COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2983 **Cir. Ct. No. 00-CF-50**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL BERNDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Daniel Berndt, pro se, appeals an order denying his motion for postconviction relief from a judgment convicting him of operating a vehicle without the owner's consent entered upon his plea of no contest. Berndt

argues that the court erroneously conducted the plea colloquy and erred at sentencing.[1] The State agrees that the court erroneously found that Berndt waived his right to counsel. It further agrees that the court's pronouncement of sentence was ambiguous. We disagree on both issues. We conclude that the record reflects a valid waiver of right to counsel and that any ambiguity in the court's oral sentence pronouncement was clarified in its written decision denying Berndt's postconviction motion. The judgment of conviction, however, does not reflect the sentence articulated in the court's written decision. Therefore, the order is affirmed and remanded with directions to correct the judgment of conviction to reflect the court's sentence contained in its written postconviction decision.

BACKGROUND

¶2 On March 28, 2000, Berndt was charged with one count of intentionally operating a motor vehicle without the owner's consent, contrary to WIS. STAT. § 943.23(3), a Class E felony.[2] The complaint recites that on March 25, 2000, at approximately 3:20 a.m., Shawano County Sheriff's department officer George Lenzner arrived at the scene of a motor vehicle accident on Oak Avenue in the Town of Richmond. He located a male, later identified as Berndt, "in the north ditch who appeared to be ejected from the motor vehicle … curled up[]" with a head laceration, a bloody nose and a strong odor of intoxicants about him. Berndt responded affirmatively to the officer's question

[1] Berndt further complains the prosecution was vindictive. Because the record reveals no support for this argument, we summarily reject it.

[2] WISCONSIN STAT. § 943.23 provides: "Whoever intentionally drives or operates any vehicle without the consent of the owner is guilty of a Class E felony."

All statutory references are to the 2001-02 version unless otherwise noted.

whether he had been driving the vehicle. Berndt further responded that no one had been with him. Upon additional questioning, Berndt advised that he did not remember anything.

¶3 The officer reported that the listed owner of the vehicle stated that Berndt had been helping him restore it, but that "he never gave [Berndt] permission to operate the vehicle and that [Berndt] was aware the vehicle was not registered to be operated on the roadway." The owner signed a statement indicating that at no time had he given Berndt permission to operate the vehicle and that Berndt had not told him that he intended to operate the vehicle.

¶4 Berndt appeared without an attorney at the initial appearance. The court stated:

> Daniel is charged with Operating a Motor Vehicle Without the Owner's Consent on March 25, 2000. … He's charged with a Class E Felony. He faces ten thousand dollars, five years prison or both.
>
> You have a right to be represented by a lawyer. If you cannot afford a lawyer the Public Defender would give you a lawyer. Did you want a lawyer?

¶5 Berndt replied: "No, thank you[]" and advised the court that he would plead not guilty and would represent himself. The court ascertained that Berndt was twenty-two years old, had finished high school and had never been through a jury trial. The court explained that the first step was a preliminary hearing to establish that Berndt had probably committed a felony. At Berndt's request, the court scheduled a preliminary hearing, and stated that Berndt was "competent to represent himself at this point anyway …." The court advised Berndt that he could always change his mind and retain a lawyer.

¶6 At the preliminary hearing, the court asked Berndt, "I think you said you were going to represent yourself, Daniel?" and Berndt indicated yes.[3] At the preliminary hearing, the owner testified that Berndt was going to fix the exhaust and brakes, and that he gave Berndt the keys in case he needed to move the car "to get it fixed, not really go and drive it around …." The owner testified he did not give Berndt permission "to use it socially" or for recreation. The owner stated that Berndt was aware the vehicle had been in storage and was not registered to be operated on the road.

¶7 Berndt cross-examined the owner, asking him if he had given Berndt permission to take the car to Waupaca to get it fixed. The owner conceded he may have given him permission to take it to get it fixed but, "Not to drive it around to run errands or to go to the bar or whatnot."

¶8 A second witness testified that he saw Berndt at the Oak Avenue Pub and Grill and that Berndt left at the same time he did, approximately 2:30 a.m. In the parking lot, Berndt "mentioned something about racing." Shortly thereafter, the witness saw Berndt "coming up behind me" and "going into the ditch." "[I]t must have went sideways in the road because there was a lot of gravel and debris flying." The witness testified further that it "went into the ditch, rolled over numerous times and landed back on the road."

¶9 Following the preliminary hearing, the court again asked Berndt whether he was going to represent himself, to which Berndt replied, "Yes." The court explained the arraignment procedure and Berndt entered a plea of not guilty.

[3] The transcript of the preliminary hearing states Berndt's response as "[INDICATING YES]."

¶10 Berndt subsequently entered into a plea bargain with the prosecutor. At the plea and sentencing hearing, the prosecutor advised the court that Berndt "has not been represented by counsel through this matter" and did not have an attorney at the time. The prosecutor recited the plea agreement: In exchange for Berndt's no contest plea to the charge of driving and operating without the owner's consent, the State would recommend "five years prison, two years incarceration, three years E.S. [imposed and stayed] and court costs, and restitution in the amount of $7,685.31." Berndt would be placed on probation for five years and be ordered to pay $7,685.31 in restitution, among other conditions.

¶11 Before accepting the plea, the court went over the elements of the offense and the range of penalties, stating,

> Let me go over this with you. If we went to trial, then [the prosecutor] would have to prove beyond a reasonable doubt that on March 25 of 2000, you did intentionally, that means on purpose and not by accident, take and drive a motor vehicle without the owner's permission, of course, knowing you had no permission. We're talking about a 1987 Ford Mustang belonging to [the owner].
>
> If you're found guilty, it is a class E. Felony. You face $10,000.00, or five years in prison, or could be both.

¶12 Berndt stated that he understood the charge and the penalties he faced. He said he intended to plead no contest. The court explained the consequences of a no contest plea and explained:

> You're giving up your right to have a lawyer. If you cannot a lawyer [sic] the public defender would give you a lawyer. And a lawyer might figure out some way to get you out of this or make it less somehow. You'll be giving up your right to have a trial. You could either have a jury decide the case or a judge. The purpose of a trial is to make the prosecutor prove every part of his charge beyond a reasonable doubt. You could question his witnesses at trial, you could bring your own witnesses to trial, and you could get up and testify yourself, but you don't have to do

> anything. And if we had a jury decide the case everybody on the jury would have to believe you're guilty before you could be found guilty.

¶13 Berndt stated that he understood he was giving up all these rights. In response to further questioning by the court, Berndt stated that he was twenty-two years old, had not been treated for any mental problem, that there were no threats or promises other than the plea bargain that was on the record and he had no questions about the proceedings. The court found that Berndt knowingly, freely and understandingly waived his constitutional rights. The court stated: "I find factual foundation for his plea in the Complaint" and upon his plea, found him guilty.

¶14 The court stated that "I am going to go along with the plea bargain." The court stated that Berndt would have "a total of five years of prison hanging over your head. … If you violate your probation, then you will go to prison for three years. … Once you get out of prison, you'll be on extended supervision. If you violate your supervision, you can be brought back and sent back to prison to finish two more years."[4] The court further explained that Berndt need not "have a reason to worry about prison time if you do what you're supposed to on probation." The judgment of conviction recites the court sentenced Berndt to three years in prison and two years' extended supervision, imposed and stayed, and that Berndt was placed on probation.

¶15 In October 2001, Berndt's probation was revoked and he was incarcerated under the terms of the judgment of conviction. Berndt filed a

[4] The record discloses no objection from either party to the court's apparent misstatement of the sentence recommended by the plea bargain.

postconviction motion claiming that he had not waived his right to counsel. He also claimed that the plea colloquy was inadequate because at no time was he asked to stipulate to the complaint as a factual basis for the plea. He further argued that the prosecution was vindictive, that there was evidence showing his innocence and that the court was careless and breached the plea agreement.

¶16 The court denied Berndt's postconviction motion in a memorandum decision. The court determined that the record was devoid of any evidence of a vindictive prosecution. With regard to his right to counsel, the court found:

> The Court on several occasions told him about his right to counsel and he said he did not want one. This is a man who had three prior felony convictions in Marathon County. He had been through the system at least on three occasions. It's interesting to read his brief. It is quite well written and he seems to be quite knowledgeable of the law.

¶17 With regard to the factual basis, the court noted that it had presided over the preliminary hearing that provided a factual basis for the plea. The court observed that while there may have been evidence suggesting innocence, there was sufficient evidence of guilt. Finally, the court stated that there was no breach of the plea agreement, explaining:

> The court adopted the plea bargain and explained to him that he was going to go to prison for two years if he has his probation revoked and beyond three years supervision. If he violated extended supervision, he could go back to prison for three years.

DISCUSSION

1. Plea Colloquy

a. Right to counsel

¶18 We disagree with the State's statement that Berndt is entitled to a remand on the issue of waiver of right to counsel based upon an inadequate colloquy. We conclude that the record is adequate to show a valid waiver.[5]

¶19 Nonwaiver is presumed unless waiver is affirmatively shown on the record to be knowing, intelligent and voluntary. ***Pickens v. State***, 96 Wis. 2d 549, 568-69, 292 N.W.2d 601 (1980). In ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), our supreme court mandated the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel:

> [T]he circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

If a defendant properly waives counsel and is competent to do so, the court must allow him to represent himself. ***Id.*** at 204. The court may rely on the record as a

[5] The State's analysis omits portions of the court's discussions with Berndt. Berndt's brief fails to include accurate record citation and does not accurately quote the proceedings. *See* WIS. STAT. RULE 809.19(1)(3). To Berndt's credit, he included a thorough appendix. Nonetheless, the purpose of the appellate rules of procedure is to facilitate review, and failure to include accurate record citation hampers this court's review of claimed error. *See* ***Cascade Mtn. v. Capitol Indem.***, 212 Wis. 2d 265, 569 N.W.2d 45 (Ct. App. 1997).

whole to determine whether a defendant's waiver of counsel was knowing, intelligent and voluntary and whether he or she was competent to represent himself. *See* ***State v. Ruszkiewicz***, 2000 WI App 125, ¶30, 237 Wis. 2d 441, 613 N.W.2d 893.

¶20 Here, there is no issue as to Berndt's competency. The record demonstrates that the trial court asked Berndt a number of times whether he intended to proceed without counsel. The court advised that Berndt may either retain an attorney or, if he could not afford one, counsel would be appointed. The record supports the court's determination that Berndt made a deliberate choice to proceed without counsel. The record unequivocally establishes that the court informed Berndt of the seriousness of the charge against him and the general range of possible penalties.

¶21 We further conclude that the record adequately shows that the court could find that Berndt was aware of the difficulties and disadvantages of self-representation. ***Id.*** Berndt was twenty-two years old, a high school graduate and had three previous felony convictions. Although the court did not go into great detail, it explained "a lawyer might figure out some way to get you out of this or make it less somehow." In the context of the entire colloquy, it is obvious that Berndt would understand that a lawyer could call witnesses and strategize a defense. We conclude that the record supports the trial court's finding of a valid waiver of his right to counsel.

b. Factual basis

¶22 Berndt argues that the record fails to establish a factual basis for his plea. He claims that the victim recanted his allegations at the preliminary hearing. We are unpersuaded. For a circuit court to accept a guilty plea, there must be an

affirmative showing that the plea is knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). WISCONSIN STAT. § 971.08(1)(b) sets forth the additional requirement that a circuit court must "Make such inquiry as satisfies it that the defendant in fact committed the crime charged."

¶23 In ***State v. Thomas***, 2000 WI 13, ¶24, 232 Wis. 2d 714, 605 N.W.2d 836, the supreme court pointed out that under WIS. STAT. § 971.08(1)(c) the judge must determine the factual basis and there is no requirement that the defendant personally articulate the factual basis. "[A] judge may establish the factual basis as he or she see fit, as long as the judge guarantees that the defendant is aware of the elements of the crime and the defendant's conduct meets those elements." ***Id.***, ¶22. On review, this court may consider the entire record including the preliminary and sentencing hearings to establish a factual basis. ***Id.***

¶24 Here, the record demonstrates the court's compliance with WIS. STAT. § 971.08(1)(b). The court ensured that Berndt was aware of the elements of the offense and that his conduct met those elements. The court based its determination of a factual basis on the allegations of the complaint. In its postconviction decision, the court correctly noted that the preliminary hearing provided an additional factual basis. Berndt's contention that the victim "recanted" at the preliminary hearing is unavailing. The owner testified that he permitted Berndt to drive the car to get it fixed. The record demonstrates that Berndt did not have the owner's consent to drive the vehicle from a bar at 2:30 in the morning. There is no suggestion that Berndt's operation of the vehicle at that

time, location, and manner was even remotely related to fixing it.[6] The record supports the court's finding of a factual basis and its subsequent denial of Berndt's challenge to the plea procedure.

2. Sentencing

¶25 Finally, the State submits that the record demonstrates confusion and contradiction with respect to the sentencing court's discretion. It points out that an unambiguous orally pronounced sentence controls over a subsequent conflicting written judgment, *see* ***State v. Perry***, 136 Wis. 2d 92, 401 N.W.2d 748 (1987), but contends that a remand is necessary to resolve the ambiguity.

¶26 We conclude that the record demonstrates the court resolved the ambiguity in its postconviction decision. When the oral pronouncement is in some way ambiguous, it must be construed to fulfill the sentencing court's intent. ***Krueger v. State***, 86 Wis. 2d 435, 443, 272 N.W.2d 847 (1978). Here, the court made two contradictory sentencing pronouncements at the sentencing hearing. Nonetheless, in its decision on Berndt's postconviction motion it stated:

> The court adopted the plea bargain and explained to him that he was going to go to prison for two years if he has his probation revoked and beyond three years supervision. If he violated extended supervision, he could go back to prison for three years.

We conclude that the court's written decision clarifies and confirms its intent to enter a sentence consistent with the State's plea agreement recommendation. On

[6] The complaint contains the investigating officer's report that following the rollover, "The vehicle was a total loss."

remand, the court is directed to enter a corrected judgment of conviction to reflect its intention as set forth in the postconviction decision.

By the Court.—Order affirmed and cause remanded with directions.

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