COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2887

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH D. PAULSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Kenneth Paulson, pro se, appeals an order denying his motion to withdraw his guilty plea to the charge of bail jumping. He argues that his plea was not entered knowingly, voluntarily or intelligently because it was coerced by the district attorney, and he was not informed of the nature of the charges. He also argues that no factual basis exists for his plea and that he was

denied due process because of a defective arraignment procedure. We affirm the order.[1]

Paulson was charged with two counts of disorderly conduct and two counts of bail jumping, as a repeat offender. The criminal complaint was based upon two acts of domestic abuse that Paulson's girlfriend reported. She claimed that Paulson grabbed her with both hands around her throat and pushed her back on to a couch, threatening to kill her. He then held her down by putting his knee against her head and forced a pillow over her face in an attempt to suffocate her. He later told her that the only reason he did not kill her was because she did not struggle or fight back.

The second attack occurred the following night. While they were eating, Paulson grabbed the woman by the hair and pushed her face down into her food, wiping her face from side to side. That same night he told her again that he was going to kill her and chop her body up in small pieces. He told her he knew of other people who had been dismembered similarly and never found, and assured her that no one would find her. The complaint further alleged that Paulson had been released from custody for an offense that was a felony under ch. 969, STATS., and intentionally failed to comply with the terms of his bond by committing a crime.

As a basis for the repeater allegations, the complaint further alleged that Paulson had been convicted of the following felonies: bail jumping in 1988;

[1] Paulson also mentions a motion to correct or modify his sentence. This issue is not argued in his brief, and we therefore do not address it. *See* ***Reiman Assocs. v. R/A Advertising***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed are deemed abandoned).

delivery of a controlled substance in 1988; and three counts of second-degree sexual assault by use or threat of violence or force in 1996. He was also convicted of the following misdemeanors: disorderly conduct in 1992; resisting an officer in 1993; battery and resisting in 1994; and disorder and bail jumping in 1996. The complaint alleged that the 1988 convictions were a basis for repeater allegations because Paulson spent three years in prison subsequent to those convictions.

At the time set for his preliminary hearing, Paulson waived the hearing and entered a plea to count four of the complaint, bail jumping, in exchange for the dismissal of the remaining three counts. The prosecutor explained that Paulson's disorderly conduct charges occurred while out on bail awaiting sentencing on the three sexual assault counts. As part of the plea negotiation on the bail jumping charge, Paulson and the prosecutor jointly recommended a ten-year sentence to be served concurrently with the sexual assault sentences.

The bail jumping plea colloquy included the following exchange:

> THE COURT: You understand that before you could be convicted of this particular offense, it would be necessary for the state to show that you'd been released from custody on another offense which was a felony. Do you understand that?
>
> MR. PAULSON: Yes, sir.
>
> THE COURT: And that it would be necessary for the state to show that you intentionally failed to comply with the terms of that bond in that you committed another crime. Do you understand that?
>
> MR. PAULSON: Yes, sir.
>
> THE COURT: Further, do you acknowledge the following convictions knowing that, pursuant to the provisions of Wisconsin Statute Section 939.62, that it would increase the maximum penalty to a fine of not more than $10,000 and up to 11 years imprisonment, or both.

The court then recited the offenses listed in the complaint, which Paulson acknowledged on the record. In response to further questions from the court, Paulson acknowledged that he signed a guilty plea and waiver of rights form, and that he understood all the constitutional rights he would be waiving. A short recess was taken to permit counsel to explain that if Paulson successfully appealed the sexual assault convictions, the bail jumping sentence would not necessarily be affected. When asked if he understood, Paulson responded, "Yeah. Ten years for disorderly conduct is a long time. I understand, though."

The court then asked whether Paulson agreed that the complaint states a sufficient factual basis that would support a finding of guilt. Paulson responded, "I threw a hamburger at her so I'm guilty of disorderly conduct." The Court repeated, "Does the Complaint state sufficient facts which would support finding you guilty of that?" to which Paulson replied, "Yes."

The court asked Paulson whether he understood that he was "under no obligation, whatsoever, to enter a plea of guilty here?" Paulson replied:

> Yes, I am under an obligation. … 'Cause I got a chance with charges pending against me going into the prison system, I'll have to go to maximum security and sit there in the maximum security setting, you know, until this is – until the case is solved.

The court responded that it understood that Paulson was making "various trade-offs in your considerations," to which Paulson replied, "Yes." The court then asked: "How do you plead then to count four, bail jumping, a Class D Felony,

with the repeater as indicated?" Paulson entered a plea of guilty. The court sentenced him to ten years concurrent with other sentences he was then serving.[2]

At the postconviction hearing, Paulson appeared pro se. He argued that before he had entered plea negotiations, he had asked his counsel whether he "would be sitting in maximum security with pending charges .... Somebody in the jail had told me that." Apparently, Paulson believed that due to the pending disorderly conduct and bail jumping charges, he would be incarcerated on the sexual assault sentences at a maximum security facility. He claimed that his attorney, at his request, checked with the district attorney, who advised that Paulson's understanding was correct. At the postconviction hearing, Paulson asserted that he pled guilty to avoid spending any time in maximum security.

The prosecutor disputed Paulson's allegations, stating that Paulson's counsel advised him that Paulson wanted to plead guilty to bail jumping against her advice. The prosecutor explained that defense counsel told him Paulson understood he would be in maximum security as long as he had pending charges, "[b]ut that by no means is information that came from me. It's information that came to us from Mr. Paulson."

Paulson agreed that he initiated plea negotiations, but claims he did so because his defense counsel, based upon discussions with the prosecutor, confirmed what a fellow jail inmate told him, which was that he would be in maximum security until sentenced on pending charges. He agreed that his defense counsel advised against entering the plea, but that his fear of maximum security,

[2] Paulson apparently received three concurrent 10-year sentences on the sexual assault convictions.

caused by misinformation from the prosecutor, coerced his plea. Paulson also denied that a factual basis supported his plea. The trial court denied Paulson's motion to withdraw his plea.

Whether to permit a defendant to withdraw a no contest plea is discretionary with the trial court. ***State v. Giebel***, 198 Wis.2d 207, 215, 541 N.W.2d 815, 817 (Ct. App. 1995). Postconviction plea withdrawal is permitted only to correct a manifest injustice, such as occurs when a plea is not knowingly, voluntarily or intelligently entered. ***Id***. The defendant bears the burden of showing the necessity for plea withdrawal by clear and convincing evidence. ***Id***.

A defendant seeking to challenge a plea hearing must satisfy two threshold requirements. ***Id***. 215-16, 541 N.W.2d at 818. First, the defendant must make a prima facie showing of the trial court's violation of § 971.08(1)(a), STATS., or other mandatory duties. ***Id***. at 216, 541 N.W.2d at 818. Second, the defendant must allege that he or she in fact did not voluntarily enter the plea, or that he did not know or understand the information that should have been provided at the plea hearing. *See* ***id***. Once this showing has been made, the burden then shifts to the State to show a knowing, voluntary and intelligent plea. ***Id***. at 215, 541 N.W.2d at 818.

Here, Paulson fails to satisfy the first of the two threshold requirements. The trial court entered into a plea colloquy that satisfied the requirements of § 971.08(1)(a) and (b), STATS.[3] The trial court personally

[3] Section 971.08(1)(a) and (b), STATS., provides:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:

(continued)

addressed Paulson regarding the nature of the charges and the potential punishment. The court also ascertained the voluntary nature of Paulson's plea. The court accepted Paulson's agreement that the criminal complaint serve as a factual basis for the plea. In addition, the trial court received a guilty plea and waiver of rights form, signed by Paulson and his attorney, demonstrating that he and his attorney discussed the various constitutional rights he would be waiving. We are satisfied that the plea colloquy complied with § 971.08(1)(a) and (b), and the record supports the court's determination that Paulson entered a knowing, intelligent and voluntary plea.

Paulson argues that the prosecutor coerced him into pleading guilty by improperly representing that he would be placed in maximum security until he entered a plea or otherwise resolved the charges. He further contends that his counsel's inaccurate confirmation of the prosecutor's advice rendered his plea involuntary. *See* ***State v. Bentley***, 195 Wis.2d 580, 536 N.W.2d 202 (Ct. App. 1995). The record fails to support this assertion. There is no objective proof that the prosecutor made such representation. Paulson was obliged to present some evidence to support his claim. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979); ***Giebel***, 198 Wis.2d at 215-16, 541 N.W.2d at 818-19. Based upon Paulson's failure to present evidence of the prosecutor's alleged misconduct, or defense counsel's alleged inaccurate advice, the trial court reasonably exercised its discretion when it rejected his claim.

> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

Finally, in his reply brief, Paulson complains that failure to hold a formal arraignment violated his due process rights and entitles him to withdraw his plea. We disagree. Paulson's valid guilty plea waives formal defects in the arraignment procedure. *See* ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986).

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.