COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2164-CR **Cir. Ct. No. 00CF5186**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN L. DISMUKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN and MARTIN J. DONALD, Judges. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Norman L. Dismuke appeals the judgment of conviction, entered following his no contest pleas, to one count of homicide by use of a vehicle with a prohibited alcohol concentration, and one count of injury by intoxicated use of a vehicle (causing great bodily harm) with a blood alcohol

concentration of 0.1% or more, contrary to WIS. STAT. §§ 940.09(1)(b) (1999-2000) and 940.25(1)(b) (1999-2000). He also appeals the order denying his motion for postconviction relief.[1] On appeal, he argues that: (1) his three statements were obtained in violation of his constitutional rights; (2) the statutory scheme under which he was sentenced is unconstitutional; and (3) thus, he was denied due process. We affirm.

I. BACKGROUND.

¶2 Dismuke was arrested as a result of a car accident that occurred on October 8, 2000. According to the criminal complaint filed against Dismuke and used as the factual basis for his pleas, a Milwaukee police officer saw a car traveling northbound on North 60th Street at a high rate of speed. He started to follow the car, but before he could stop it, after coming over the crest of a hill, he saw that the car and another auto were involved in a serious accident. The officer related that as he approached the accident scene, he saw Dismuke get out of the car he had been following, fall to the ground, get back up and run away from the accident scene. After a brief chase, Dismuke was caught. After being apprehended, but before being either questioned or advised of his ***Miranda*** rights,[2] the officer claimed that Dismuke blurted out, "I knew you were going to come after me, so I tried to get away."

¶3 Three people were in the car struck by Dismuke. Two were badly injured. One, Shemicka Johnson, a rear passenger, died at the scene. The other,

[1] The judgment of conviction was entered by the Honorable Kitty K. Brennan. The order denying his motion for postconviction relief was entered by the Honorable Martin J. Donald.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Rudolfo Fuentez, was trapped in the front seat. As a result of the accident, Fuentez suffered cracked ribs, a fractured clavicle, a bruised liver and a bruised hip.

¶4 Dismuke was taken to a nearby hospital for treatment of his facial injuries where another Milwaukee police officer read him his ***Miranda*** rights. The officer then questioned him. Dismuke admitted to being the driver of the car, but Dismuke refused to answer any of the officer's other questions, although he did continually ask the officer if everyone was okay. Later, he was conveyed to the police administration building where he was again advised of his ***Miranda*** rights, after which he gave the police a more extensive statement admitting his involvement in the accident.

¶5 Dismuke was originally charged with homicide by use of a vehicle with a prohibited alcohol concentration and injury by intoxicated use of a vehicle (causing great bodily harm) with a blood alcohol concentration of 0.1% or more, both as a habitual criminal. After a preliminary hearing, the State filed an information charging Dismuke with six felonies, all containing habitual criminal sentence enhancers. Dismuke filed a motion seeking to suppress his three statements. After an evidentiary hearing, the trial court refused to suppress the statements, finding them admissible. Following the suppression hearing, Dismuke entered no contest pleas to two of the six counts in exchange for the State's agreement to dismiss counts two, four, five and six, with the further understanding that counts five and six were to be read–in at the time of sentencing. The State also agreed to dismiss all of the habitual criminality enhancers. Following the acceptance of his pleas, the trial court ordered a presentence report.

¶6 Before being sentenced, Dismuke filed a motion seeking to have Wisconsin's sentencing scheme declared unconstitutional and asking that sentencing guidelines be adopted. The trial court denied the motion. Later, Dismuke was sentenced to fifteen years' confinement with ten years' extended supervision on count one, and five years' confinement and two years' extended supervision on count two, each count to be served consecutive to the sentence he was then serving and to each other. Dismuke filed a postconviction motion again asking that the trial court find the sentencing scheme unconstitutional. His motion was denied without a hearing.

II. ANALYSIS.

A. All of Dismuke's statements were admissible.

¶7 The trial court ruled that all three statements given by Dismuke were admissible. The trial court held that Dismuke's first statement, explaining why he tried to run away, was given while Dismuke was in custody at the scene of the accident, but, as it was volunteered, was therefore admissible despite the fact Dismuke had not been advised of his ***Miranda*** rights. As to the second statement given at the hospital, in which Dismuke admitted to driving the car, the trial court found that the officer had advised Dismuke of his constitutional rights and that Dismuke understood them. The trial court further found that Dismuke never exercised his right to remain silent, nor did he ask for a lawyer. Thus, the trial court ruled that this statement was also admissible. Finally, the trial court held that Dismuke's third and last statement, taken at police headquarters, occurred after Dismuke had again been advised of his rights. The trial court further found that Dismuke never told the detective he was on federal electronic surveillance or that an attorney represented him in that matter.

¶8 Dismuke submits that the trial court failed to explain or analyze why it found the police officers' version of the events more credible than his testimony. Dismuke argues that the trial court utilized "an inflexible and mechanistic approach" in determining that Dismuke was not as credible as the officers who testified at the suppression hearing and that the trial court improperly relied on demeanor when reaching its conclusion. He also argues that the first statement should not have been admitted because, contrary to the trial court's finding that he volunteered his initial statement to the police, he was actually being interrogated when he told the police officer why he ran away from the scene. With respect to the second statement, Dismuke claims that, under the totality of the circumstances, the statement was not admissible because it was not voluntary and he did not know that he was waiving valuable constitutional rights when he spoke to the officer, due to the fact that he was injured, drugged and handcuffed. Additionally, Dismuke contends that when he refused to answer the officer's other questions, he was invoking his right to silence. As a result, Dismuke complains that the detective who took his third statement violated the holding in ***Edwards v. Arizona***, 451 U.S. 477 (1981), because he had invoked his right to silence, and, therefore, he should not have been interrogated unless he "initiate[d] further communication" with the police. Finally, he contends that the detective had to have seen the electronic monitoring device attached to him, and thus, was on notice that Dismuke had an attorney. We disagree.

¶9 When reviewing a ***Miranda*** challenge, this court is bound by the trial court's findings of fact unless they are clearly erroneous. However, whether the ***Miranda*** rights were violated is a constitutional fact that we review *de novo*. ***State v. Ross***, 203 Wis. 2d 66, 79, 552 N.W.2d 428 (Ct. App. 1996).

¶10 We first observe that the record defeats Dismuke's allegation that the trial court failed to explain its rulings. The trial court weighed the testimony of the various witnesses and its decision is replete with explanations as to how its ultimate conclusions were reached. Nor does our review support Dismuke's claim that the trial court used "an inflexible and mechanistic approach" in its decision-making. Further, contrary to Dismuke's contention, demeanor is a proper factor for the trial court to consider when weighing conflicts in testimony. *See* ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976) (noting that a reason why an appellate court gives deference to a trial court's findings is "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony").

¶11 With respect to the first statement, the officer testified that he asked no questions of Dismuke after apprehending him and that Dismuke looked at him and volunteered, "I knew you were coming, so I was just trying to get away from you." Dismuke testified at the hearing that he was responding to a question posed by the arresting officer when he gave the statement explaining his attempt to run away. The finding by the court that the statement was volunteered and that the officer was more truthful than Dismuke is not clearly erroneous given that it was in Dismuke's self-interest to claim that the officer asked him a question. Thus, this statement was admissible, despite the fact that Dismuke was in custody and not advised of his constitutional rights.[3]

[3] In determining "the moment of arrest in a constitutional sense[,]" the standard is

(continued)

¶12 As to the second statement, we agree with the trial court's assessment that Dismuke's testimony that he could not recall ever being advised of his ***Miranda*** rights at the hospital was not credible. Further, the totality of the circumstances supports the trial court's ruling that Dismuke understood the rights he was given and, therefore, his abbreviated statement that he was the driver of the automobile was voluntary and admissible, as were his inquiries as to whether everyone involved in the accident was all right. *See* ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (stating that "[i]n examining whether a confession was rationally and deliberately made, it is important to determine that the defendant was not the victim of a conspicuously unequal confrontation in

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> whether a reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances. The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test.

State v. Swanson, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991) (citations omitted). Here, there appears to be no dispute as to whether Dismuke was in custody. Accordingly, the next important consideration is whether Dismuke was interrogated, since he was in custody and had not yet been advised of his constitutional rights. The Supreme Court has concluded:

> that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect…. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (footnotes omitted). *See also* ***State v. Cunningham***, 144 Wis. 2d 272, 278-81, 423 N.W.2d 862 (1988). Although Dismuke was in custody, there was no interrogation. The trial court found that the officer's testimony was more credible than Dismuke's and, accordingly, that the statement was voluntary.

which the pressures brought to bear on him by representatives of the state exceed[ed] the defendant's ability to resist. This determination is made, in turn, by examining the totality of the facts and circumstances surrounding the confession." (citation omitted)). *See also* ***State v. Agnello***, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999) (determining "that the State must prove by a preponderance of the evidence that a defendant's confession was voluntarily obtained").

¶13 Moreover, Dismuke's argument that his statement was involuntary because he was injured, drugged and handcuffed, is not supported by case law. *See* ***State v. Hanson***, 136 Wis. 2d 195, 401 N.W.2d 771 (1987) (defendant's statements were determined to be voluntary despite suffering from a gunshot wound, undergoing surgery, and ingesting morphine). As stated in ***Clappes***, 136 Wis. 2d at 241-42:

> Proof of physical pain and/or intoxication should not affect the admissibility of the evidence where there is no proof that the confessor was irrational, unable to understand the questions or his responses, otherwise incapable of giving a voluntary response, or reluctant to answer the questions posed by the authorities.

Apparently Dismuke had minor facial injuries, as he was discharged to the police the evening of the accident and taken to the jail. Inasmuch as Dismuke recalled the events at the jail, his claim of being too injured and drugged to appreciate his constitutional rights at the hospital is suspect. Thus, the trial court's findings that the statement was admissible and that Dismuke never invoked his right to silence are not clearly erroneous.

¶14 We also accept the trial court's findings concerning the third statement. Because Dismuke never invoked his right to silence, no impediment existed to prevent the detective from questioning Dismuke after advising him of

his constitutional rights. As a result, there was no violation of the holding in ***Edwards***, 451 U.S. 477, 484-85, where the Supreme Court held that once the right to remain silent is invoked, police questioning must cease unless the suspect "initiates further communication." Additionally, we note, as did the trial court, that Dismuke admitted to signing the statement taken by the detective, but could not recall if he ever asked for a lawyer. We are also satisfied with the trial court's determination that the failure of the police reports to make mention of Dismuke's pending charge for a federal gun crime lends support to the detective's testimony that he never saw the electronic monitoring device and, thus, had no reason to know that Dismuke was represented by a lawyer in that matter. Moreover, for a suspect to invoke the Fifth Amendment right to counsel, he or she must unequivocally invoke that right; ambiguous or equivocal requests for counsel are insufficient. ***State v. Jennings***, 2002 WI 44, ¶36, 252 Wis. 2d 228, 647 N.W.2d 142. Consequently, the trial court's ruling on the admissibility of those statements is affirmed.

B. The statutory scheme under which Dismuke was sentenced is constitutional.

¶15 Dismuke declares that the implementation of the new truth-in-sentencing law that calls for determinate sentences has greatly increased the length of incarceration for many convicted under the new law, and has created greater disparity in sentences for the same crime.[4] As support for this statement, Dismuke cites to two local newspaper stories. Dismuke also contends that the legislature's

[4] The first Truth-in-Sentencing law originated in 1997, as Wisconsin Act 283, and applied to crimes committed on or after December 31, 1999. This timeframe encompasses the date of Dismuke's crime. A second Truth-in-Sentencing law was enacted in 2001, as Wisconsin Act 109, and applies to crimes committed on or after February 1, 2003.

failure to enact any sentencing guidelines, as was recommended by the legislature's authorized Criminal Penalties Study Committee, renders the scheme void for vagueness because the law as it presently stands fails to state "with sufficient clarity the consequences of violating a given criminal statute" as set forth in ***United States v. Batchelder***, 442 U.S. 114, 123 (1979). Dismuke also argues that the failure to adopt sentencing guidelines permits arbitrary and capricious sentencing and denied him due process.

¶16 The constitutionality of a statute is a question of law that this court reviews *de novo*. ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W. 2d 115 (1995). We presume that legislative enactments are constitutional. ***Id.*** In order to successfully challenge a statute on constitutional grounds, the challenger has the burden of proving the statute unconstitutional beyond a reasonable doubt. ***Norquist v. Zeuske***, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997). Moreover, in deciding this issue, we note that "sentencing is a matter of legislative policy. The legislature decides whether and to what degree the sentencing court's discretion should be limited." ***State v. Setagord***, 211 Wis. 2d 397, 407, 565 N.W.2d 506 (1977) (citation omitted). A trial court then exercises its discretion based upon the parameters set by the legislature.

¶17 Here, Dismuke has utterly failed to meet his burden of proof. Dismuke's foundation for his belief that the truth-in-sentencing laws have resulted in longer sentences and greater disparity in sentences for the same crime rests with two newspaper articles, hardly amounting to a scientific sampling of the cases which have been prosecuted under the new sentencing laws. He cites no cases on point to support his contention that his constitutional rights have been violated because of the absence of sentencing guidelines. Thus, his argument may be rejected on this ground. ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d

392 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶18 However, in addressing his assertions, we first note that Dismuke's claim that the truth-in-sentencing scheme is void for vagueness is disingenuous. The new sentencing scheme spells out in far more detail the effects of a sentence than did the older statutes. Specifically, the truth-in-sentencing statutes provide for a maximum sentence, as their predecessors did. *See* WIS. STAT. § 973.01(2)(b) (2001-02). The statutory scheme also directs that the minimum initial confinement must be one year, and the period of extended supervision must equal at least 25% of the initial term of confinement. *See* WIS. STAT. § 973.01(2)(a)-(b) (2001-02). Thus, we conclude the statutes cannot be considered "vague."

¶19 We are equally unimpressed with Dismuke's other arguments that the lack of sentencing guidelines violates due process or leads to arbitrary and capricious sentences. The developed case law concerning the trial court's role and obligations in sentencing still applies under the new law. *See* ***State v. Gallion***, 2002 WI App 265, ¶¶8-9, 258 Wis. 2d 473, 654 N.W.2d 446. Trial judges still need to explain their sentences and the facts of record must support the trial court's exercise of discretion. *See* ***id.***, ¶9 (citing and quoting ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971)). Further, the same standards must be applied when sentencing under either law. *See* ***id.***

¶20 Dismuke's reliance on Justice Bablitch's concurring opinion in IN RE JUDICIAL ADMINISTRATION: FELONY SENTENCING GUIDELINES, 120 Wis. 2d 198, 204-08, 353 N.W.2d 793 (1984) (Bablitch, J., concurring), is also misplaced. Justice Bablitch's remarks assumed that because of then-pending legislation,

sentencing guidelines would be passed by the legislature. Indeed, the majority opinion adopted the position of a study committee that "there was no unjustified disparity in sentencing in Wisconsin courts" and stated that: "[i]mposing sentencing guidelines would interfere with the exercise of [a trial judge's] discretion." ***Id.*** at 200. Dismuke has pointed to nothing that concludes otherwise. The cases he cites deal with federal death penalty cases, federal sentencing guidelines and social security law. Thus, we conclude that Dismuke has failed to meet his burden. The lack of sentencing guidelines has not deprived him of any constitutional rights. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).