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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2015AP2176 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

VS.

PATRICK P HAYNES,

Defendant-Appellant.

On Appeal from an Order Sentencing Defendant After Revocation,
the Honorable J.M. Bitney presiding.
Dunn County Circuit Court Case #14CT85

BRIEF-IN-CHIEF and APPENDIX of PLAINTIFF -RESPONDENT

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Statement of Oral Argument

The State agrees that the issues presented in this case can be addressed totally without the need for oral argument and publication is unnecessary. This case can be decided on well settled law.

Argument

The Trial Court properly exercised its discretion when sentencing Patrick Haynes.

Sentencing determinations are reviewed under the erroneous exercise of discretion standard. *State v. Berggren*, 2009 WI App 82, ¶ 39, 320 Wis. 2d 209, 236 769 N.W.2d

110; *State v. Gribble*, 2001, WI App 227, ¶ 64, 248 Wis.2d 409, 454, 636 N.W.2d 488. Sentencing decisions are left to the sound discretion of the sentencing court, and a sentencing court has broad sentencing discretion when fashioning a sentence. *State v. Travis*, 2013 WI 38, ¶ 163, 347 Wis.2d 142, 152, 832 N.W.2d 491; *State v. Douglas*, 2013 WI App 52, ¶ 20, 347 Wis.2d 407, 423, 830 N.W.2d 126. In numerous early Wisconsin sentencing cases, the Court stated that the sentence imposed in each case should recognize the minimum amount of custody or confinement which is consistent with the need to protect the public, the gravity of the offense, and the rehabilitative needs of the defendant. *State v. Setagord*, 211, Wis.2d 397, 416, 565 N.W.2d 507 (1997); *State v. Borrell*, 167 Wis.2d 749, 764, 482 N.W.2d 883 (1992). Courts must consider three primary factors in determining an appropriate sentence at a defendant's sentencing: (1) The gravity of the crime/offense; (2) The character of the defendant; (3) The need to protect the public. *State v. Frey*, 2012 WI 99, ¶ 46, 343 Wis.2d 358, 376, 817 N.W.2d 436.

In our case, the trial court properly considered the correct primary factors. (Sentencing Hearing After Revocation 6:25 - 7:2). The Court noted that it was a serious OWI 3rd Offense in that Haynes was significantly impaired at night without his driver's headlights illuminated, so drunk that he hit a telephone or light pole and snapped it off and didn't bother stopping as the pole fell and shattered on the ground and kept going. In addition, he admitted to the officer that he was on his cell phone at the time of the accident. (Sentencing Hearing after Revocation 7:9 - 19). As far as the character of the defendant and rehabilitative needs, the Court noted that the defendant had failed miserably on probation. The Court noted when Haynes was arrested on the most recent

incident, he lied and tried to blame this on his wife. (Sentencing Hearing After Revocation 9:9 - 19). The Court noted that while on probation Haynes had been charged for multiple burglaries and thefts in which there were allegedly a number of items stolen including firearms. Allegedly Haynes had admitted that he did that as a way to make ends meet and try to pawn these items for cash. (Sentencing Hearing After Revocation 10:3 - 8). The Court also noted that while on probation, there were a number of questionable portable readings that registered positive in various amounts about whether or not he continued to use alcohol when he was banned from doing that. The Court noted that Haynes hadn't made any payments towards restitution or court costs. The Court noted that while in jail, Haynes got high on Ambien and was reportedly using while he was a Huber Inmate according to his fellow inmates. (Sentencing Hearing after Revocation 10:9 - 16). The Court also noted that the entire time Mr. Haynes was on probation; he was robbing storage units; drove while under the influence; got into an accident which is similar to what he was originally placed on probation for; been terminated from treatment at Arbor Place; has charges pending for hit and run, failure to notify police of an accident, operating without insurance; and has a number of charges pending in St. Croix and Dunn County for burglary and theft. (Sentencing Hearing After Revocation 10:17 - 25). The Court noted that it was fully aware of what the guidelines for this offense were, but correctly noted that those were not mandatory or binding on the Court. (Sentencing Hearing After Revocation 11:1 - 12)

Our case is very similar to a recent unpublished decision in the matter of *State v. Weaver*, 365 Wis. 2d 196 (Ct App 8/31/15). A copy of that decision is included in the Appendix. In *State v. Weaver*, the Court of Appeals upheld a maximum sentence for

OWI 3rd Offense. *Weaver* claimed that the Circuit Court erred as a matter of law by disregarding the guidelines. The Court of Appeals found that the Trial Court properly exercised its discretion by considering the primary factors when fashioning a sentence. The Court of Appeals also held that the guidelines are not mandatory and a court may disregard them if it so chooses. Citing *State v. Smart*, 2002 WI App 240 ¶ 15, 257 Wis.2d 13, 652 N.W.2d 429. The Trial Court in our case made a similar exercise of discretion when sentencing the defendant to the maximum sentence and not following the OWI guidelines. The decision was not based on an erroneous understanding of the law but upon a reasoned exercise of sentencing discretion.

Haynes points out that the number of the charges considered by the Court when sentencing were pending charges for which Haynes had not yet been convicted. A Sentencing Court is entitled to consider pending criminal charges against the defendant when imposing a sentence. *State v. Reed*, 2013 WI App 132 ¶ 9 351 Wis.2d 517, 523, 839 N.W.2d 877; *State v. Ziegler*, 2006 WI App 49, ¶ 32 n. 7, 289 Wis.2d 594, 609 n. 7, 712 N.W.2d 76; *State v. Jackson*, 110 Wis.2d 548, 329 N.W.2d 182 (1983).

Haynes also argues that, because the sentence significantly exceeded the recommendations of the parties, the fairness of the sentence has to come into question. The Court is not bound by the recommendations of the parties and it can sentence the defendant up to the maximum possible penalty for the crime. This does not disrupt the sentencing scheme. Sentencing is a matter of Trial Court discretion. *State v. Owen*, 2002 Wis.2d 620, 645, (Ct App 1996). In our case, the Trial Court considered the proper factors, the sentence is within the statutory limitations, and the sentence is not so excessive so as to shock the public conscience. The defendant failed on probation, has

allegedly committed new crimes, and has admitted to doing so. The offense he was convicted of was an aggravated OWI 3rd.

CONCLUSION

Wherefore, the State respectfully requests that the Judgement and Order in the above-captioned matter be affirmed.

Dated this _____ day of January, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,095 words.

Dated this _____ day of January, 2016.

Andrew J. Maki
Assistant District Attorney

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 _____ day of January, 2016.

Andrew J. Maki
Assistant District Attorney