STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL R. SADLER,

Defendant-Appellant.

UNPUBLISHED
July 31, 1998

No. 194443
Recorder's Court
LC No. 95-010917

Before: Young, Jr., P.J., and Gribbs and S.J. Latreille*, JJ.

PER CURIAM.

Defendant pleaded guilty to second-degree murder, MCL 750.317; MSA 28.549, operating a motor vehicle under the influence of intoxicating liquor (OUIL), causing the death of another person, MCL 257.625(4); MSA 9.2325(4), and leaving the scene of a personal injury accident, MCL 257.617; MSA 9.2317. Defendant was sentenced to concurrent terms of ten to twenty years' imprisonment for his second-degree murder conviction, five to fifteen years' imprisonment for his OUIL, causing death, conviction, and two to five years' imprisonment for his leaving the scene of a personal injury accident conviction. We affirm.

On the evening of September 13, 1995, defendant went to a bar and ate dinner. Having also consumed three strong alcoholic beverages, he decided to drive home. In the course of driving home along Hines Drive, defendant claims that he passed out at the wheel and his car veered from the roadway and struck a woman who was jogging on the shoulder. Defendant did not stop to render aid, but instead continued his drive home. Defendant's blood alcohol content was 0.21 grams per 100 milliliters of blood, and defendant admitted that he had consumed cocaine the day before. Defendant was also ill with the flu, and had been sleeping during most of the day.

Defendant was arrested and charged with (1) second-degree murder, (2) OUIL, causing death, and (3) leaving the scene of a personal injury accident. As stated, defendant pleaded guilty to all three charges. At his plea hearing, defendant stated that he had no memory of even being on Hines Drive: "I only remember sort of coming to at the sound of a very loud impact, and I panicked and went straight

* Circuit judge, sitting on the Court of Appeals by assignment.

home." Following his sentencing, defendant moved to withdraw his guilty plea of second-degree murder, which request the trial court denied.

On appeal, defendant first argues that this Court should vacate his guilty plea of second-degree murder because the factual basis for his plea was insufficient. Specifically, defendant contends that the factual basis was insufficient to permit an inference that defendant acted with malice when causing the victim's death. In reviewing a claim that the factual basis of a plea is inadequate, this Court reviews the factual basis to determine whether a trier of fact could properly convict on the facts elicited from the defendant at the plea-taking proceeding. *People v Haack*, 396 Mich 367, 376-377; 240 NW2d 704 (1976). A factual basis is sufficient if an inculpatory inference can be drawn from what the defendant has admitted. *People v Rashid*, 154 Mich App 762, 764-765; 398 NW2d 525 (1986).

Malice can be established by proof that a defendant acted with the intent to kill, intent to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). In the recent companion cases of *People v Goecke*, *People v Baker*, and *People v Hoskinson*, 457 Mich 442; ___ NW2d ___ (1998), all of which involve drunk-driving-related deaths, our Supreme Court adopted the following formulation of the third, so-called "depraved heart," form of malice which is at issue in these kinds of cases:

> "[M]alice may be implied when the defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with wanton disregard for human life." [*Id*. at 467, quoting *People v Fuller*, 86 Cal App 3d 618, 628; 150 Cal Rptr 515 (1978).]

The Court emphasized that it was not adopting the position that drunk driving alone is sufficient to establish malice, noting that the conduct at issue in *Goecke*, *Baker*, and *Hoskinson* "involve a level of misconduct that goes beyond that of drunk driving." *Id*. at 469. The Court subequently found sufficient evidence to permit an inference of malice in all three cases.

Here, defendant admitted the following facts at his plea hearing: (1) his blood-alcohol content was .21 grams per 100 milliliters of blood, twice the legal limit; (2) he had used cocaine less than twenty-four hours before the accident; (3) he was ill with the flu and had been sleeping during most of the day as a consequence of the effects of his illness; (4) he consumed three strong alcoholic beverages just before leaving the bar and part of a fourth; (5) he willfully disregarded the effects of the alcohol on his body; and (6) he "passed out" at the wheel. Specifically regarding the accident, defendant stated that he had no memory of driving except for "coming to" when he left the roadway and hit the victim, who smashed into his windshield. Thereafter, defendant stated that he had to swerve back onto the road, but never stopped his car after hitting the victim to provide aid *although he was aware of having hit a human being*.[1]

We conclude that the facts adduced at defendant's plea hearing were sufficient to support an inference of malice. By these admissions, a reasonable trier of fact could, as in *Goecke*, *Baker*, and

Hoskinson, infer that defendant willfully disregarded the fact that he was in no condition to drive and chose to do so when he was barely conscious, such that the risk of death or great bodily harm would have been an almost certain result of his actions. In this case, defendant's admissions establish wantonness and extenuating circumstances beyond merely driving while intoxicated. Accordingly, the factual basis for defendant's plea was sufficient to support an inference of malice and, therefore, his conviction for second-degree murder.

We also reject as unfounded defendant's assertion that his guilty plea of second-degree murder is invalid because it was not knowing and voluntary. Finally, we note that the Supreme Court in *Goecke, supra*, slip op p 22 n 22, squarely rejected defendant's argument that the Legislature, by enacting the OUIL, causing death, statute, intended to preclude the prosecution from filing second-degree murder charges in a case such as this.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Roman S. Gribbs
/s/ Stanley J. Latreille

[1] At the plea hearing, defendant responded as follows to the trial court's inquiry concerning defendant's knowledge and actions at the point of impact and thereafter:

> THE COURT: Apparently you've indicated to me that you were on Hines Drive when this accident occurred. And, you said that you knew you had struck someone, you heard the impact?
>
> DEFENDANT: Correct.
>
> THE COURT: And did you have reason to believe at least, that there was some probability that it was a human being?
>
> DEFENDANT: At that moment - -
>
> THE COURT: I mean, you said you panicked.
>
> DEFENDANT: Yes, I did panic.
>
> THE COURT: All I'm talking about at that point is some reason to believe that that was a human being?
>
> DEFENDANT: I should have had a reason to believe that absolutely. . . .
>
> THE COURT: Your heart was racing because you figured maybe you hit someone?
>
> DEFENDANT: Yes, your honor.