COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1828-CR **Cir. Ct. No. 2009CF2096**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFONZO C. TREADWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Alfonzo C. Treadwell, *pro se*, appeals from a judgment, entered upon his guilty plea, on one count of first-degree reckless homicide, while armed with a dangerous weapon, as party to a crime. He also appeals from an order denying his postconviction motion to withdraw his plea or,

alternatively, for resentencing. Treadwell contends that his plea was not knowing, intelligent, and voluntary because of defects in the plea colloquy, that the party-to-a-crime statute was unconstitutionally applied, and that his sentence is excessive. We reject Treadwell's arguments and affirm the judgment and order.

BACKGROUND

¶2 The information in this section is taken primarily from the portions of the criminal complaint that are based on statements given to police by Treadwell and his co-actor, Omar Smith. Several days before the homicide, someone fired more than twenty shots into Smith's home. Smith later learned the "Deuce Squad" was responsible. Treadwell, a friend of Smith's, was angered by the shooting because he could have been at Smith's house when it happened. On the day of the homicide, Treadwell was at Smith's home when Smith came up to him and said, "Come on with the heat." Smith intended to go scare the "Deuce Squad" members. Treadwell went willingly with Smith, arming himself with a .45-caliber handgun while Smith carried a 9mm semiautomatic handgun.

¶3 Treadwell and Smith got into the back seat of a car driven by a third person. As they traveled, Treadwell loaded eight bullets into his weapon and cocked it so that he would be ready to fire when he got out of the car. When they arrived at their destination, Treadwell immediately got out, firing the first shots in the incident toward a house where people were standing outside. Treadwell said he saw "Ricky" standing nearby and fired two or three shots at him, plus four or five shots at someone in a black car in front of the house. When his gun was empty, Treadwell heard more gunshots but, not knowing their source, he fled the scene. Two bystanders were injured and a third was killed, evidently by one of Smith's 9mm bullets. Eight .45-caliber casings were recovered from the scene.

¶4 Treadwell was charged with one count of first-degree reckless homicide and two counts of first-degree recklessly endangering safety, all with use of a dangerous weapon and all as a party to a crime. Pursuant to plea negotiations, Treadwell would plead guilty to the homicide and in exchange, the State would dismiss the reckless-endangerment charges and agree to recommend no more than twenty-five years' initial confinement. Treadwell entered his plea and the circuit court sentenced him to twenty-five years' initial confinement and fifteen years' extended supervision.

¶5 Treadwell filed a *pro se* postconviction motion seeking plea withdrawal or, alternatively, resentencing. He claimed that the circuit court had failed to determine the extent of his education and general comprehension so as to assess his capacity to understand the proceedings, and that this somehow meant that he did not understand how he aided and abetted Smith in a reckless homicide. Treadwell also complained that party-to-a-crime liability was unconstitutionally applied to him because it was Smith's bullet that killed the victim, and that his sentence was unconscionable. The circuit court denied the motion, explaining that the plea colloquy demonstrated Treadwell's understanding, the record revealed his role in the homicide, and the sentence was proper.

DISCUSSION

I. Plea Withdrawal Motion

¶6 A defendant seeking to withdraw a guilty plea after sentencing must show, by clear and convincing evidence, that refusal to allow plea withdrawal will result in a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way for a defendant to show manifest injustice is to show that the plea was not knowingly, intelligently, and voluntarily entered. ***Id.***

¶7 To ensure that a plea is constitutionally valid, a circuit court taking a plea must fulfill several duties set both by statute and judicial mandate. *See* ***State v. Howell***, 2007 WI 75, ¶26, 301 Wis. 2d 350, 734 N.W.2d 48. When these duties are unfulfilled, a defendant may seek to withdraw his plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). The defendant must make a *prima facie* showing that the circuit court failed to follow a mandated procedure, *see* ***id.***, and that he did not know or understand the information that should have been provided at the colloquy, ***Howell***, 301 Wis. 2d 350, ¶27.

¶8 If the motion is sufficiently pled, the burden of proof shifts to the State at an evidentiary hearing. *See* ***id.***, ¶29. Whether a postconviction motion is sufficient to entitle the defendant to an evidentiary hearing is reviewed *de novo*. *See* ***id.***, ¶¶30-31.

¶9 The circuit court's duties at the plea colloquy were compiled into a numbered list in ***Brown***, 293 Wis. 2d 594, ¶35. In his postconviction motion, Treadwell alleged that the circuit court failed to comply with obligation number 1; on appeal, he also claims the circuit court failed to follow obligations number 5 and 6.[1] These duties require the circuit court to:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> ….
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;

[1] The failure to allege, in the postconviction motion, lack of compliance with the fifth and sixth obligations would be reason alone to reject Treadwell's claim.

> (6) Ascertain personally whether a factual basis exists to support the plea[.]

Id. (footnotes omitted). We conclude that Treadwell has failed to sufficiently identify defects in the plea colloquy. *See* ***Howell***, 301 Wis. 2d 350, ¶31.

¶10 Though the circuit court did not expressly ask Treadwell about his educational history, it had the benefit of a plea questionnaire/waiver of rights form in which Treadwell indicated he had completed the ninth grade and lacked a high school diploma or equivalent. The circuit court inquired whether Treadwell had reviewed that form with counsel, whether he understood it, and whether the answers were true. Treadwell answered each question affirmatively. This is not inadequate. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987); *see also* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794 ("A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties."). The circuit court also specifically inquired whether Treadwell had taken drugs or alcohol in the preceding twenty-four hours—another way in which the circuit court may assess whether a defendant's comprehension might be impaired. Thus, Treadwell has not sufficiently established the circuit court's failure to determine the extent of his education and understanding.

¶11 The circuit court undertook to establish Treadwell's understanding of party-to-a-crime liability in two ways.[2] First, it personally explained the elements of the offense, including the elements of party-to-a-crime-liability, to

[2] Treadwell only complains that the circuit court failed to establish his understanding of the nature of the crime; he does not claim he was not properly advised of the potential punishments he faced.

Treadwell. *See* ***Brown***, 293 Wis. 2d 594, ¶46. Treadwell confirmed his understanding following the circuit court's explanation. The circuit court also noted that trial counsel had attached the relevant jury instructions, which set forth the offense elements for both the predicate offenses and the enhancers, to the plea questionnaire. *See* ***id.***, ¶48 ("'[T]he trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing.'") (citation omitted). Those attachments bear Treadwell's signature. The circuit court asked whether Treadwell understood those documents when he reviewed them with counsel. Treadwell confirmed that he did. Thus, Treadwell has not sufficiently shown the circuit court's failure to establish his understanding of the nature of the crime.[3]

¶12 The circuit court also ascertained whether a factual basis supported the plea when it inquired whether it could rely on the criminal complaint. Trial counsel and the State agreed that it could. The circuit court then asked Treadwell whether he had read the complaint. When he confirmed that he had, the circuit court asked, "And did you agree the facts in it are true?" Treadwell personally answered, "Yes." Those facts, as set forth above in the background section of this

[3] In his appellate brief, Treadwell asserts that during the colloquy and in response to a question, he told the circuit court, "I ain't understand that." He claims he then "went on record elaborating to the circuit court that he had, to no avail, tried to get defense counsel" to better explain how he could be guilty of the homicide when it was Smith who fired the fatal shot.

A review of the transcript reveals, however, that what Treadwell claimed not to understand was that, by pleading guilty, he would be giving up the right to challenge evidence and certain defenses. Trial counsel told the circuit court that Treadwell had thought there might be a basis for challenging his arrest, although counsel had previously explained why that challenge would not succeed. The circuit court gave trial counsel time to re-explain the waiver to Treadwell, who confirmed his understanding when back on the record.

opinion, adequately support the plea.[4] Treadwell has not sufficiently shown that the circuit court failed to properly ascertain a factual basis for his plea.

¶13 Treadwell's postconviction motion fails to identify any deficiency in the plea colloquy. As such, he was not entitled to an evidentiary hearing, so the circuit court properly denied the motion for one.

II. Unconstitutional Application of Party-to-a-Crime Statute

¶14 Treadwell's second claim is that the circuit court and the State unconstitutionally applied the party-to-a-crime statute, WIS. STAT. § 939.05 (2009-10), to the reckless homicide count. He asserts that the statute itself "is not being attacked here as being unconstitutional, however, the State is liable for its unconstitutional application here and that is especially so where there is no accountability attributed to Mr. Treadwell for the reckless conduct of Omar Smith[.]"

¶15 Statutes are presumed constitutional, and a party raising an as-applied challenge to a statute must prove that the rule, as applied to him, "is unconstitutional beyond a reasonable doubt." *See* ***State v. Smith***, 2010 WI 16, ¶¶8-9, 323 Wis. 2d 377, 780 N.W.2d 90. We agree with the State that this argument is underdeveloped: Treadwell does not identify precisely what the unconstitutional application is, either generally or as to himself, nor does he

[4] Treadwell asserts that there are "no facts in the record that would ostensibly show that Mr. Smith was aware of Mr. Treadwell's willingness to assist, aid, or abet Mr. Smith doing anything at all" and that there is no evidence that Treadwell "had knowledge of what, if anything, Mr. Smith was going to do." By Treadwell's own admission, though, Smith invited him to "[c]ome on with the heat," an invitation with which Treadwell willingly went along. Also by Treadwell's own admission, both men sat in the back seat of the car as Treadwell loaded his weapon.

include any citation to legal authority to support his claims of error. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). We need not consider the argument further.[5]

III. Excessive, Unconscionable, Unduly Harsh Sentence

¶16 Finally, Treadwell complains about the length of his sentence and accuses the circuit court of erroneously exercising its sentencing discretion by failing to adequately explain its sentence. We reject this argument.

¶17 Sentencing is committed to the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the circuit court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised. *See* ***id.*** at 418-19.

¶18 In its exercise of discretion, the circuit court is to identify the objectives of its sentence, which include but are not limited to protecting the

[5] It appears that Treadwell believes the party-to-a-crime statute, which ascribes liability to someone who "intentionally aids and abets the commission of a crime," *see* WIS JI—CRIMINAL 400, cannot logically be applied to a crime like reckless homicide, which does not require the State to prove any specific intent element. However, the State is still required, in a reckless-homicide prosecution, to prove the defendant acted in a particular manner. *See* WIS JI—CRIMINAL 1020. It is not inconsistent, much less unconstitutional, to allege that one person intended to aid and abet another person's actions, irrespective of the intent underlying those actions.

We also note that an as-applied constitutional challenge can be waived. *See* ***State v. Bush***, 2005 WI 103, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80. A valid guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional error. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

community, punishing the defendant, rehabilitating the defendant, and deterring others. ***Gallion***, 270 Wis. 2d 535, ¶40. In determining the sentencing objectives, we expect the circuit court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court's discretion. ***Id.*** The amount of necessary explanation of a sentence varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39.

¶19 Treadwell asserts that the circuit court should have explained what it expected him to accomplish over his forty-year sentence. To the extent that Treadwell believes that the circuit court had to explain precisely how it calculated a particular sentence length, he is not entitled to that degree of specificity. *See* ***State v. Fisher***, 2005 WI App 175, ¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. If the circuit court "has considered the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable, the court does not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed." ***State v. Matke***, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 692 N.W.2d 265.

¶20 The circuit court noted that the offense here was serious—a life had been lost and two others wounded. It commented that going to shoot up someone's home in retaliation for the shooting of someone's home was pointless and merely caused a circle of violence. The circuit court rejected any notion that Treadwell had no idea what would happen—he may not have known who would have gotten hurt, but that there was no way Treadwell could start shooting and think that no one would get hurt or killed. The circuit court also noted that even if the people who were shot had been the people who shot into Smith's home,

Treadwell's actions would still be inexcusable. The circuit court thus concluded that there "has to be punishment for taking a life that can never be returned." It also expressed a hope that this punishment would protect the community and deter Treadwell and others. The circuit court expressly noted that anything less than twenty-five years' initial confinement would not "serve the needs of punishment here." The circuit court considered only proper objectives and factors. *See* ***id.***

¶21 The maximum possible sentence Treadwell could have received was sixty-five years' imprisonment. The sentence totaling forty years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Twenty-five years of initial confinement is also the sentence that Treadwell agreed to let the State recommend as part of the plea bargain, without objection. The circuit court properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).