COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP999-CR **Cir. Ct. No. 2007CM1118**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARL C. BLOECHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Karl C. Bloecher appeals from a judgment of conviction for criminal trespass to a dwelling and misdemeanor bail jumping.

[1] This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Bloecher pled no contest to both offenses, but subsequently moved for postsentence plea withdrawal on grounds that: (1) he had contested the factual basis for the plea during allocution, (2) his plea was involuntary due to his subjective belief that he was the target of a police department conspiracy, and (3) the plea was invalid insofar as it was based on a defective criminal complaint. He additionally appeals from the trial court order denying his WIS. STAT. RULE 809.30 motion for postconviction relief. Because we conclude that his pleas were properly entered and he forfeited his right to challenge the complaint, we affirm the judgment and postconviction order.

BACKGROUND

¶2 The facts, as alleged in the criminal complaint, are as follows. On November 4, 2007, at approximately 4:30 p.m., two deputies went to a property located in the town of Saukville. While there, the deputies met with John and Dana Thomas who informed them that Bloecher had entered their residence without permission and without knocking and that once Bloecher came inside the residence, John confronted him but he refused to leave. John told the deputies that he had to shove Bloecher out of the residence. When Bloecher spoke with one of the deputies, the deputy noted an odor of intoxicants on his breath. A preliminary breathalyzer test indicated a result of .055. Bloecher was out on bail at the time of this incident. Bloecher was subsequently charged with criminal trespass to a dwelling and misdemeanor bail jumping.

¶3 On February 18, 2008, Bloecher pled no contest to the charges of criminal trespass and misdemeanor bail jumping.[2] After the plea colloquy but prior to sentencing, Bloecher made a statement as to the circumstances surrounding the incidents. The trial court then sentenced Bloecher to sixty days in jail on each count to run concurrently and with Huber privileges. Bloecher subsequently filed for postconviction relief under WIS. STAT. RULE 809.30(2)(h). Bloecher argued that (1) the complaint was defective because it failed to specify the alleged conduct which would have violated the terms of his bond, and (2) his plea was not knowingly, voluntarily and intelligently entered because, among other things, he did not understand that his attorney had stipulated to the complaint as a basis for sentencing and he repudiated the facts in the complaint during his allocution after the entry of his plea, and he felt pressured to enter the plea due to his belief that he was the subject of unfair scrutiny by the police department.[3]

¶4 Following a hearing at which both Bloecher and his trial counsel testified, the court denied Bloecher's postconviction motion. The trial court determined that: (1) the plea colloquy satisfied the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and (2) there were sufficient facts to support the bail jumping charge and the criminal trespass to dwelling charge. Bloecher appeals.

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[2] We note that the judgment of conviction reflects the entry of a "guilty" plea. However, the transcript of the plea hearing indicates that Bloecher pled "no contest" to each of the counts.

[3] Bloecher based this claim on the circulation of an "officer safety bulletin" which he alleged was distributed to law enforcement agencies by the brother of his ex-girlfriend. The bulletin, introduced as an exhibit at the postconviction hearing, identified Bloecher as an individual with whom "[e]xtreme [c]aution should be used … as no current information is known regarding his current mental state or deterioration of same due to alcohol and the mixing of alcohol and psychotropic medication."

DISCUSSION

¶5 Bloecher raises three arguments on appeal. First, he contends that his rights were violated when the trial court failed to engage in further colloquy after he refuted the factual basis for the plea during his allocution before sentencing. Second, Bloecher contends that the trial court erred in denying his motion for plea withdrawal when his guilty plea was based on pressure resulting from his subjective belief that he was the target of a police conspiracy. Finally, Bloecher contends that he was not properly charged with bail jumping because the criminal complaint contained factual allegations to support two incidents of bail jumping and the State failed to specify which act provided the basis of the charge.

¶6 Bloecher moves for plea withdrawal after sentencing and, therefore, must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a "manifest injustice." *See* ***State v. Nawrocke***, 193 Wis. 2d 373, 378-79, 534 N.W.2d 624 (Ct. App. 1995). The "manifest injustice" test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea. ***Id.*** at 379. Under a manifest injustice standard of review, the trial court's exercise of its discretion when deciding a postsentence motion for plea withdrawal will be affirmed if the record shows that legal standards were correctly applied to facts and a reasoned conclusion was reached. ***Id.*** at 381.

¶7 We begin with Bloecher's challenge based on statements he made following the plea colloquy. WISCONSIN STAT. § 971.08(1)(b) sets forth the requirement that a circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." The factual basis requirement "protect[s] a defendant who is in the position of pleading voluntarily with an

understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted).

¶8 WISCONSIN STAT. § 943.14, entitled "Criminal trespass to dwellings," states: "Whoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A misdemeanor." Bloecher concedes on appeal that "the court properly entered a plea after Bloecher, by counsel, accepted the facts of the complaint."[4] However, he argues that his disputed version of the facts during his allocution "cloud[ed] the factual basis for the plea."

¶9 During Bloecher's statements following the entry of his plea, he explained his recollection regarding the November 4 incident. He stated:

> And with these neighbors next door two days prior to this I helped them rake up their backyard, clean up their backyard, and took all the debris and put it on my parents' property and land to fix things up in their backyard. I had watched the Packer game. I slept. I woke up….
>
> When I woke up I was to make a phone call to my aunt … but the phone was not working[.]
>
> I panicked like … you hear your alarm clock and … wake up and all of a sudden you run up. And I tried to use the phone. It didn't work. I ran across to the neighbor's house,

[4] While Bloecher does not challenge the initial acceptance of his plea, we nevertheless note that a factual basis for a plea can be established when defense counsel stipulates on the record to the facts in the criminal complaint. *See* ***State v. Thomas***, 2000 WI 13, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836. Here, the plea hearing transcript reflects that the trial court inquired of Bloecher's attorney: "May I accept the facts in the complaints as a basis," and Bloecher's attorney responded: "Yes, your Honor."

> knocked on their door, opened it up. And he was right there, your Honor, and he pushed me right out….
>
> So from there I went back to my parents[’] house.

Based on his statements, Bloecher argues on appeal that he "admitted only to opening the unlocked front door of a neighbor and calling inside," and, therefore, he did not admit to being inside the dwelling and there were no actions that would tend to "cause or provoke a breach of the peace." However, this characterization is not entirely accurate.

¶10 Bloecher stated that he "knocked," then "opened" the door, and was "pushed … right out." From his statement that he was "pushed … out," one could reasonably infer that he had, in fact, been *in* the residence. We see nothing in Bloecher's statement that refutes the factual basis for the plea. Rather, the tenor of the allocution statements was to request leniency, not to argue the facts underlying the charge. Further, for Bloecher's statements to be construed as he urges, they would have to be examined in a vacuum, separate from the rest of the plea hearing. This is not the law. In determining whether a defendant has agreed to the factual basis underlying his or her plea, we look to the "totality of circumstances," including the plea hearing record, the sentencing hearing record, and defense counsel's statements concerning the factual basis presented by the state. ***Thomas***, 232 Wis. 2d 714, ¶18.

¶11 Here, Bloecher was informed by the trial court of each element of the offenses and indicated that he understood the elements of the charges, his defense counsel conceded the factual basis for the plea as set forth in the criminal complaint, and nothing in Bloecher's statements during the plea hearing materially contradicted or detracted from that factual basis. Therefore, the trial court did not

err in denying Bloecher's postsentence motion for plea withdrawal on this ground.[5]

¶12 Next, we turn to Bloecher's contention that the plea was not voluntarily entered because of his subjective belief that he was the subject of a police department conspiracy. Bloecher's motion as to this issue is of the "***Nelson/Bentley*** variety." *See* ***State v. Basley***, 2006 WI App 253, ¶4, 298 Wis. 2d 232, 726 N.W.2d 671 (citing ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)). That is, Bloecher concedes that the plea satisfied the ***Bangert*** requirements, but sought to withdraw his plea for reasons that are not apparent from the record. ***Basley***, 298 Wis. 2d 232, ¶4. As explained in ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48, "[a] defendant invokes ***Bangert*** when the plea colloquy is defective; a defendant invokes ***Nelson/Bentley*** when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." Thus, the trial court erred insofar as it denied

[5] We note that Bloecher's testimony at the postconvicton motion hearing also failed to negate the factual basis for the charge of criminal trespass to a dwelling.

> [Counsel]: Did you ever have a chance before [Mr. Thomas] came up the stairs to ever even fully enter the house?
>
> [Bloecher]: No.
>
> [Counsel]: Okay. Where were you situated at the time that he pushed you out?
>
> [Bloecher]: My one foot was outside the door holding the screen door open yet and my other door [sic] was up on the lip.

Bloecher's motion based on his failure to raise his concerns during the plea colloquy.[6]

¶13 Under ***Nelsen*/*Bentley***, the defendant must show by clear and convincing evidence that the plea represents a manifest injustice. ***State v. Brown***, 2006 WI 100, ¶42, 293 Wis. 2d 594, 716 N.W.2d 906. The record of the plea hearing reflects that Bloecher expressly indicated that he had not been promised anything in conjunction with his plea, he had not been threatened in any manner, and he was pleading freely and voluntarily. At the postconviction motion hearing, Bloecher's trial counsel testified that Bloecher never mentioned feeling pressured to enter a plea. Trial counsel's impression was simply that Bloecher had another matter pending in Sheboygan county and that he was interested in resolving the charges at issue in this case so he could turn his attention to the other matter. Counsel's notes reflected that Bloecher had some disagreement with the allegations underlying the criminal trespass charge but that he wanted the matter resolved.

¶14 Bloecher testified at the postconviction hearing that he had felt pressured to enter the plea due to his belief that the police department was targeting him. Bloecher was on antidepressants and under a lot of stress at the time of the plea and believed that an "officer safety bulletin" was negatively influencing law enforcement's treatment of him. Bloecher believed that the bulletin had "possibly" been created by his ex-girlfriend's brother and testified

[6] When issuing its oral decision, the trial court referenced Bloecher's claim that he didn't believe he could receive a fair trial due to the police bulletin issued by his ex-girlfriend's brother. The trial court stated: "[Bloecher] was certainly questioned about the voluntariness of the plea during the colloquy that I had with him. He didn't mention it then."

that it contained false allegations and portrayed him in a "bad light." Although counsel had no recollection of it, Bloecher testified that he had discussed his concerns regarding the officer safety bulletin with his trial attorney and his belief that the officer safety bulletin "had a play in the arrest." Finally, Bloecher cited to a plea offer that had been withdrawn by the State after they learned of a pending charge in another county and had decided to add a bail jumping charge. Based on the above, Bloecher did not believe he would receive a fair trial. If he had not had the belief that he was being "singled out because of the officer safety bulletin," he would have gone to trial because "there was no criminal trespassing."

¶15 The trial court denied Bloecher's postconviction motion on this ground based on its determination that it lacked a sufficient factual predicate to justify postsentence plea withdrawal. Based on our review of the record, the trial court properly exercised its discretion. While we understand Bloecher's concern regarding his past involvement with law enforcement, if the facts underlying the criminal trespass to dwelling charge were materially contested, Bloecher's argument may have been more persuasive. However, Bloecher's own recollection of the events supports the criminal trespass charge, albeit he disputes that he actually intended to act in a manner consistent with trespass. Unfortunately, Bloecher's intent, other than his intent to enter the residence to use the phone, is not relevant.

¶16 As the trial court pointed out, the postconviction record fails to support any suggestion that Bloecher was being targeted by law enforcement or any suggestion that Bloecher believed he was being targeted at the time of his plea. Based on the trial court's findings, we conclude that Bloecher failed to prove by clear and convincing evidence that plea withdrawal is necessary to avoid a

manifest injustice. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶60, 67, 317 Wis. 2d 161, 765 N.W.2d 794.

¶17 Finally, Bloecher contends that the criminal complaint was deficient because it failed to specify the conduct underlying the bail jumping charge. The complaint in this case charges misdemeanor bail jumping, alleging that on November 4, 2007, Bloecher "having been charged with a misdemeanor and having been released from custody … did intentionally fail to comply with the terms of his bond." Bloecher contends that the complaint is duplicitous and it is not clear from the complaint whether the bail jumping charge stems from the criminal trespass to dwelling or, as set forth in the probable cause section of the criminal complaint, from the presence of alcohol on his breath.[7] However, Bloecher was informed of the elements of the offense of bail jumping, and he admitted that a factual basis existed for the plea—whether it be the commission of a crime or the consumption of alcohol.[8] By pleading to the bail jumping charge, Bloecher forfeited his right to challenge the complaint. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (a guilty or no contest plea forfeits all nonjurisdictional defects, including constitutional claims).

¶18 Although Bloecher waived his right to challenge the complaint, we nevertheless conclude that the complaint was sufficient to put Bloecher on notice

[7] Based on the duplicitous charge, Bloecher argues that the court did not have subject matter jurisdiction to accept his plea. Bloecher is mistaken. There is a distinction between a complaint that is duplicitous and charges two offenses and a complaint that charges a non-offense. *See* ***United States v. Adesida***, 129 F.3d 846, 850 (6th Cir. 1997). Jurisdiction is at issue when the complaint charges a "non-offense," and that is not the case here.

[8] We note that by pleading to the offense of criminal trespass to a dwelling, Bloecher conceded the basis for the bail jumping charge.

of the charge and the facts underlying the charge such that he was able to enter a plea. *See* ***Blenski v. State***, 73 Wis. 2d 685, 695-96, 245 N.W.2d 906 (1976).

CONCLUSION

¶19 For the reasons stated above, we conclude that Bloecher forfeited his right to challenge the complaint and that his plea was properly entered. We further uphold the trial court's determination that he failed to establish by clear and convincing evidence that postsentence plea withdrawal was necessary to correct a manifest injustice. We therefore affirm the judgment and postconviction order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.