COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP518-CR **Cir. Ct. No. 2010CF774**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALVIN C. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Alvin C. Harris appeals from a judgment of conviction entered upon his guilty plea to bail jumping and disorderly conduct.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Harris additionally appeals from postconviction orders denying his requests for plea withdrawal and sentence modification. We conclude that the circuit court properly exercised its discretion at sentencing. We further conclude that Harris failed to establish that plea withdrawal is necessary to avoid a manifest injustice. We affirm the circuit court's denial of Harris's postconviction order for plea withdrawal.

BACKGROUND

¶2 Following an altercation on July 10, 2010, Harris was charged with felony bail jumping, misdemeanor battery, misdemeanor bail jumping and disorderly conduct. Harris subsequently pled guilty to disorderly conduct and misdemeanor bail jumping. Pursuant to the plea agreement, the other charges were dismissed but read in for purposes of sentencing. Harris was sentenced to nine months in jail for bail jumping and ninety days in jail for disorderly conduct to run concurrent to the bail jumping sentence, but consecutive to any other current or pending sentences.

¶3 In January 2012, Harris filed a postconviction motion for sentence modification and plea withdrawal. Harris argued that the circuit court did not address the necessary sentencing factors. As to plea withdrawal, Harris contended that the circuit court failed to inform him during the plea colloquy that the State must convince each member of the jury beyond a reasonable doubt that he committed the crime.

¶4 After hearing arguments by counsel, the circuit court entered orders denying Harris's postconviction motion for sentence modification and plea withdrawal. While the record does not include a transcript of the postconviction

motion hearing, it appears that Harris's motion to withdraw his plea was denied without an evidentiary hearing. Harris appeals.

DISCUSSION

¶5 *Plea withdrawal*. We turn first to Harris's challenge to the circuit court's denial of his postconviction motion for plea withdrawal. To withdraw a guilty plea after sentencing, a defendant must establish by clear and convincing evidence that withdrawal is necessary to avoid manifest injustice. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A manifest injustice occurs when a plea is not knowing, voluntary and intelligent. ***State v. Yates***, 2000 WI App 224, ¶4, 239 Wis. 2d 17, 619 N.W.2d 132.

¶6 To ensure that pleas are knowing, voluntary and intelligent, circuit courts must engage defendants in adequate plea colloquies that satisfy WIS. STAT. § 971.08 and other court-mandated duties. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). A defendant is entitled to an evidentiary hearing on a motion to withdraw a guilty plea when: (1) the defendant makes a prima facie showing that the circuit court's plea colloquy did not conform with § 971.08 or other procedures mandated at a plea hearing and (2) the defendant alleges lack of knowledge or understanding as to the information that should have been provided at the plea hearing. ***Brown***, 293 Wis. 2d 594, ¶2.

¶7 Here, Harris's motion alleged that his plea was not entered knowingly, intelligently, and voluntarily because of a defect in the plea colloquy. Specifically, Harris argued that the circuit court failed to inform him, and ascertain whether he understood, that he was waiving his constitutional right to have the State convince every member of the jury of his guilt beyond a reasonable doubt. *See* WIS JI—CRIMINAL SM-32. Although the transcript confirms Harris's

contention, we nevertheless conclude that the plea colloquy conducted by the circuit court was adequate under ***Bangert***. The law does not require the circuit court to specifically enumerate each constitutional right that the defendant is giving up. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 826, 416 N.W.2d 627 (Ct. App. 1987); ***State v. Hoppe***, 2009 WI 41, ¶40, 317 Wis. 2d 161, 765 N.W.2d 794. Rather, the circuit court may "specifically refer to some portion of the record or communication between defense counsel and [the] defendant which affirmatively exhibits [the] defendant's knowledge of the constitutional rights he [or she] will be waiving." ***Moederndorfer***, 141 Wis. 2d at 827 (quoting ***Bangert***, 131 Wis. 2d at 271); ***Hoppe***, 317 Wis. 2d 161, ¶40-41 (noting that in ***Moederndorfer***, the circuit court generally referenced the constitutional rights listed in the form, ascertained that the defendant understood the form's contents and that he would be giving up those rights by pleading guilty).

¶8 Here, the transcript of the plea hearing reflects that the circuit court went over each element of the offenses and the potential penalties. The circuit court established that Harris understood that, by pleading guilty, he was admitting that he committed the crimes and that he was relieving the State from having to prove beyond a reasonable doubt the elements of the charges at trial. As for the plea questionnaire form, the circuit court ascertained that Harris went over the form with his attorney; he understood everything in the form, and he did not need additional time to go over the form. Specifically addressing Harris's waiver of constitutional rights, the circuit court confirmed that Harris understood the constitutional rights on the form and that by pleading guilty he was giving up those constitutional rights.[2] The standard plea questionnaire/waiver of rights form

[2] That portion of the plea colloquy relevant to Harris's challenge is as follows:

(continued)

completed by Harris includes an "X" by the statement, "I understand that by entering this plea … I give up the right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty."

¶9 Based on our review of Harris's motion and the plea colloquy, we conclude that Harris fails to make a prima facie showing that the plea colloquy

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> [The Court:] Also by pleading guilty it means that you are giving up important constitutional rights; do you understand that?
>
> [Harris:] Yes.
>
> [The Court:] The constitutional rights that you are giving up are set forth on page one of the plea form that you completed today; is that your understanding also?
>
> [Harris:] Yes.
>
> [The Court:] Knowing that by pleading guilty to these charges that you are giving up those constitutional rights, do you still wish to continue with your guilty pleas?
>
> [Harris:] Yes.
>
> THE COURT: [Defense counsel], have you had sufficient opportunity to thoroughly discuss these cases and the plea decisions with Mr. Harris?
>
> [Counsel]: I have.
>
> THE COURT: Are you satisfied that he is making his guilty pleas freely, voluntarily and intelligently?
>
> [Counsel]: I am.
>
> ….
>
> THE COURT: Are you also satisfied he is knowingly and intelligently giving up his constitutional rights?
>
> [Counsel]: Yes, Judge.

conducted by the circuit court failed to satisfy the requirements of WIS. STAT. § 971.08 and other court-mandated duties. *See* ***Bangert***, 131 Wis. 2d at 266-72. We conclude that Harris has not established that plea withdrawal is necessary to avoid a manifest injustice.

¶10 *Sentencing modification*. We turn next to Harris's challenge to the sentence imposed by the circuit court. Sentencing is committed to the discretion of the circuit court and our review is limited to determining whether that discretion was erroneously exercised. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). This exercise of discretion contemplates a process of reasoning based on facts that are of record or that are reasonably inferred from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***Id.*** at 277. A strong public policy exists against interfering with the circuit court's discretion in determining sentences, and the circuit court is presumed to have acted reasonably. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. To obtain relief on appeal, the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992).

¶11 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court may also consider the following factors:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness;

> (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id. at 623-24 (quoting ***State v. Harris***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977)) The circuit court need discuss only the relevant factors in each case. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶12 Here, the transcript of the sentencing hearing reflects that the circuit court considered the three primary sentencing objectives, namely, Harris's character and lengthy criminal record, the seriousness of the offense, and the need to protect the public.[3] The court noted that Harris had a "lengthy record" dating back to the 1990s and was out on bail at the time of the offenses at issue. The court observed that "these are serious matters" given that Harris confronted the victim and "got involved" in an altercation while out on bail. It stated that confinement, not probation, would be the only appropriate sentence. While Harris complains that the circuit court did not give weight to his need for rehabilitation, it was not required to do so. We see no error in the circuit court's exercise of discretion.

[3] We note that when we review a sentence, we look to the totality of the court's remarks and the entire record, including any postconviction proceedings. *See* ***State v. Santana***, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998) ("The transcripts of the sentencing hearing as well as several postconviction hearings make an extensive record of the trial court's comments at sentencing and its explanation for what was considered."). Because Harris failed to provide a transcript of the postconviction hearing, we will assume that it would support the circuit court's sentencing determination. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

CONCLUSION

¶13 We conclude that the circuit court properly exercised its sentencing discretion. We further conclude that the plea colloquy conducted by the circuit court was adequate and, thus, Harris failed to establish that plea withdrawal is necessary to avoid a manifest injustice. We affirm the judgment and orders denying Harris's motion for sentence modification and plea withdrawal.

By the Court.—Judgment and orders affirmed.

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