COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP537-CR **Cir. Ct. No. 2000CF152**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMAICA WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. Jamaica Wilson appeals an order of the circuit court denying his motion for plea withdrawal. Wilson argues that he is entitled to plea withdrawal because he did not admit, either expressly or implicitly, all facts necessary to prove he committed first-degree intentional homicide as a party to a

crime. We reject Wilson's argument. First, we conclude that the plea colloquy reveals that Wilson disputed only a fact that was not necessary to support his conviction for first-degree intentional homicide as a party to a crime. Second, we conclude, under well-settled case law, that there is no requirement that Wilson, during the plea colloquy, needed to admit all facts necessary to prove he committed the crime to which he entered his plea. Accordingly, we affirm the circuit court.

Background

¶2 This case arises out of an attempted robbery of an alleged drug dealer by Wilson and others. Wilson and two accomplices entered a residence in Madison intending to rob a drug dealer. During the robbery, one of Wilson's accomplices shot two young males with a handgun. One of these males was shot in the chest and died. Wilson and his accomplices fled with money and drugs. Wilson was charged with several crimes relating to these events.

¶3 Pursuant to a plea agreement, Wilson entered a guilty plea to a single count, first-degree intentional homicide as a party to a crime. During the plea colloquy, after ascertaining Wilson's understanding of the elements of the crime, the following exchange occurred:

> THE COURT: And do you agree that the State has evidence to prove that you did commit the offense of party to the crime of first degree intentional homicide?
>
> [Wilson]: No.
>
> THE COURT: Yes or no?
>
> [Wilson]: No.

The circuit court then turned to Wilson's counsel. Counsel stated there was no real dispute as to whether Wilson was present and actively engaged in the underlying felony, armed robbery. However, counsel stated that Wilson was maintaining that he did not intend that anybody be killed. Counsel then recited additional evidence placing Wilson in the residence at the time of the robbery and shooting. Counsel also stated there was evidence that Wilson encouraged the shooting. Counsel told the court that, although Wilson contended that he did not intend that anyone be killed, the evidence supported Wilson's liability as an aider and abettor.[1]

¶4 Prior to sentencing, Wilson filed a motion for plea withdrawal. He asserted that the circuit court should allow him to withdraw his plea because the court did not establish a factual basis for the plea "from the defendant." In denying the motion, the circuit court wrote:

> The law is well-settled that the *source* of the factual basis provided is determined by the trial judge and may come from any or several of the following sources: inquiry of the prosecutor; inquiry of the defendant; witnesses' testimony; statements of evidence; or a stipulation by counsel on the record to facts in the criminal complaint.

Wilson was later sentenced. He now challenges the circuit court's order denying him presentencing plea withdrawal.

[1] Wilson asserts in his appellate brief that there was no "discussion … as to why he disagreed that a factual basis existed." As the above summary demonstrates, this assertion is not accurate.

Standard of Review

¶5 The applicable standard for presentence plea withdrawal was set forth in ***State v. Kivioja***, 225 Wis. 2d 271, 592 N.W.2d 220 (1999):

> A defendant seeking to withdraw a plea of guilty or no contest before sentencing must show that there is a "fair and just reason," for allowing him or her to withdraw the plea. Should a defendant make this necessary showing, the court should permit the defendant to withdraw his or her plea unless the prosecution has been substantially prejudiced. While the circuit court is to apply this test liberally, the defendant is not entitled to an automatic withdrawal.
>
> As for the practical application of the test, this court has held that a "'fair and just reason'" contemplates the "'mere showing of some adequate reason for defendant's change of heart.'" Whether a defendant's reason adequately explains his or her change of heart is up to the discretion of the circuit court. A circuit court's decision with respect to this discretionary ruling will not be upset on review unless it was erroneously exercised. A reviewing court will uphold a discretionary decision on appeal if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts.

Id. at 283-84 (citations and footnote omitted).

Analysis

¶6 Wilson argues that he did not admit, either expressly or implicitly, all facts necessary to prove that he committed first-degree intentional homicide as a party to a crime. He contends that his plea colloquy was insufficient because he refused to agree that the State had undisputed evidence proving that he committed the crime. He states that, "in his inexperienced manner," he was asserting he was not guilty.

¶7 As legal support for the proposition that a valid plea may not be entered unless the defendant admits, expressly or implicitly, all facts necessary to prove the crime at issue, Wilson relies on the following language in ***State v. Thomas***, 2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836:

> This court has also stated that it is one of a circuit court's duties to determine "[t]hat the conduct which the defendant admits constitutes the offense … to which the defendant has pleaded guilty." Therefore, if a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred.
>
> … [A] defendant does not need to admit to the factual basis in his or her own words; the defense counsel's statements suffice. We also hold that a court may look at the totality of the circumstances when reviewing a defendant's motion to withdraw a guilty plea to determine *whether a defendant has agreed to the factual basis* underlying the guilty plea.

Id., ¶¶17-18 (citations omitted; emphasis added). Wilson also notes that in ***State v. Black***, 2001 WI 31, 242 Wis. 2d 126, 624 N.W.2d 363, the supreme court repeated language from ***Thomas***: "[W]e have noted that if a circuit court 'fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred.'" ***Black***, 242 Wis. 2d 126, ¶11 (quoting ***Thomas***, 232 Wis. 2d 714, ¶17).

¶8 Even assuming Wilson's interpretation of ***Thomas*** were correct, we would reject his argument because the plea colloquy at issue does not involve Wilson declining to agree to facts necessary to support his conviction of first-degree intentional homicide *as an aider and abettor*. As recited in the background section, a careful review of the plea hearing reveals that Wilson's "no" answer was intended as his factual assertion that he never intended that anyone be killed. When the circuit court asked Wilson if he agreed that the State had evidence

proving he committed first-degree intentional homicide as a party to a crime and Wilson said no, his counsel explained that Wilson was asserting that he did not intend a killing. Counsel went on to acknowledge, however, that the State was not obliged to prove that Wilson personally intended that anybody be killed. Thus, Wilson's position may have had implications for his sentencing,[2] but it does not provide a basis for the argument he makes on appeal.

¶9 The above reasoning is sufficient to affirm the circuit court. Still, we observe that Wilson's legal argument—that defendants are entitled to plea withdrawal when, during plea colloquies, they refuse to agree that the State has undisputed evidence proving that the defendant committed the crime at issue—is without merit. Despite language in some cases that might be read in isolation as saying that a defendant must admit facts constituting the crime to which the defendant enters a plea, it is clear that a valid plea may be entered even when a defendant declines to make any factual admissions.

¶10 In ***Thomas***, the case on which Wilson places primary reliance, the court discussed the factual basis requirement codified in WIS. STAT. §971.08(1)(b).[3] The ***Thomas*** court stated:

> It is significant that both the federal rule and the Wisconsin adaptation [WIS. STAT. §971.08(1)(b)] speak in terms of a *judge's* determination that a factual basis exists. Neither the rule nor the case law interpreting the rule requires a defendant to personally articulate the specific facts that constitute the elements of the crime charged. The

[2] In the presentence report, Wilson denied the allegation that he told an accomplice to shoot. At sentencing, Wilson's counsel argued that the court should not accept as true the assertion that Wilson urged an accomplice to shoot the homicide victim.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> federal courts have long held that a judge does not have to "engage in a colloquy with the defendant to establish a factual basis for a guilty plea." *United States v. Musa*, 946 F.2d 1297, 1302 (7th Cir. 1991). All that is required is for the factual basis to be developed on the record—several sources can supply the facts.

Thomas, 232 Wis. 2d 714, ¶20.

¶11 In ***United States v. Musa***, 946 F.2d 1297 (7th Cir. 1991), the case cited in the passage above with approval by the ***Thomas*** court, the Seventh Circuit explained that a defendant's agreement to facts is not a prerequisite to a valid plea. The ***Musa*** court observed: "'An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.'" ***Musa***, 946 F.2d at 1302 (quoting ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970)). Indeed, the ability to contest facts is "the essence of what a defendant waives when he or she enters a guilty or no contest plea." ***Black***, 242 Wis. 2d 126, ¶16.

¶12 In sum, we reject Wilson's arguments and affirm the circuit court's order denying Wilson's motion for plea withdrawal.

By the Court.—Order affirmed.

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