COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0825-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VONNIE DARBY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Reversed and cause remanded for further proceedings.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Vonnie Darby appeals from a postconviction order and argues that his no contest pleas were not free and voluntary and, therefore, that

the trial court erred in denying his postconviction motion to withdraw them.[1] We reverse the postconviction order and remand the matter to the trial court for a hearing to determine whether Darby should be allowed to withdraw his pleas.

On September 18, 1995, Darby was charged with fleeing an officer, possession of marijuana, and obstructing an officer. A warrant was issued for Darby's arrest when he failed to appear for his initial appearance. On January 8, 1996, Darby was returned to court on the warrant. He also appeared in court on January 17, 1996, for his preliminary hearing; January 23, 1996, for a scheduling conference; January 10, 1997, for motions; January 27, 1997, twice, for motions and trial, which were adjourned; and June 25, 1997, for motions, trial, and sentencing. Defense counsel also appeared for Darby, while Darby remained in custody, on October 17, 1996, for status; and on April 21, 1997, for the re-scheduling of the trial date. At none of the appearances prior to June 25, 1997, did the State indicate any intention to add a habitual criminal penalty enhancer to the charges.

On the June 25, 1997 trial date, however, after the conclusion of several pre-trial matters including the evidentiary hearing on Darby's motion to suppress his statement, the prosecutor stated:

> There's another thing. This case was charged by another prosecutor in our office, who very conscientiously wrote this up but couldn't use the prior Milwaukee County convictions because of time[]frame. I have no doubt and I feel he had just as much regret that none of those thirteen

[1] Darby also sought to appeal from the judgments of conviction and argues that the trial court erroneously exercised discretion when sentencing him. Our reversal of the postconviction order and our remand for further proceedings render premature our review of those judgments. Consequently, we need not address Darby's challenge to the trial court's exercise of sentencing discretion because this opinion reverses only the postconviction order.

prior convictions would be the predicate[] for habitual criminality.

This is a very high speed chase that ironically started within a stone's throw of the infamous Jeremiah Whiteside chase where Jeremiah Whiteside was convicted and the judge sentenced him to forty-seven years for killing three citizens who were sitting on a bus stop on 64th and Silver Spring. This chase happened while the other defendant was awaiting to get this forty-seven year sentence and it starts despite all of the publicity and the media attention that was on that case. And Mr. Darby is actually going a whole lot faster and is doing things every bit as dangerous if not more so, but luckily he doesn't hit anybody.

I later learned long after the arraignment in this case that this defendant in addition to the thirteen priors here has more recent prior convictions in outlying counties and in fact has a prior fleeing conviction in Ozaukee County within the five year period, has a prior burglary conviction in Fond du Lac County within the five year period and would most definitely, with those convictions, qualify under 939.62 to be subject to extra time for not more than eight years for the fleeing and possibly not more than three years for the marijuana, although that might create an issue for litigation, and definitely not more than three years on the obstructing which would approximately triple if not quadruple his exposure in this case.

I've been doing a little research, given Mr. Darby's position in this case, and I believe that given the reason that we did not have those convictions, that they were out-of-county convictions, I believe I'd be justified in reissuing this case, moving to dismiss it without prejudice, reissuing the case with the penalty enhancer actions, and I think I will easily be able to prove that it was not any type of inexcusable negligence, any type of manipulation here but that this is a case that by its very nature deserves the repeater clause now that it is known to the state that the defendant qualifies twice over from two different counties.

I intend to do that. However, I wanted to give Mr. Darby one last chance to consider the court's rulings on the pretrial motions, and I'm willing to wait until three-fifteen this afternoon, which is about thirteen minutes from now, before I make that motion to the court, but I wanted to advise the court that it is my belief that the court has the authority to grant this motion. The court could, of course, deny the motion and proceed to trial, I don't question that that's within the court's discretion, but this is a horrible case which is well described in the complaint.

> This is a person who if he's gonna take this case to trial, the state very strongly believes ought to face the full force of the law. And he has worked hard to earn his qualifications, if you will, for habitual criminality and I'd like to give him that opportunity if that's what he wants to do. And I wanted to put that on the record, and I have no objection if the court is willing to wait until three-fifteen to entertain this motion by the state.

Defense counsel then requested the opportunity to confer with Darby and, after a break in the proceedings, Darby pled no contest to the charges and was sentenced.

Darby moved to withdraw his no contest pleas, asserting that they were coerced by the prosecutor's threat to dismiss and reissue the charges with the habitual criminality penalty enhancers. The trial court denied his motion. Darby renews his claim on appeal, maintaining: (1) his pleas were constitutionally flawed because they were not free, voluntary, and intelligent; and (2) his pleas should be vacated to correct a manifest injustice.

"After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Krieger***, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991). A factual situation that establishes a manifest injustice is that a plea was not voluntary. *See* ***id.*** at 251 n.6, 471 N.W.2d at 602 n.6. Further:

> Whether a [no contest] plea is voluntarily and intelligently made is a conclusion with respect to the state of mind of the accused. Inquiry with respect to threats and promises is made for the purpose of determining the accused's state of mind with respect to the voluntariness and intelligence of the [no contest] plea of the accused. Unless the threats coerce or induce the plea to an extent that deprives the accused of understanding and free will, they provide no basis for rejection of the [no contest] plea or later withdrawal.

See ***Verser v. State***, 85 Wis.2d 319, 329, 270 N.W.2d 241, 246 (Ct. App. 1978).

Although, on appeal, Darby explicitly disclaims any suggestion that "prosecutorial discretion" is "the focus" of his argument, he implicitly links his assertion of coercion to the prosecutor's threat and timing. While a court may grant a prosecutor's motion to dismiss and reissue a charge with a habitual criminality penalty enhancer, the appropriateness of doing so may depend on factors such as the circumstances surrounding the discovery of a defendant's prior record and the timing of the motion. *See* ***State v. Martin***, 162 Wis.2d 883, 902-03, 470 N.W.2d 900, 908 (1991); *see also* ***State v. Lettice***, 205 Wis.2d 347, 353, 556 N.W.2d 376, 378 (Ct. App. 1996). Under the circumstances of this case, we conclude that a hearing is warranted to allow the trial court the opportunity to review whether, as the prosecutor contended, the timing of his threatened motion was unrelated to "inexcusable negligence" or improper "manipulation," and whether Darby's no contest pleas were voluntary.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* RULE 809.23(l)(b)5, STATS.