COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP857 **Cir. Ct. No. 2003CF1136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH WALKER, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Joseph Walker, Jr. appeals, *pro se*, from an order denying a motion to withdraw his guilty plea after sentencing. Walker claims: (1) he should be entitled to withdraw his plea because no factual basis existed for his plea or the charges against him; and (2) that the State engaged in prosecutorial

misconduct when it improperly amended the original charge of first-degree reckless homicide to first-degree intentional homicide. Because the trial court complied with the dictates of WIS. STAT. § 971.08 (2003-04),[1] Walker's plea was knowing, intelligent and voluntary; furthermore, because there was an evidentiary basis to charge first-degree intentional homicide and Walker waived any allegation of prosecutorial misconduct by pleading guilty, we affirm.

BACKGROUND

¶2 During the evening hours of February 17, 2003, two City of Milwaukee police officers on squad patrol were flagged down by a citizen who pointed to the residence at 8610 West Melvina Street, apartment #F, and informed the police that a woman inside was screaming. The officers approached the residence and heard a woman scream, "He is going to kill me!" The officers forced their way into the residence and observed that Patricia Walker, the wife of Joseph Walker, had multiple stab wounds to her body and arms. She was able to state that her husband, the defendant, had stabbed her. Walker was present during this exchange. The officers arrested him. Mrs. Walker was conveyed to the hospital for treatment, but died en route.

¶3 On February 19, 2003, in a criminal complaint, the State charged Walker with one count of first-degree reckless homicide, while armed, contrary to WIS. STAT. §§ 940.02(1) and 939.63. Walker waived his preliminary hearing. An information was filed on March 3, 2003, charging Walker with the same offenses. On April 16, 2003, the State informed Walker's counsel that if the matter were to

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

go to trial, it would be tried as a first-degree intentional homicide case. On June 27, 2003, the State, with leave of the court, filed an amended information, charging Walker with first-degree intentional homicide. On September 25, 2003, however, the State informed the court that plea negotiations had successfully taken place. As a result, the State requested to reinstate the information charging first-degree reckless homicide to which charge Walker had agreed to plead guilty. The court granted the request and, on September 29, 2003, Walker pled guilty to the reinstated charge. Walker's postconviction motion was denied and he now appeals.

ANALYSIS

¶4 Walker contends he is entitled to a plea withdrawal because no factual basis existed for his guilty plea or the charges brought against him. We are not convinced.

¶5 When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). In order to withdraw a guilty or no contest plea after sentencing, a defendant carries the heavy burden of establishing that the trial court should permit the defendant to withdraw the plea to correct a "manifest injustice." ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998).

¶6 This court employs a two-step process when evaluating a trial court's denial of a plea withdrawal motion. First, we analyze the plea transcript to measure if the defendant has made a *prima facie* showing that the trial court did not meet the procedures mandated by WIS. STAT. § 971.08. *See* ***State v. Mohr***, 201 Wis. 2d 693, 697, 549 N.W.2d 497 (Ct. App. 1996). If the defendant meets this burden, we shall then test whether the State has nevertheless demonstrated by clear and convincing evidence that the defendant entered the plea knowingly, voluntarily and intelligently. ***Id.*** While the defendant's understanding must be measured at the time of the plea, we may look to the record as a whole to determine if a defendant understood the consequences of his or her plea at the time. ***State v. Van Camp***, 213 Wis. 2d 131, 149, 569 N.W.2d 577 (1997).

¶7 To begin our review, we shall first examine the contents of the plea colloquy. Walker signed a plea questionaire, which declared that the trial judge could rely upon the facts set forth in the criminal complaint for the purposes of accepting a plea by the accused. The court then inquired to its satisfaction that Walker had reviewed and understood the plea questionaire. It further ascertained that counsel for Walker had reviewed both the criminal complaint and the facts of the case as they pertained to the elements of the charged crimes.

¶8 Next, the trial court explained to the parties, that it intended to rely on the contents of the complaint, the contents of the information, and from a ***Miranda-Goodchild***[2] hearing as the factual basis for the crimes charged. Both Walker and his counsel acceded to the trial court's intended approach.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶9 The complaint alleged that the police found the victim, Walker's wife, in a residence bleeding from multiple stab wounds to her body and arms. She told police that Walker had stabbed her. She was subsequently pronounced dead; the cause of death was "exsanquination from the loss of blood from multiple stab wounds to her chest and abdomen." Walker admitted to police that he stabbed his wife. These factual contents of the complaint, as incorporated in the trial court's colloquy, more than adequately substantiated the basis for Walker's guilty plea.

¶10 Part and parcel of the plea colloquy was the trial court's additional explanation to Walker that, by entering a guilty plea to the charges, he was surrendering his right to a jury trial and the right to present possible defenses and challenges to the charges of criminal acts alleged.

¶11 The court further determined under the evidence presented, that Walker had not been threatened or coerced into entering a plea, and that he had not consumed any alcohol or medicine within twenty-four hours of his plea. It thus concluded that he was entering a knowing, intelligent and voluntary plea. Doubtless, the record supports these determinations and conclusions. From this recitation of the record, we conclude Walker has not made a *prima facie* showing that the trial court failed to satisfy the procedures mandated by WIS. STAT. § 971.08. *See* ***Mohr***, 201 Wis. 2d at 697.

¶12 Tangential to his main claim of trial court error, Walker asserts he is entitled to withdraw his plea because the State filed an amended information on June 13, 2003, without evidence to support the charge of first-degree intentional homicide. We are not persuaded.

¶13 WISCONSIN STAT. § 971.29(1) allows for an amendment to a criminal charge at any time prior to arraignment without leave of the court. Amendments to a criminal charge post-arraignment, however, must comport with certain due process standards. In ***Whitaker v. State***, 83 Wis. 2d 368, 265 N.W.2d 575 (1978) our supreme court declared that an amendment to the charge is proper with leave of the court after arraignment and prior to trial provided the accused's rights are not prejudiced. The court explained: "Subsection (1) of sec. 971.29 should be read to permit amendment of the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial and the opportunity to defend." ***Whitaker***, 83 Wis. 2d at 374.

¶14 As noted earlier, the complaint in the instant case was filed on February 19, 2003. Walker then waived his preliminary hearing and the original information was filed on March 3, 2003. It is uncontroverted that on April 16, 2003, the State informed Walker's counsel that if the matter went to trial, it would be a trial for first-degree intentional homicide, while armed. An amended information was filed on June 27, 2003, with leave of the court. The trial was originally set for July 14, which was then adjourned for a final pretrial on September 25, 2003. On that date, Walker's counsel informed the court that his client had reached a plea agreement on the original charge. Walker has advanced no reasons demonstrating how the criteria of ***Whitaker*** have been violated. Thus, he was not shown how he was prejudiced or that any of his due process rights were violated.

¶15 Walker additionally claims that the State did not have an evidentiary basis to amend the charge from reckless homicide to intentional homicide. In response, the State, refering to the substance of WIS. STAT. §§ 940.01 and 940.02,

is quick to observe the only difference between the two charges is that the former requires the State to show a perpetrator's intent to cause the death of another human being while the latter only requires the State to show a perpetrator's utter disregard for human life. Citing ***Gelhaar v. State***, 41 Wis. 2d 230, 243, 163 N.W.2d 609 (1969) and ***State v. Carlson***, 5 Wis. 2d 595, 604, 93 N.W.2d 354 (1958), the State then cogently argues it was not required to submit any additional evidence to support a charge of intentional homicide. The original complaint establishes a sufficient factual basis for first-degree intentional homicide by alleging that Walker caused the death of his wife because "the law presumes that a person intends the natural and probable consequences of his own acts." Because the State had a sufficient evidentiary basis to charge first-degree intentional homicide, Walker's claim of manifest injustice fails.

¶16 Last, Walker claims prosecutorial misconduct based on the State's discretionary decision to amend the information. He also argues his due process rights were violated when the State increased the charge before trial as a bargaining chip for the purpose of making a guilty plea more likely, thus asserting prosecutorial vindictiveness. We reject this claim.

¶17 In the plea negotiation process, as long as a prosecutor has sufficient evidence to believe that an accused has committed an offense defined by a statute, the decision of what charge to lodge against an accused is entirely within the discretion of the prosecutor. This selective process "is not in itself a federal constitutional violation" provided "the selection was [not] deliberately based upon unjustifiable standards such as race, religion, or other arbitrary classifications." ***Bordenkircher v. Hayes***, 434 U.S. 357, 364-65 (1978) (citation omitted). Because we have already decided that the prosecutor was well within his discretion to amend the charge, Walker's claim of vindictiveness fails.

By the Court.—Order affirmed.

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