, play an important role in creating a consistent system of enforcement for OWI offenses.

Asking an upper court to reverse the sentence imposed by a trial court is no small request. There is a "strong policy against interference with the discretion of the trial court in passing sentence." Ocanas v. State, 70 Wis. 2d 179, 183 (1975) (citation omitted). Indeed, "as long as the trial court considered the proper factors and the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience. Owen, 202 Wis. 2d at 645.

In the present case, Appellant's counsel argued for the 10th Judicial District Guidelines, while the Department of Corrections recommended a sentence between 6 and 9 months. The prosecutor representing the State did not make a

specific recommendation, but instead highlighted both what the guidelines called for and what was recommended by the Department of Corrections. Thus, the trial court was presented with a recommended sentence ranging from 140 days or 4.5 months to 9 months. The trial court imposed a 12 month sentence. This sentence was nearly three times the district guideline, double the lower end of the Department of Corrections recommendation and was the absolute maximum sentence the law allows. While minor deviations might be acceptable based on the conduct of a particular defendant, wholesale departure of this magnitude does not just reduce, it outright destroys, the consistency the law depends on to survive. As Judge Fine stated in Reynolds, 2002 WI App 15, ¶ 24 (Judge Fine, concurring), "[i]f we are to have a system of justice that is fair and not random we must, in my view and although I have not been a supporter of sentencing guidelines in the past, install some system that will result in similar sentences for defendants with similar levels of culpability and recidivism potential.

While it is true that in sentencing after revocation, "a court may determine that conduct following the first sentencing hearing casts defendant in a very different light," that alone cannot justify this type of sentence. Id. at ¶ 13. Even assuming, without conceding, that Appellant's conduct required some deviation from both the guidelines and recommendations of the parties, the sentence imposed is beyond all reasonable application of the judge's discretion.

The guidelines created by the chief judge already factor in the severity of the offense. There are escalating penalties for both subsequent OWI offenses and

for having varying blood alcohol concentrations. There is also an enhanced penalty for aggravated driving behaviors, which include both accidents and status violations, such as having a revoked license. The guidelines also factor in the need to protect the public within its requirements. Reflecting an increased risk to the public from repeat offenders, the guidelines are escalating for subsequent offenses. There is a requirement for the installation of an ignition interlock device for all second and subsequent OWI offenses. The primary purpose of the ignition interlock device is to prevent intoxicated driving. The guidelines also dictate increasing license revocations for repeat offenses and for increasing blood alcohol concentrations. The guidelines also provide for a mitigated sentence if the defendant undergoes a pretrial assessment, completes a driver safety plan and/or goes through a pretrial treatment program. These incentives are all designed to reduce repeat offenses, thereby protecting the public. The guidelines were created with Wisconsin's sentencing factors in mind and with a target of consistency for offenders.

The guidelines, if they are lacking in a focus on the sentencing factors, it would be in the area of character of the accused. There is limited focus on this factor – primarily done be allowing for a mitigation of sentence based on a pretrial treatment program. There is a certain difficulty in incorporating character factors into a guideline. There are systems in which character traits do play a role, such as the federal sentencing system, wherein a litany of factors are considered and calculated to determine the appropriate sentence. However, the system employed

in the federal level is far more expansive than that of the OWI Sentencing Guidelines.

To justify the deviation from the guidelines, the trial court had focused on the character of the accused in this case. The trial court highlighted several facts that reflected poorly on Appellant, specifically that he was now accused of several new crimes, including felonies. The trial court also highlighted that Appellant had apparently been operating a motor vehicle after taking Lorazepam, a prescription medication, and was involved in an accident. However, the trial court also noted two important positive character factors – Appellant maintained employment while on probation and was taking care of his family during that time.

The trial court appeared to put an extreme amount of weight on Appellant's character, even going so far as to call Appellant a "career criminal." (Sent. Hr'g After Rev. 11:5-6). But, after a review of the record, there is no reference to a prior criminal history, exclusive of the prior OWI offenses. Additionally, at the time of the sentencing after revocation, Appellant had yet to be convicted of a single crime referenced in the revocation. The trial court hammered away at the burglary allegations with statements about Appellant needing to "get his head on straight," stop his "criminal thinking," and stop "thinking it is okay to steal and burglarize." (Sent. Hr'g After Rev. 12:4-19). The trial court's purpose in discussing the unproven burglary allegations must be a discussion of Appellant's character. If not viewed as such, the actions of the trial court stray dangerously close to sentencing Appellant for crimes for which he had not been convicted.

While it may long be time for our system to adopt some other means of imposing sentence on citizens that violate our criminal law, that is not the issue at bar. The question is only whether the trial court abused its discretion at the sentencing after revocation in this case; whether the sentence shocks the public conscience.

The trial court was given numerous factors to consider – both good and bad. On the positive side, Appellant was working and maintaining his family. Appellant also sought out multiple treatment programs for his substance abuse. However, at the same time, Appellant failed to abstain from substance use. He also drove without a driver's license, leading to an accident. Additionally, he was accused of committing new criminal acts.

The trial court was given a standardized framework from which to develop a sentence in this case. The 10th Judicial District has guidelines in place for OWI offenses. The guidelines were designed specifically to create like treatment for like crimes. These guidelines had a litany of factors that could be considered to tailor the guidelines to each particular defendant.

The trial court had recommendations from defense counsel, the prosecutor and the Department of Corrections. Defense counsel recommended following the aggravated guideline for this offense. The Department of Corrections recommended a 6-9 month jail term – the high end of which would be approximately two times as severe as the guidelines. The prosecutor recited both the Department of Corrections recommendation and the guideline for this offense.

The trial court bypassed these recommendations and created its own scale for justice. In doing so, the court not only disrupts the sentencing scheme so thoughtfully created, it strikes at the foundation of the criminal justice system. Having deviations of this nature eliminates the predictability within the system that allows it to function. Instead of giving due weight to the guidelines, the parties and Department of Corrections, the trial court took it upon itself to decide that new criminal allegations warranted a harsh sentence. The rationale was that Appellant's character and need to protect the public dictated that only a maximum sentence would suffice. This action removes the stability and predictability involved in the justice system. This stability and predictability is continually relied upon by defense attorneys and prosecutors to resolve cases prior to trial. The attorneys are already operating in a system where significant doubt hinders settlement because judges are not bound by any agreement – leaving defendants to question whether what they agreed to will actually occur. Obviously, in this situation, there was no agreement as to what the sentence should be, but there was a range of recommendations spanning about 4.5 months to 9 months. The trial court imposed 12 months. When a trial court significantly exceeds the recommendations of the parties, the fairness of the sentence has to come into question. Simply put, what did the judge observe that the parties and the Department of Corrections did not observe? If the goal is as Judge Fine describes, that sentencing be "fair and not random" then a sentence that nearly triples the

guideline and is about 150% higher than the highest recommendation simply cannot stand.

Conclusion

For these reasons the trial court abused its discretion at the sentencing after revocation on June 26, 2015 and the sentence should be reversed.

Dated this_____day of_____, 2015.

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Certification as to Form/Length

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,916 words.

This brief was prepared using *Microsoft Word 2013* word processing software. The length of the brief was obtained using the Word Count function of the software.

Dated this_____day of_____, 2015.

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Certification of Compliance with Electronic Filing Requirement

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 hereby 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 all the paper copies of this brief filed with the court and served on all opposing parties.

Dated this_____day of_____, 2015.

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APPENDIX

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Appendix Certification

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; and (3) 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 hereby 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 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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