COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1626-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANDREW M. OBRIECHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Andrew Obriecht appeals an amended judgment of conviction, entered following the revocation of his probation, which sentences him for theft, trespass and criminal damage to property. He also appeals an order denying his postconviction motions to set aside his termination from a deferred prosecution program, to withdraw the guilty pleas which he had entered pursuant

to the deferred prosecution agreement, and to modify his sentences. He claims that: (1) he was entitled to a hearing before being terminated from the deferred prosecution program; (2) requiring an admission of his guilt as a condition of entering the deferred prosecution program violated his due process rights; (3) his pleas were invalid because he did not personally enter them on the record; (4) his trespass and theft pleas were manifestly unjust because he had valid defenses to those charges; and (5) evidence presented at his postconviction motion hearing about his lack of dangerousness warranted a downward modification of his sentences.

¶2 We conclude that Obriecht has forfeited the right to challenge his termination from the deferred prosecution program, the prosecutor's authority to require the pleas, and the manner in which the pleas were entered all because he did not timely raise these issues. We further conclude that Obriecht has failed to establish any manifest injustice relating to his pleas, and that the evidence of Obriecht's positive response to treatment after sentencing does not constitute a new sentencing factor. We therefore affirm the judgment and order.

BACKGROUND

¶3 Obriecht was charged with burglary after he broke into his mother's home and took money without her permission while she hid in a closet. Obriecht's mother said she had been having conflicts with Obriecht in the weeks before the incident and had asked him to move out. She believed that her son was acting irrationally as the result of a beating to the head with a baseball bat he had received a few weeks earlier. Because Obriecht had no criminal record, the district attorney offered to refer him to the Dane County Deferred Prosecution Program on the condition that he plead guilty to three misdemeanor charges of

trespass, theft, and criminal damage to property. If Obriecht completed the program satisfactorily, the district attorney would ask the court to dismiss the charges. If not, the court would adjudicate Obriecht guilty based upon his pleas. Obriecht eventually agreed to the terms.

¶4 Obriecht was unilaterally terminated from the deferred prosecution program, without a hearing, for failing to comply with a counseling requirement. The trial court then adjudicated Obriecht guilty on the outstanding charges, withheld sentence, and placed him on probation. Several months later, Obriecht was taken into custody on a probation hold after he was charged with multiple counts of fourth- and second-degree sexual assault for inappropriately touching several women. An attempt to arrange sexual offender treatment as an alternative to the revocation of Obriecht's probation failed when the treatment facility refused to accept him. Obriecht's probation was subsequently revoked and he returned to the court for sentencing. After being presented evidence of Obriecht's disruptive behavior and lack of impulse control, the court observed that Obriecht had some childhood abuse and mental health issues, but noted that it was necessary to impose close to the maximum nine-month sentences to protect the public from the likelihood that he would reoffend. The court then sentenced Obriecht to three consecutive eight-month jail terms without Huber privileges, but noted that it might be willing to reconsider granting Huber privileges if Obriecht obtained counseling.

¶5 Obriecht filed a set of three postconviction motions, alternately seeking to vacate his pleas on the trespass and theft charges, to obtain a hearing on his termination from the deferred prosecution program, or to modify his sentences. While he was out on bail pending resolution of the motions, he attended counseling sessions, met with a psychiatrist and obtained a neurological

examination. At the postconviction hearing, Obriecht presented a psychiatric report which concluded that his mental illnesses (including a bipolar schizo-affective disorder and an impulse control disorder) were treatable. Based on the fact that Obriecht had been able to reduce his disruptive behaviors in the months prior to the hearing, the psychiatrist opined that, with treatment, the likelihood of Obriecht continuing to break the law was "not terribly high."

¶6 The trial court refused to allow Obriecht to withdraw his trespass and theft pleas, rejecting his contention that there was no factual basis for them and noting that no evidence had been offered in support of his other plea withdrawal theories. The trial court also rejected Obriecht's challenge to his termination from the deferred prosecution program, reasoning that deferred prosecution did not create a liberty interest to which due process guarantees would attach. The court noted that Obriecht had failed to raise any objection to the termination of his deferred prosecution arrangement when he was returned to court for adjudication and sentencing, and Obriecht had failed to show prejudice by establishing a likelihood that the deferred prosecution arrangement would not have been terminated if there had been a hearing. Finally, the trial court treated the psychiatrist's evaluation of Obriecht as a confirmation of the mental health factor which it had previously considered, rather than a new factor. It declined to adjust the length of the sentences imposed, but did agree to grant Obriecht Huber privileges in light of his recently-demonstrated ability to conform his behavior to acceptable standards.

ANALYSIS

¶7 As a threshold matter, the State argues for the first time on appeal that Obriecht was barred from challenging his pleas and his termination from the

deferred prosecution program after his probation was revoked. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (allowing a respondent to raise an argument that supports the trial court ruling on a theory or reasoning not presented below). We agree that a challenge to a post-revocation sentence does not bring the underlying judgment of conviction before the court. *See* ***State v. Drake***, 184 Wis. 2d 396, 399-400, 515 N.W.2d 923 (Ct. App. 1994). Therefore, Obriecht's plea withdrawal motion and his objection to termination without a hearing, which were filed over a year after he was adjudicated guilty and placed on probation, would have been untimely under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30(2)(b) (1997-98).[1] *See* ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996).

¶8 However, Obriecht contends that ***Tobey*** is inapplicable here because he filed his motions under WIS. STAT. § 974.06 rather than under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. A motion is timely under § 974.06 so long as the defendant is still in custody.[2] Obriecht correctly asserts that a request for plea withdrawal or other motion raising a constitutional issue may properly be brought under § 974.06. *See, e.g.,* ***State v. Meado***, 163 Wis. 2d 789, 472 N.W.2d 567 (Ct. App. 1991). Obriecht's motions do not specify under which statute they were brought, § 974.02 or 974.06, and the trial court did not address the issue. Because the State assumes that Obriecht's motions were brought under § 974.02

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Of course, even if timely, a motion under WIS. STAT. § 974.06 still may be procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), or be limited in scope to constitutional or jurisdictional issues under the terms of § 974.06(1). The State does not claim any such impediment here.

and RULE 809.30, it did not brief its position regarding the proper result in the event they were brought under § 974.06.

¶9 We agree with the State, however, that Obriecht waived any objection to his summary termination from the deferred prosecution program by failing to object to the termination when he was brought before the trial court for adjudication and sentencing. We are persuaded by the State's argument that an improper termination from the deferred prosecution program would have constituted a breach of the plea agreement, warranting either plea withdrawal or specific performance in the form of reinstatement to the program.[3] "[T]he right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant." ***State v. Smith***, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989). There can be no question on the record before us that Obriecht was aware when he returned to court for adjudication and sentencing that he had not been afforded a hearing prior to being terminated from the deferred prosecution program. He could have challenged the termination at that time if he believed that he had not been afforded all the process he was due. Because we conclude the trial court could properly have denied Obriecht's motion for a termination hearing on the grounds of waiver, we do not address the other arguments advanced by the appellant or discussed by the trial court in regard to that motion.

¶10 We next consider Obriecht's motion for plea withdrawal. A plea may be withdrawn after sentencing only when the defendant can demonstrate by

[3] We also note that Obriecht himself argued below that he did not receive the benefit of his plea agreement when he was terminated from the deferred prosecution program without a hearing.

clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). The determination of whether a manifest injustice has occurred is ordinarily left to the trial court's discretion. *See* ***State v. Farrell***, 226 Wis. 2d 447, 453-54, 595 N.W.2d 64 (Ct. App. 1999). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). However,

> [w]hen a defendant's assertion of a violation of a constitutional right forms the basis for a plea withdrawal request, he or she may withdraw the plea as a matter of right by demonstrating: (1) that a violation of a constitutional right has occurred; (2) that this violation caused the defendant to plead guilty; and (3) that at the time of the plea, the defendant was unaware of the potential constitutional challenge to the case against him or her because of the violation.

State v. Sturgeon, No. 98-2885, slip op. at ¶15 (Wis. Ct. App. Nov. 17, 1999, ordered published Dec. 16, 1999). We review such questions of ultimate constitutional fact independently. *See* ***id.*** at ¶16.

¶11 Obriecht contends his pleas were manifestly unjust for four reasons: (1) because the prosecutor exceeded his statutory authority under WIS. STAT. § 971.39 by conditioning Obriecht's participation in the deferred prosecution program upon the entry of guilty pleas, (2) because Obriecht never actually entered the pleas on the record, (3) because he had viable defenses to the theft and trespass charges, and (4) because he did not receive due process prior to his termination from the deferred prosecution program.

¶12 However, Obriecht did not raise the issues of the prosecutor's statutory authority to require the pleas, or Obriecht's failure to personally enter the pleas in the trial court, and he did not move to withdraw his plea on the damage to property conviction. Because these issues are being raised by the appellant for the first time on appeal, we will not consider them. *See* ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992) (requiring any issue other than the sufficiency of the evidence to be preserved in the trial court by a timely objection or a postconviction motion before being be raised as a matter of right on appeal).

¶13 The trial court considered Obriecht's assertion that he had viable defenses to the theft and trespass charges in the context of whether there was a factual basis for those pleas. Obriecht's mother filed an affidavit and testified at the motion hearing that she had told Obriecht he could come by the house to pick up some of his belongings, and that he had in the past borrowed money from her and paid her back, or she had taken it out of the account she held in trust for him. Obriecht claimed his mother's statements supported a defense that he lacked intent to commit the crimes charged, except for the damage to property. However, the trial court found the mother's motion hearing testimony lacked credibility, and considered that her original preliminary hearing testimony provided a sufficient factual basis for the pleas. The trial court's resulting determination that there was no manifest injustice established by Obriecht's alleged defenses to the trespass and theft charges was well within its discretion.

¶14 Obriecht's claim that his trespass and theft pleas were manifestly unjust because he did not receive due process prior to his termination from the deferred prosecution program would appear to be constitutional in nature. We need not resolve whether the lack of a termination hearing actually deprived Obriecht of due process, however, because it is clear that an event which had not

yet occurred could not have "caused" Obriecht to enter his pleas. This is not a situation where the defendant was in some way mislead about the conditions of a deferred prosecution contract or the manner in which his participation could be terminated from the program. Therefore, Obriecht cannot satisfy the manifest injustice standard for alleged constitutional violations.

¶15 Finally, Obriecht maintains he was entitled to have his sentence modified on the basis of new factors. A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, which operates to frustrate the purpose of the original sentence. *See* ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997). Whether a set of facts constitutes a new factor is a question of law that we review without deference to the trial court. *See* ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶16 We are satisfied that neither the expert testimony about Obriecht's amenability to treatment nor his improved behavior while on bail awaiting resolution of his postconviction motions constituted new sentencing factors. The record shows that the trial court was aware at the time sentence was imposed that Obriecht had mental health problems which could require treatment, but that he had failed to comply with a counseling requirement of his deferred prosecution agreement. Additional details about the nature or seriousness of Obriecht's problems and the available modes of treatment did not frustrate the trial court's expressed intent to protect society from a defendant who had failed to demonstrate prior to sentencing the willingness or ability to deal with his unacceptably violent behavior. Neither did Obriecht's post-sentence progress justify a sentence modification. *See* ***State v. Kluck***, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997).

By the Court.—Judgment and order affirmed.

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