COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1690-CR **Cir. Ct. No. 2005CF62**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY R. POPKE,

DEFENDANT-APPELLANT.

APPEAL from judgment and an order of the circuit court for Waupaca County: JOHN P. HOFFMAN, Judge. *Reversed*.

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

¶1 PER CURIAM. Anthony Popke appeals from a judgment of conviction for one count of first-degree reckless homicide, WIS. STAT. § 940.02(1)

(2007-08),[1] and the order denying his motion to withdraw his plea. Popke argues he should be allowed to withdraw his plea because the circuit court did not establish a factual basis for the plea, he did not understand the element of "utter disregard for human life," the State breached the plea agreement at sentencing, and he received ineffective assistance of trial counsel because trial counsel did not properly explain the elements of the crime to him and did not object to the State's breach of the plea agreement. We conclude that there was a sufficient factual basis to establish that Popke acted with utter disregard for human life, and that the record shows that the circuit court properly explained the elements of the crime to him and determined that he understood them before accepting his plea. The circuit court properly denied Popke's motion to withdraw his plea on this basis.

¶2 We agree with Popke, however, that the letter sent to the circuit court by a police chief in which he argued for a longer sentence than the recommendation the State agreed to make, was a breach of the plea agreement, and that Popke's trial counsel was ineffective for not objecting to this breach. We conclude, however, that the remedy for this breach is not plea withdrawal, but rather specific performance. Therefore, we reverse the judgment of conviction, and remand the matter to the circuit court for resentencing before a different judge, who has not seen this case before and is not privy to any of this record.

Background

¶3 On March 25, 2005, Tony Popke went out with family and friends, including his girlfriend, Sarah Torkelson, and spent most of the day drinking. By

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the time he reached the Pantry Restaurant, sometime before 3 a.m. on March 26, he had gotten "quite drunk." Nicolas Resch was also at the Pantry Restaurant that night.[2] Popke was angry with Resch because Torkelson, who was pregnant with their child, had complained that Resch had been "hitting on" her. Torkelson knew Resch from work, and felt that Resch had harassed her.

¶4 While they were at the restaurant, Popke told another man, Jared Polley, that Resch had been "hitting on" Torkelson and had told Torkelson that Popke "wasn't shit." Popke also told Polley "to stay out of it when he started swinging" because he "goes nuts." Jennifer Suprise was also at the Pantry Restaurant shortly after 3 a.m. that night. Suprise saw Resch leave the restaurant, and go out to the parking lot; she saw Popke follow a few minutes later. In the parking lot, Popke confronted Resch. Popke claims that when he tried to talk to Resch, Resch pushed him. Popke responded by punching Resch three times in the face and three times in the chest. Resch fell down and got back up again, at which point Popke punched him three more times in the face. Resch did not hit Popke. Resch again fell to the ground. Although Popke knew that he had hurt Resch "pretty bad," he walked away without helping Resch. There were no witnesses to the encounter.

¶5 At about the same time, Suprise walked out to the parking lot and saw Popke coming toward her. She also saw Resch on the ground. Suprise asked Popke "what's up with [that guy]?" and Popke responded: "Don't worry about

[2] Nicolas's name is spelled variously as "Nicolas" and "Nicholas" throughout the record and the parties' briefs. Because "Nicolas" is the spelling used by his mother in a letter she sent to the author of the presentence investigation report, we have used that spelling in this opinion.

him. He's just sleeping." Popke then went back into the restaurant, had Torkelson pay the bill, and left.

¶6 Suprise, in the meantime, went to check on Resch. She did not recognize him at first because he had blood pouring from his nose and mouth, and he was making a gurgling sound. Around this same time, Polley looked out of a window into the Pantry's parking lot, and saw Popke getting into his truck. Popke motioned to Polley by drawing his hand across his throat and mouthed three times: "You didn't see me." Suprise went back into the restaurant to get help. She returned to the parking lot with others, including Polley. Polley, who had known Resch for a long time, also did not recognize him at first because Resch's face was "messed up." Someone called 911 and Resch was taken to the hospital.

¶7 Meanwhile, Popke went to his mother's home. There he changed most of his clothes, and asked his step-father to hide the clothes he had been wearing. Popke then went to the police to turn himself in.

¶8 Nicolas Resch died on April 4, 2005. He was twenty-seven years old. The doctor who performed the autopsy testified that Resch suffered a "multitude of blunt trauma injuries to the head and neck," and his brain was "severely swollen." The doctor testified that Resch's brain died before the actual date of death, and that the cause of death was brain necrosis related to both head and neck trauma, and aspiration pneumonia.[3]

[3] "Aspiration pneumonia" is caused by food or other type of material that is vomited, and then unable to be cleared from the airway by coughing or further vomiting, so that it is inhaled into the lungs, where it causes an inflammation.

¶9 Popke eventually entered a plea of no contest to one count of first-degree reckless homicide. The plea agreement provided that the State would argue for no more than eighteen years in prison. Just before the sentencing hearing, the court received a letter from Police Chief Wilkinson that asked the court to sentence Popke to half of the maximum, or twenty years. The court sentenced Popke to twenty years of initial confinement and fifteen years of extended supervision.

¶10 After sentencing, Popke moved to withdraw his plea on the basis that: (1) there was no factual basis for the plea because the evidence at the preliminary hearing was insufficient to support the charge; (2) Popke did not knowingly, intelligently, and voluntarily enter his plea because he did not understand the elements of the crime with which he was charged; and (3) the State breached the plea agreement when Police Chief Wilkinson sent a letter to the circuit court arguing for a longer sentence than the plea agreement called for. The circuit court held a hearing on the motion, and denied it.

Discussion

¶11 Popke argues that he should be allowed to withdraw his plea because the circuit court erroneously found that a factual basis existed for the plea. Popke alleges that at the time he entered his plea, he was unaware that his conduct in the parking lot the night of the incident did not meet the statutory definition of first-degree reckless homicide. Specifically, Popke argues that the State did not offer any evidence that he acted with an "utter disregard for human life." Popke also argues that the circuit court did not "personally determine that [his] conduct met the elements of the offense of first-degree reckless homicide." Consequently, he

asserts, his plea was not entered knowingly, intelligently, and voluntarily, and he should be allowed to withdraw it.

¶12 After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 201 (Ct. App. 1987). "One type of manifest injustice is the failure to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads." ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). "Unless it was clearly erroneous, we will uphold the circuit court's determination that there existed a sufficient factual basis to accept the plea." ***State v. Sutton***, 2006 WI App 118, ¶8, 294 Wis. 2d 330, 718 N.W.2d 146.

¶13 The circuit court in this case determined that there was a sufficient factual basis to uphold the plea. The elements of first-degree reckless homicide are: (1) the defendant caused the death of the victim; (2) by actions that created "an unreasonable and substantial risk of death or great bodily harm;" (3) the defendant was aware of the risk, and 4) the circumstances showed the defendant's utter disregard for human life. ***State v. Edmunds***, 229 Wis. 2d 67, 75, 598 N.W.2d 290 (Ct. App. 1999). The jury instructions further explain the element of utter disregard:

> In determining whether the conduct showed utter disregard for human life, you should consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.

WIS JI—CRIMINAL 1020 (footnotes omitted). The State is not required to establish "utter disregard" in fact; "rather, the State satisfies its burden when it proves that the conduct of the defendant and the surrounding circumstances, as generally

considered by mankind, are sufficient to evince utter disregard for human life." ***Edmunds***, 229 Wis. 2d at 76.

¶14 Popke argues that the evidence at the preliminary hearing was merely that he hit someone repeatedly in a fight, and that this was insufficient to show he acted with "utter disregard for human life." We do not agree with Popke that the evidence at the preliminary hearing was insufficient to establish that he acted with utter disregard for the life of Nicolas Resch.

¶15 The evidence established that Popke followed Resch into the parking lot to confront him about the comments Resch made to Popke's girlfriend. The evidence also established that Popke punched Resch repeatedly in the head and neck. Resch did not hit Popke during this fight. Popke hit Resch so forcefully that Popke's face was so bloodied and swollen that his friends did not recognize him. After knocking Resch to the ground, and even though Popke knew that Resch was badly hurt, Popke simply walked away. Further, Popke tried to dissuade other people from helping Resch as Resch lay on the ground choking on his own blood and vomit. Then, Popke left the scene and went to his parents' home to hide his bloody clothes. We conclude that these facts were sufficient to establish that Popke acted with utter disregard for the life of Nicolas Resch.

¶16 Popke also argues that he did not enter his plea knowingly, intelligently, and voluntarily. "When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea violates fundamental due process." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). This presents a question of constitutional fact. ***Id.*** "We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently

whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.***

¶17 Popke argues that the circuit court did not properly determine whether he understood the charges against him. He asserts that his trial counsel stipulated that there was a factual basis in the record, but that the record of the preliminary hearing did not support this stipulation. Popke further argues that the circuit court did not properly determine in the plea colloquy that he understood the elements of the offense to which he pled.

¶18 Popke testified at the postconviction motion hearing that his counsel did not go over the elements of the crime with him. Counsel, however, testified that she did discuss the elements of the crime with him. The court found that trial counsel's testimony was more credible, that the evidence at the preliminary hearing established a factual basis for the plea, and that the plea colloquy adequately addressed these issues. The court denied Popke's motion.

¶19 We have already concluded that the evidence at the preliminary hearing established a factual basis for the plea. Consequently, to the extent Popke's argument is based on this premise, we reject it. Further, we agree with the circuit court that the plea colloquy properly addressed the issues and that the court determined Popke's understanding of the crime to which he pled. The circuit court explained the elements to Popke, and asked if he understood by entering his plea, he was not contending that the State could prove this. As for the element of "utter disregard," the court explained that "the jury would be instructed to consider these factors: What you were doing, why you were engaged in that conduct, how dangerous the conduct was, how obvious the danger was, whether the conduct showed any regard for life, and all other facts and circumstances

relating to the conduct." Popke responded that he understood. We agree with the circuit court's conclusion that Popke's plea was knowing, intelligent, and voluntary.

¶20 The last issue is whether the State breached the plea agreement when Chief Wilkinson sent a letter to the court asking the court to impose a longer sentence than the sentence the State agreed to argue for in the plea agreement. The State has conceded that this was a breach of the plea agreement under ***State v. Matson***, 2003 WI App 253, ¶27, 268 Wis. 2d 725, 674 N.W.2d 51, and we agree. Because counsel did not object to the letter at the sentencing hearing, the issue arises in the context of ineffective assistance of counsel.[4]

¶21 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In this case, Popke has established that counsel performed deficiently by failing to object to the breach of the agreement, and prejudice is presumed under the facts of this case. *See* ***State v. Smith***, 207 Wis. 2d 258, 282, 558 N.W.2d 379 (1997) (a defendant is automatically prejudiced when the prosecutor breaches the plea agreement by recommending a lengthy sentence after agreeing to make no recommendation). The remaining question, then, is what is the appropriate remedy for this breach.

¶22 In ***Matson***, the defendant sought as a remedy specific performance in the form of resentencing by another judge, and that was the remedy we ordered.

[4] Trial counsel testified at the postconviction hearing that she did not object because she thought that making "a big stink" would not have helped.

Matson, 268 Wis. 2d 725, ¶33. In this case, Popke argues that he should be allowed to withdraw his plea. However, the choice of the remedy is not up to the defendant and "[t]he less extreme remedy of specific performance is always preferred." ***Id.***

¶23 We conclude that specific performance is the appropriate remedy in this case. The State breached the plea agreement by recommending a sentence that was two years longer than the sentence agreed upon during plea negotiations. The breach did not undermine the benefits Popke bargained for in the plea agreement, other than the length of the sentence he received. By returning the case to the circuit court for resentencing, at which the State will cap its sentence recommendation at eighteen years, Popke will be placed in the same position he was in before the State breached the agreement. We conclude that specific performance gives Popke the benefit of his bargain, and is the appropriate remedy under all the circumstances of this case.

¶24 Popke also argues that counsel was ineffective for failing to properly explain the element of "utter disregard" to him. This argument, however, is premised on Popke's claim that the facts of this case do not prove this element. We disagree, and conclude that trial counsel was not ineffective on this basis.

¶25 Consequently, we reverse the judgment and order, and remand the case to the circuit court for resentencing only in front of a different judge.

By the Court.—Judgment and order reversed.

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