COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 17, 1996

No. 95-1924-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN E. BACHER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. John Bacher, following pleas of no contest to charges of battery by a prisoner as a repeater and attempted escape, appeals his judgment of conviction and an order denying postconviction relief. Bacher contends that threats against his person by jail staff rendered his plea involuntary and that the repeater penalty attached to the conviction for battery by a prisoner constitutes a double jeopardy violation. Bacher first raised these issues following his no contest plea to the two counts and a sentence of maximum consecutive sentences on each count, to be served consecutive to earlier sentences for other crimes. Because the circuit court's finding that any

threats to Bacher's safety did not influence his decision to enter his pleas, we reject the claim of involuntariness. Because the two convictions do not present a double jeopardy problem, we also reject Bacher's other contention and affirm the convictions and order denying relief.

The charges underlying this appeal arise out of Bachman's attack on a Price County jailer during a failed escape attempt. According to Bacher's postconviction affidavit, following the escape attempt he was "physically mistreated" by the jail staff "in that I was repeatedly shoved into the hallway walls while being escorted to my cell." He also averred that he was subject to almost constant verbal abuse, including promises of physical harm "if you dare even breathe wrong." He alleged most of the abuse was from a jailer "whose physical size and apparent strength was extremely intimidating to me." Bacher alleged that he believed the only way he could prevent physical injury to himself by jail staff was to "plead out and be sentenced quickly ...."

The circuit court expressly found not credible Bacher's contention that his no contest pleas to the charges were influenced by the jailers' conduct. The court found Bacher's claim that he was intent on obtaining an immediate transfer to the state prison undermined by the fact that he was already awaiting transfer to prison on earlier sentences pending an opening at the Dodge Correctional Facility when he entered his no contest pleas. The court further relied upon Bacher's extensive involvement with the court system dating back to age twelve, his previous convictions of three separate offenses in adult court, and the fact that he was well acquainted with the court system and was represented by an attorney. The court also relied upon the fact that while Bacher's affidavit alleged a fear of the county jail environment as the basis for his plea, he had also alleged that his attempted escape was motivated in the first place by a fear of attacks by inmates in the state prison.

Findings of fact by a circuit court shall not be set aside unless they are clearly erroneous. Section 805.17(2), STATS. Wisconsin has adopted the "manifest injustice test" for review of a motion to withdraw a guilty or no contest plea following the sentence in a criminal case. ***State v. Reppin***, 35 Wis.2d 377, 386, 151 N.W.2d 9, 14 (1967). Manifest injustice may occur if a plea was involuntary. ***State v. Washington***, 176 Wis.2d 205, 214 n.2, 500 N.W.2d 331, 335 n.2 (Ct. App. 1993). The defendant seeking to withdraw a plea under this standard bears a heavy burden of establishing the grounds by clear and

convincing evidence. ***Id.*** at 213, 500 N.W.2d at 335. We review the circuit court's decision as a discretionary determination. ***State v. Canedy***, 161 Wis.2d 565, 579, 469 N.W.2d 163, 169 (1991). A discretionary decision must be made on the facts appearing in the record and in reliance on the applicable law. ***Id.*** at 579-80, 469 N.W.2d at 169. A discretionary decision must be the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. ***Id.*** at 580, 469 N.W.2d at 169.

Whether Bacher's affidavit alleging that his fear of the jailers rendered his plea involuntary or whether he was merely seeking an excuse to negate a lengthy sentence involved a question of fact that the fact finder resolved against him. The court found that Bacher was not influenced to enter his plea on the basis of the alleged conduct, and that finding is not clearly erroneous. The court, therefore, did not erroneously exercise its discretion to deny the motion to withdraw the no contest pleas.

Bacher also raises a double jeopardy issue. He maintains that because battery is normally a misdemeanor, the consideration of his status as a prisoner to impose a felony penalty under the "battery by a prisoner statute" bars a repeater allegation. He argues that his status as a prisoner and his status as a repeater are virtually identical and prevent the added punishment. We disagree.

We agree with the attorney general that a repeater charge does not invoke a double jeopardy bar. This court has held that a repeater enhancement is not a separate crime for which a defendant may be separately punished, and thus the charges do not involve "two statutory provisions [which] proscribe the 'same offense.'" ***State v. James***, 169 Wis.2d 490, 496-97, 485 N.W.2d 436, 439 (Ct. App. 1992).

Moreover, even were we to accept Bacher's assertion that this repeater charge implicates a double jeopardy question, the question then becomes one of legislative intent: "[T]he question of what punishments are constitutionally permissible [under the double jeopardy clause] is not different from the question of what punishments the Legislative Branch intended to be imposed." ***Albernaz v. United States***, 450 U.S. 333, 344 (1981).

It is apparent that the legislative goal in adopting the battery by a prisoner statute and the repeater statute do not serve identical purposes. The former is a method of protecting jailers and inmates from assault; the latter is "to increase the punishment of those who do not learn their lesson ... for their prior violations of the criminal laws ...." *See* ***State v. Ray***, 166 Wis.2d 855, 872, 481 N.W.2d 288, 295 (Ct. App. 1992).

Finally, contrary to Bacher's contention, the status of prisoner and repeater are not "virtually identical": Repeaters are not always prisoners, and prisoners are not always repeaters. We conclude that the legislature intended to permit separate punishments for a battery by a prisoner and for committing the crime as a repeater. There is no double jeopardy bar to Bacher's sentence in this case.

By the Court. – Judgment and order affirmed.

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