COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3348-CR **Cir. Ct. No. 99CF001145**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES L. WRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 SNYDER, J. James L. Wright appeals from a judgment of conviction for possession of cocaine with intent to deliver and obstruction. Both charges included repeat offender penalty enhancers. He further appeals from an order denying his motion for postconviction relief. Wright contends that the

conviction for obstruction lacked a factual basis, and that the prosecutor undercut an agreed-upon sentencing recommendation. We disagree with these contentions and affirm the judgment and order in this regard. Wright also argues that the circuit court improperly accepted his plea of no contest to the cocaine charge because there was no factual basis in the record to support the charge. We agree, reverse the judgment and order, and remand with directions to allow Wright to withdraw his plea to this charge.

BACKGROUND

¶2 On October 26, 1999, City of Kenosha Police Officer Peter Falk received a tip that Wright had provided drugs to another person and that Wright often carried "dope on him." Falk learned that Wright had recently been released from prison and he checked a booking photo of Wright before going out on patrol. At approximately 9:00 p.m. that night, Falk saw two men walking on the sidewalk and recognized one as Wright and the other as someone with whom he had had prior contact. At the time of the encounter, Falk was driving an unmarked police car and he was wearing plain clothes and his badge.

¶3 Falk pulled up alongside the two men and directed them to stop, but Wright continued walking. Falk then exited his car and again told Wright to stop. Wright started walking faster. Falk followed Wright and for the third time directed him to stop. At that point, Wright took his hand from his pocket and turned away from Falk. Falk then instructed Wright to put his hands on his head. Wright put his hand near his mouth and then threw something on the ground. Falk grabbed Wright and handcuffed him as Wright yelled, "Take me to [ ] jail." After arresting Wright, Falk went back with a flashlight to find the object Wright threw on the ground. He found a clear plastic bag containing crack cocaine.

¶4 The State charged Wright with knowingly possessing a total weight of 5.5 grams of cocaine with intent to distribute, in violation of WIS. STAT. § 961.41(1m)(cm)2. (1997-98),[1] and subject to a fine of up to $500,000 and imprisonment of six to thirty-one years, with sentence enhancers, upon conviction. The complaint's factual basis stated that Wright "threw an object approximately four feet away onto the sidewalk" and that the arresting officer "walked over to the area where [Wright] threw the object … and recovered … a white rock-like substance which was later tested and determined … to be 5.5 grams of crack cocaine."

¶5 At the bail hearing on July 21, 2000, the State conceded that the cocaine weighed 2.9 grams rather than 5.5 grams, a violation of WIS. STAT. § 961.41(1m)(cm)1., rather than § 961.41(1m)(cm)2. Consequently, the circuit court directed that the information be amended to reflect the proper drug weight and statute section.[2] The State did not file an amended information.

¶6 At the plea hearing on February 9, 2001, the charges were resolved pursuant to a negotiated plea agreement. Under the plea agreement, the State would recommend incarceration for five years on the drug charge and consecutive

[1] We apply the 1997-98 version of the Wisconsin Statutes in light of the amendment of this section by 1997 Wis. Act 283, § 371, effective December 31, 1999. All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The circuit court stated:

> You will have to file an amended Information. I doubt if [trial defense counsel] will object to the amendment because it reduces the exposure from 30 to 21 [years] but still a three-year presumptive minimum.

probation on the obstruction charge.[3] At that time, the information was revised to reflect the negotiated plea agreement by striking the phrase "within a thousand feet of the school," a reference to WIS. STAT. § 961.49, and changing the penalty from imprisonment of not less than four years nor more than thirty years to imprisonment for up to sixteen years. However, the original amount of 5.5 grams of cocaine and the corresponding statute section appearing in the original complaint and information remained unchanged.

¶7 During the plea colloquy, the circuit court advised Wright that the sentence exposure would be "16 years with a $500,000 fine" on the drug count. Wright was further advised that the element that he "intended to deliver the [drug] substance" was based upon a factual allegation of "possession … as indicated on the complaint … of a substance later determined to be cocaine and 5.5 grams." Wright said that he understood the nature of the charge. The court found a factual basis for accepting Wright's no contest pleas.

¶8 On March 12, 2001, the circuit court entered its judgment convicting Wright of obstruction and of possessing ">5-15g" cocaine with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(cm)2. On September 13, 2002, Wright moved to withdraw his pleas of no contest, alleging that: (1) the factual basis relied on by the circuit court was to the original, and greater, criminal charge the State conceded it could not prove; (2) there was no factual basis for the obstruction charge; and (3) the prosecutor violated the plea agreement. The court denied

[3] Wright acknowledges the plea agreement and does not contend that the State violated the agreement by failing to amend the information to allege a lesser offense. He does contend that the State violated the agreement by saying that its five-year prison cap recommendation resulted in a "modest" term of incarceration.

Wright's motion. With regard to the drug charge, the court directed that an amended judgment of conviction be filed reflecting that the conviction was for a violation of § 961.41(1m)(cm)1., rather than § 961.41(1m)(cm)2. The amended judgment of conviction was filed on November 13, 2002, and an order denying postconviction relief was entered two weeks later. Wright appeals.

DISCUSSION

¶9 Wright contends that both the conviction for possession with intent to deliver cocaine and the conviction for obstructing an officer lacked a sufficient factual basis and therefore he is entitled to withdraw his pleas of no contest. He argues that plea withdrawal is necessary to correct a manifest injustice. A circuit court's decision to allow a defendant to withdraw a guilty plea is a matter of discretion, subject to review for an erroneous exercise of that discretion. ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. When a defendant moves for plea withdrawal after sentencing, the defendant bears the "heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***Id.***, ¶16 (citation omitted).

¶10 When a criminal defendant pleads guilty or no contest, the circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b). This requirement exists to

> protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his [or her] conduct does not actually fall within the charge.

White v. State, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978) (citation omitted). The absence of a factual basis for a plea constitutes a manifest injustice as a matter

of law. ***Thomas***, 232 Wis. 2d 714, ¶17. Whether the plea colloquy is legally sufficient encompasses an analysis based upon the total facts and circumstances in the record. *See* ***State v. Burns***, 226 Wis. 2d 762, 773, 594 N.W.2d 799 (1999).

¶11 In this case, the State concedes that no factual basis exists for the charge of possession with intent to deliver more than five grams of cocaine. The State argues, however, that our first task is to determine whether Wright pled no contest to possession of more than five grams under WIS. STAT. § 961.41(1m)(cm)2., or possession of less than five grams under § 961.41(1m)(cm)1.

¶12 Wright contends that the circuit court's colloquy at the plea hearing plainly states that his conviction would be based on the factual allegation that he possessed 5.5 grams of cocaine. Further, he notes that the circuit court entered a judgment of conviction for possession with intent to deliver more than five grams of cocaine.

¶13 The State counters that the penalty imposed reflects the lesser charge and directs us to the following exchange at the plea hearing:

> [DEFENSE COUNSEL]: Your Honor, if Mr. Wright enters a plea to one count of possession of cocaine with intent to deliver as a repeater and enters a plea to obstructing as a repeater, then the State will be recommending a five-year cap on the possession charge and they will be recommending consecutive probation on the obstructing as a repeater charge.
>
> THE COURT: First, is that your understanding?
>
> [PROSECUTOR]: Yes, Judge.
>
> THE COURT: Therefore, the State is striking the within 1,000 feet?
>
> [PROSECUTOR]: Correct.

> THE COURT: And, therefore, the presumptive minimum is no longer present but is the maximum penalty of 30 years still present?
>
> [DEFENSE COUNSEL]: No. We have a maximum penalty of 16 years.
>
> THE COURT: 16 years?
>
> [PROSECUTOR]: Yes.
>
> [DEFENSE COUNSEL]: On the possession with intent to deliver.

The State contends that the penalty, which would have reflected possession with intent to deliver 2.9 grams of cocaine, demonstrates that Wright pled to the lesser charge.[4]

¶14 On appeal, the State concedes that the "proceedings at the plea hearing … muddied the waters." The State further concedes that the handwritten revisions to the information reflect the same confusion apparent in the plea hearing transcript. As amended, the information describes the maximum penalty of sixteen years in prison, which is associated with the lesser charge under WIS. STAT. § 961.41(1m)(cm)1. The information's references to 5.5 grams of crack cocaine and to § 961.41(1m)(cm)2., however, were not stricken. The State aptly describes the amended information as "hopelessly ambiguous with respect to the offense being charged."

¶15 The State asserts that because Wright has the burden of proof, the ambiguity in the record "defeats Wright's claim that a factual basis for his plea

[4] Conviction of WIS. STAT. § 961.41(1m)(cm)2., without enhancers, subjected a defendant to not less than one nor more than fifteen years' incarceration, while § 961.41(1m)(cm)1., without enhancers, carried a sentence of not more than ten years without a mandatory minimum.

was lacking." The State continues, "When … the record is not clear as to the offense to which the defendant pleaded guilty or no contest, that burden would necessarily include the production of clear and convincing proof of the nature of the offense to which the defendant pleaded." This argument is placed before us without references to legal authority. Arguments unsupported by references to legal authority will not be considered. ***State v. Lindell***, 2000 WI App 180, ¶23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500, *aff'd*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. Moreover, we refuse to hold that the State should benefit from the hopeless ambiguity created by its own charging documents.

¶16 At the postconviction hearing, the circuit court determined that a factual basis existed for the elements of the crime of possession with intent to deliver. The court ruled that the amount of cocaine was "basically an enhancer in terms of the penalty" and that the "penalty … was the correct one of not 5.5 but below." When a circuit court determines that there was a factual basis for a plea of no contest, we will not upset that determination unless it was clearly erroneous. ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Here, the record is so hopelessly ambiguous as to which crime was the subject of Wright's plea that we conclude that the circuit court's exercise of discretion was clearly erroneous and we hold that Wright is entitled to relief.

¶17 The manifest injustice resulting from a circuit court's failure to establish a factual basis for a plea generally warrants the remedy of plea withdrawal. ***State v. West***, 214 Wis. 2d 468, 474, 571 N.W.2d 196 (Ct. App. 1997). The State argues, however, that plea withdrawal is not always the proper remedy. When the missing information applies to a penalty factor rather than elements of the core offense, the State argues that the proper remedy is resentencing. We do not reach this issue because the complaint, the information,

and the hearing transcripts are ambiguous as to the crime for which Wright was sentenced. We conclude that Wright is entitled to withdraw his plea of no contest to the charge of possession of cocaine with intent to deliver and we remand to the circuit court for further proceedings.

¶18 Wright also argues that he is entitled to withdraw his plea to the charge of obstructing an officer. As noted above, a circuit court's decision to allow a defendant to withdraw a guilty plea is a matter of discretion, subject to review for an erroneous exercise of that discretion. ***Thomas***, 232 Wis. 2d 714, ¶13.

¶19 Obstruction of an officer occurs when someone "knowingly … obstructs an officer while such officer is doing any act in an official capacity and with lawful authority …." WIS. STAT. § 946.41(1). This charge, therefore, requires that Wright knew he was obstructing a police officer when he continued walking after Falk ordered him to stop. *See* ***State v. Lossman***, 118 Wis. 2d 526, 535-36, 348 N.W.2d 159 (1984). Wright argues that there is no factual basis for this element of the offense.

¶20 Record facts indicate that Falk was driving an unmarked car and wearing plain clothes. Also, Falk stated that he did not identify himself as a police officer when ordering Wright to stop. Falk stated that he was wearing a badge at the time of the stop and that the badge was visible at all times during the encounter. The man walking with Wright at the time Falk ordered them to stop followed that order. Wright said, "Take me to [ ] jail" when Falk grabbed him.

¶21 The facts presented allow us to draw more than one inference: Wright may or may not have known that Falk was a police officer. "[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint

or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record ...." ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. This is precisely the case here. Wright waived his right to argue the correctness of his preferred inference when he pled no contest to the charge based on the record. *See* ***id***. Furthermore, Wright acknowledged in the plea questionnaire that (1) he knowingly obstructed an officer, (2) while that officer was acting in his official capacity, and (3) he knew the officer was acting in his official capacity.

¶22 Wright also argues that the obstruction charge lacks a factual basis because he was merely "exercising his constitutional right to continue on his way" and Falk failed to "objectively invoke his authority as a police officer." We disagree with Wright's characterization. In ***State v. Kelsey C.R.***, 2001 WI 54, ¶33, 243 Wis. 2d 422, 626 N.W.2d 777, we held that an officer made a show of authority by telling a citizen to "stay put." Here, Falk told Wright to "stop" three times and, as noted above, Wright knew Falk was acting in his official capacity. We conclude that Falk did indeed invoke his authority when he told Wright to stop. We conclude that there is a sufficient factual basis for Wright's plea of no contest to the charge of obstructing an officer.

¶23 Finally, Wright contends that the State breached the plea agreement by making comments intended to influence the circuit court to impose a greater sentence. The plea agreement stated that if Wright pled to the cocaine charge, the State would not recommend more than five years in prison. Wright contends that the prosecutor undercut the plea agreement when she stated that a five-year sentence was "a very modest recommendation given the nature of this offense and the history involved in this case." The circuit court imposed a twelve-year prison sentence.

¶24 Whether the State's comments constitute a breach of the plea agreement and whether the breach is material and substantial are questions of law. ***State v. Liukonen***, 2004 WI App 157, ¶9, ___ Wis. 2d ___, 686 N.W.2d 689. An actionable breach must be more than merely a technical breach. ***Id.*** "[N]othing prevents a prosecutor from characterizing a defendant's conduct in harsh terms, even when such characterizations, viewed in isolation, might appear inconsistent with the agreed-on sentencing recommendation." ***Id.***, ¶10 (emphasis omitted).

¶25 Wright argues that the prosecutor sent a covert message to the judge that turned the five-year cap into a five-year floor. We disagree. When placed in context with her entire presentation to the court, we see that the prosecutor conformed to the terms of the plea agreement and did not cross that fine line that all prosecutors face at a sentencing hearing. *See* ***State v. Hanson***, 2000 WI App 10, ¶27, 232 Wis. 2d 291, 606 N.W. 2d 278. Here, the prosecutor opened her comments with the State's recommendation that Wright be sentenced to five years in prison and three years of consecutive probation. She continued with an overview of Wright's criminal history, and then made the challenged statement that five years was a "modest recommendation." In her concluding comments, the prosecutor reiterated that "the State is recommending the five-year prison term with consecutive probation."

¶26 A prosecutor crosses that fine line when he or she makes comments intended to convey to the sentencing court that he or she now considers the recommended disposition inadequate. *See* ***State v. Williams***, 2002 WI 1, ¶50, 249 Wis. 2d 492, 637 N.W.2d 733. Although the prosecutor's characterization of the recommended sentence as "modest" comes close to that fine line, we conclude that in the context of her entire presentation to the court, she did not breach the plea agreement.

CONCLUSION

¶27 We conclude that the circuit court properly denied Wright's postconviction motion to withdraw his no contest plea to the obstruction charge because there was a sufficient factual basis for accepting the plea. We further conclude that the prosecutor's comments at sentencing did not breach the plea agreement. We reverse the circuit court's denial of Wright's motion to withdraw his plea to the possession of cocaine with intent to deliver charge and direct that he be allowed to withdraw his plea. The record is so hopelessly ambiguous that it is impossible to tell whether Wright pled to the charge of possession with intent to deliver more than five grams of cocaine or less than five grams of cocaine. We remand the matter to the circuit court for further proceedings in accordance with this decision.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.