COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2682-CR **Cir. Ct. No. 2006CF5833**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA JAMES SCOLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Joshua James Scolman appeals from judgments convicting him of numerous offenses arising out of a fatal drunk driving accident and his subsequent threats and firing of a gun. He also appeals from an order

denying his postconviction motion to withdraw his no contest pleas or for sentence modification. Scolman argues that he established a manifest injustice justifying plea withdrawal because he did not understand important legal principles relating to the plea agreement, and he faults his trial attorney and the trial court for failing to explain the law. He also argues that the prosecutor violated the plea agreement and that the facts do not support the consecutive sentences imposed. We conclude that Scolman's motion presented sufficient facts to justify a hearing on his alleged misunderstanding of the law and his claim of ineffective assistance of counsel. Therefore, we reverse on those issues and remand the matter for further proceedings. We affirm as to the remaining issues.[1]

BACKGROUND

¶2 The complaint alleges that Scolman was driving with a blood alcohol concentration (BAC) of .242 when he sped through a red light and collided with an automobile, causing the death of three people and traumatic brain injuries to a fourth person. After the collision, Scolman exited his vehicle and began yelling at an innocent motorist, Donte Sims, about the damage to his car. Scolman pointed a gun at Sims's head and threatened to shoot. He ignored Sims' suggestion that they should help the accident victims. Scolman then chased Sims and fired four or five shots. Sims escaped unharmed. Scolman later resisted officers who were trying to search him for weapons.

¶3 The State charged Scolman with two offenses for each of the persons he killed or injured. The information charged both death or injury by intoxicated

[1] Because we reverse and remand we ordinarily would not address the other issues. We address them to provide guidance should these issues arise again.

use of a vehicle and causing death or injury while operating a vehicle with a prohibited BAC. Under WIS. STAT. § 940.09(1m) (2005-06),[2] Scolman could be convicted of only one offense for each person he killed or injured. Pursuant to a plea agreement, the State dropped three counts of homicide and one count of injury by driving with prohibited BAC, and Scolman pled no contest to three counts of homicide and one count of injury by intoxicated use of a vehicle, as well as endangering safety with a dangerous weapon, disorderly conduct and resisting or obstructing an officer.

¶4 In his postconviction motion,[3] Scolman alleged that he did not know the four counts had to be dismissed under WIS. STAT. § 940.09(1m). He thought the plea agreement benefitted him by dismissing the four BAC charges when, in reality, the dropped charges did not affect his sentencing exposure. He alleged that he would not have entered the no contest pleas if he had known about § 940.09(1m).

DISCUSSION

¶5 Scolman is entitled to an evidentiary hearing on his motion to withdraw the no contest pleas. He alleged sufficient facts that, if true, demonstrate he did not understand the law as it relates to his plea agreement. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). The record does not show that Scolman was informed that he could only have been sentenced on four of the

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] We broadly construe Scolman's motion to include attachments and the brief in support of the motion.

eight offenses relating to death and injury. The effect of WIS. STAT. § 940.09(1m) is not a matter of common knowledge and it is not evident that Scolman would have entered the no contest pleas had he understood the limited nature of the plea agreement.

¶6 Scolman faults his trial counsel for failing to explain WIS. STAT. § 940.09(1m). At the postconviction hearing, the burden will be on Scolman to establish deficient performance and a reasonable probability that he would not have entered the no contest pleas but for counsel's errors. *See* ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). Regardless of whether Scolman establishes ineffective assistance of counsel, he is entitled to withdraw his plea if he can establish that the plea was not knowingly, voluntarily and intelligently entered. *See* ***State v. Brown***, 2006 WI 100, ¶42, 293 Wis. 2d 594, 716 N.W.2d 906.

¶7 Scolman's motion does not allege sufficient facts to establish circuit court error for failing to determine whether Scolman understood WIS. STAT. § 940.09(1m). The court's obligation when accepting a no contest plea is set out in ***Brown***, and it does not include any requirement to insure that a defendant is getting a good deal in the plea agreement. ***Brown***, 293 Wis. 2d 594, ¶¶34-35. Therefore, we reject Scolman's argument that the court had any obligation to explain factors that determine whether the plea agreement constituted a good deal, and the burden of proof at the postconviction hearing will not shift to the State to establish Scolman's knowledge of the law. *See* ***id.***, ¶40.

¶8 We also reject Scolman's argument that the prosecutor breached the plea agreement.[4] Scolman argues that the prosecutor breached the plea agreement at the plea hearing before Scolman entered his no contest pleas. The prosecutor calculated the maximum term of imprisonment at eighty-nine years and, in an attempt to persuade the court to accept the plea agreement, stated: "I think that certainly serves the needs of the community." Scolman contends that mentioning the maximum sentence and indicating it serves the needs of the community violates the agreement that called for the prosecutor to recommend substantial confinement. However, the plea agreement did not call for the prosecutor to request any specific term of imprisonment. Even if the prosecutor's comments are construed as a recommendation to impose the maximum sentences, that recommendation is consistent with the agreement that allowed the prosecutor to recommend substantial confinement.

¶9 Scolman also failed to raise adequate grounds for sentence modification. He argues that the sentencing court improperly considered deterrence as a sentencing objective and that the facts fail to support the sentences totaling fifty-one years and nine months of initial confinement. A sentencing court has discretion determining the length of a sentence within a statutory range. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The weight to be accorded each of the sentencing factors is left to the sentencing court's discretion. ***Id.*** A sentence will be upheld unless it is so excessive as to shock public sentiment. ***Id.***

[4] We reach the merits of this issue despite the fact that Scolman waived the issue by not adequately presenting it to the circuit court.

¶10 While the sentence is lengthy, it reasonably reflects the seriousness of the offenses, Scolman's character and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). Deterrence is a legitimate factor when considering the propriety of a sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The consecutive sentences imposed are not so excessive as to shock public sentiment in light of Scolman's irresponsible conduct leading to the deaths and injury and his outrageous conduct after the accident.

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

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