COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP379-CR **Cir. Ct. No. 2006CF695**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD A. VOSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Todd Voss appeals a judgment of conviction, entered upon his no contest plea, for one count of first-degree reckless homicide

by delivery of methadone, contrary to WIS. STAT. § 940.02(2)(a).[1] Voss also appeals an order denying his motion for postconviction relief. He asserts there was no factual basis for his plea and, further, it was constitutionally impermissible for the court to consider read-in charges at sentencing absent his admission to those crimes. We conclude the record adequately establishes a factual basis for Voss's plea and the read-ins were appropriately considered. Accordingly, we affirm the judgment and order.

Background

¶2 Voss was initially charged in September 2006 with the reckless homicide count, one count of first-degree reckless injury, and one count of delivery of methadone. These charges arose from a series of events where Voss provided methadone to his co-defendant, William Kloss. Kloss then gave the drug to Martin Helms, who died.

¶3 Following a preliminary hearing, where Voss was bound over for trial, the State filed an information containing the initial three counts, plus four more delivery of methadone counts, another first-degree reckless injury count, and one count of delivery of valium. Voss was arraigned and pled not guilty. Trial was set for December 19.

¶4 In November, counsel sought a competency exam. On December 4, the court received the report and determined Voss was competent to stand trial. Voss then entered a plea. In exchange for his no contest plea to the count of

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

first-degree reckless homicide, the State agreed to dismiss and read in the remaining charges. The State also agreed to cap its sentencing recommendation at twelve years' initial confinement plus ten years' extended supervision out of a maximum possible penalty of forty years. The court recited the factual basis for the plea, which Voss acknowledged. The court then accepted the plea and ordered a presentence investigation. Upon receipt of the PSI, the court sentenced Voss to fifteen years' initial confinement and ten years' extended supervision. Voss filed a motion to withdraw his plea or, alternatively, for resentencing. The court denied the motion. Voss appeals.

Discussion

I. Plea Withdrawal

¶5 A defendant who seeks to withdraw a plea after sentencing must show the withdrawal is necessary to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. One circumstance that constitutes a manifest injustice is the lack of a sufficient factual basis underlying the plea. ***Id.***, ¶17.

¶6 Voss complains there is an insufficient factual basis supporting his plea for multiple reasons. He argues the complaint alleges no facts that Helms' death was caused by Voss's methadone delivery. He points out that the affidavit for the search warrant accompanying the complaint indicates an autopsy "revealed no apparent cause of death for Helms" subject to a later drug screen. Voss points out that neither the drug screen results nor a subsequent autopsy report were ever put in the record, nor has a pathologist ever testified in this case. Thus, because Voss believes an official cause of death was never established, there is no factual basis for claiming he caused that death and his plea is therefore invalid.

¶7 A determination whether a sufficient factual basis for the plea exists lies within the circuit court's discretion. ***State v. Higgs***, 230 Wis. 2d 1, 11, 601 N.W.2d 653 (Ct. App. 1999). We will not overturn the court's determination "unless it is contrary to the great weight and clear preponderance of the evidence." ***Id.*** When the plea is negotiated, a court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996) (quoted source omitted).

¶8 Many sources can supply the requisite facts. ***Thomas***, 232 Wis. 2d 714, ¶20. A defendant may personally articulate the basis, but witness testimony, prosecutors' reading of police reports, or statements of evidence may also be utilized. ***Id.***, ¶21. On review, we may examine the "multiple sources spanning the entirety of the record" to determine whether a sufficient factual basis exists. ***Id.***, ¶23.

¶9 We conclude the record adequately establishes a factual basis for the plea. First, the complaint alleges Voss caused Helms' death by delivery of methadone, which Helms used. Then, the affidavit for the search warrant details the events preceding Helms' death. His girlfriend told police that on September 3, 2006, he showed her two bottles of methadone that he had obtained from Kloss. Kloss later identified Voss as his source. Helms' girlfriend observed him ingest a portion of the methadone and approximately thirty-six hours later, he was dead. Considering that a conviction can be sustained on the basis of circumstantial evidence, *see* WIS JI—CRIMINAL 170, this timeline of events alone would inferentially supply a factual basis for the plea.

¶10 At the plea colloquy, the court advised Voss that the substance of the action against him was that Kloss obtained the methadone from Voss and delivered it to Helms, "who then took it to his home in Marshfield and subsequently died from taking your methadone. That death was substantiated by an autopsy and a drug screen…." The court then asked if Voss understood why he was being charged with first-degree reckless homicide. Voss responded, "Yes, I do." The court also asked, "Do you understand by pleading no contest, you are not admitting it but *you're not challenging the facts that I referred to*?" (Emphasis added.) Voss answered, "Yeah." The court further advised Voss that with a trial, the State "would have to prove that Mr. Helms used the substance that you delivered and, as a result of that, he died." Voss acknowledged he was surrendering the right to force the State to prove its case and chose to proceed with his plea. By declining to challenge the facts recited by the court, Voss has in effect conceded them. This has the same practical effect as a stipulation, which can provide the factual basis for the plea. *See* ***Thomas***, 232 Wis. 2d 714, ¶21.

¶11 The PSI author noted a coroner had reported the cause of death as a methadone overdose, and the PSI included the methadone levels determined by the toxicology screening. While neither report is part of the record, Voss offers no authority for his suggestion that the State had to present all its evidence at the plea hearing—this was, after all, not a trial. Voss declined to put the State to its proof and ***Thomas***'s mention of "statements of evidence" suggests that actual exhibits need not be introduced at this stage. *See* ***id.*** Moreover, while Voss corrected certain errors in the PSI, he did not challenge the inclusion or accuracy of the information from the coroner or the toxicologist. Finally, at sentencing, Voss acknowledged his responsibility for Helms' death. Accordingly, we are satisfied that an adequate factual basis supports the plea.

II. Read-in Offenses

¶12 As part of the plea agreement, the State agreed to dismiss and read in for sentencing the remaining eight counts charged in the information. Voss now claims it was error for the court to consider these offenses because he never specifically admitted the charges and the court never found a factual basis for them. He claims that considering the read-ins violates his Sixth Amendment presumption of innocence, his due process right to be sentenced on accurate information, and the requirement, consistent with ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), that any fact increasing a penalty must be proven beyond a reasonable doubt.

¶13 Our supreme court recently withdrew "language in the case law that may be read as intimating that when a charge is read in a defendant must admit or is deemed to admit the read-in charge for sentencing purposes."[2] ***State v. Straszkowski***, 2008 WI 65, ¶95, 750 N.W.2d 835. Our read-in procedure does not require a defendant to admit he or she is guilty of the read-in charges for sentencing purposes. ***Id.***, ¶92.

¶14 As to Voss's specific arguments, there is no violation of his presumption of innocence. First, there is no trial, so there is no implication of his trial-specific rights. Second, sentencing courts are obligated to consider the

[2] The court suggested it would be good practice for judges and attorneys to omit references to "admitting" a read-in charge unless the defendant actually admits it. Instead, the courts and counsel should recognize that a defendant's agreement to a read-in affects sentencing in the following ways: the court is allowed to consider the charge when imposing sentence, although without increasing the potential maximum; the court may order restitution on read-in charges; and read-ins have a preclusive effect, preventing the State from recharging the defendant for the same crime at a later date. ***State v. Straszkowski***, 2008 WI 65, ¶93, 750 N.W.2d 835.

defendant's character and behavior patterns before imposing sentence. ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. To this end, they are entitled to consider uncharged, unproven offenses, and even facts relating to charges of which the defendant has been acquitted. ***Id.*** Thus, "admission" of the read-in charges is not a prerequisite to the court's consideration of them.

¶15 There is no violation of the due process right to be sentenced on accurate information. Voss has not made a threshold showing that there was any inaccuracy, and certainly has not shown the court relied on any inaccuracy. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. To the extent Voss now claims he did not directly deliver some of the drugs underlying the delivery charges, the appropriate manner for challenging his participation in those crimes was through a trial. Even if Voss's protestations of innocence are ultimately true, the court is permitted to consider that he engaged in a pattern of behavior that put him in a position where such charges could be made against him.

¶16 There is no violation of ***Apprendi***. That case dictates that "any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S. at 490 (emphasis added). But that case applies to penalty enhancers: in ***Apprendi***, the Court dealt with a hate crime enhancer extending the maximum penalty by ten to twenty years. ***Id.*** at 468-69. By contrast, read-in sentences do not increase the maximum sentence of the crime of the conviction. ***State v. Martel***, 2003 WI 70, ¶21, 262 Wis. 2d 483, 664 N.W.2d 69. Rather, they simply expose the defendant to the possibility of a greater penalty within the statutorily prescribed maximum. Thus, Voss's reliance on ***Apprendi*** is misplaced.

By the Court.—Judgment and order affirmed.

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