COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2340-CR **Cir. Ct. No. 01-CF-195**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS L. GILLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas L. Gillen appeals from a judgment convicting him of operating while intoxicated, fifth offense, contrary to WIS.

STAT. § 346.63(1)(a) (2001-02).[1] Gillen also appeals the order denying his motion for plea withdrawal. Gillen argues the trial court erred by: (1) finding that his offense was a "fifth or subsequent" OWI; and (2) denying Gillen's plea withdrawal motion. Specifically, Gillen contends that his claimed misunderstanding of the potential penalties rendered his no contest plea unknowing and involuntary. Gillen also argues that the 9-1-1 and dispatch tapes relevant to his offense should not have been destroyed until the final disposition of his case. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In April 2001, the State charged Gillen with OWI as an eleventh offense. An amended complaint added one count of operating a motor vehicle with a prohibited alcohol concentration. Following the denial of Gillen's suppression motions, Gillen agreed to plead no contest to operating while intoxicated. The following exchange occurred:

> Court: And so you have a factual dispute about the characterization, but you're prepared to enter a no contest plea to this as a fifth or subsequent offense, correct?
>
> [Defense Counsel]: We are prepared to plead to an operating while intoxicated, Your Honor, not necessarily as to a fifth or subsequent.
>
> Court: Okay. Well, --
>
> [Defense Counsel]: The Court may well find that it's appropriately a fifth or subsequent, but my understanding is that that was not a matter of proof but that it was a matter of law to be determined as part of imposition of sentence.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> Court: Well, that could be, but Mr. Gillen is entering [a] plea, and it seems that in the usual course of things we would expect Mr. Gillen to have an understanding of what the potential penalties might be.

¶3 Defense counsel then told the court that he had informed Gillen of the maximum and minimum potential penalties depending on whether the court found that it was a third offense or a fifth or greater offense. The court adjourned to consider the form of plea proposed. When court reconvened, the following colloquy continued:

> Court: Do you have the Plea Questionnaire there, [defense counsel]?
>
> [Defense Counsel]: Yes, we do.
>
> ….
>
> Court: And you'd be offering the no contest plea to the O.W.I. charge, with the understanding the P.A.C. would be dismissed?
>
> [Defense Counsel]: Correct.
>
> Court: And, Mr. Gillen, you understand that your attorney is – and I'm dismissing the P.A.C. charge. This Complaint alleges that you're guilty of a fifth or subsequent offense having to do with drinking and driving. Do you understand that?
>
> Gillen: Yes.
>
> Court: The potential penalties for a fifth or subsequent offense under our laws are up to five years incarceration. Do you understand that?
>
> Gillen: Yes.
>
> Court: You understand further that there is a disagreement about just how many prior offenses should be attributed to you under our law because some of these offenses are outside, arguably outside the scope of time where they should be counted, some of them arose in different states on different sets of laws with different definitions, and there's argument about that. Do you understand that?

> Gillen: Yes, sir.
>
> Court: And the District Attorney's office is arguing or contending that we should establish a number as five or over that, up to, you know, they might argue 10 or 11. Your attorney's arguing that it might be as little as … three or four as opposed to five or greater. Do you understand that?
>
> Gillen: Yes, sir.
>
> Court: And you understand that the question of whether it's three, four or five or more is something that the Court's going to have to decide? Do you understand that?
>
> Gillen: Yes, sir.
>
> Court: Not a jury. Do you understand?
>
> Gillen: Yes, sir.
>
> Court: And to the extent it might be possible, you're giving up the opportunity for a jury to decide whether it might be third, fourth, fifth or later for purposes of establishing, you know, what potential sentence you might, or what potential maximum sentence you might face. Do you understand what I'm saying?
>
> ….
>
> Court: So, for example, if I were to decide that the proper number of prior convictions as it relates to your potential sentence is three, then the maximum penalty would be a year in jail, and minimum mandatory would be 30 days. If I decided it was four, then the maximum would still be a year, and minimum mandatory would be 60 days. And if I decide it was five or more, then the maximum penalty's up to five years. Do you understand?
>
> Gillen: Yes, sir.

¶4 After ascertaining that Gillen understood the plea questionnaire and waiver of rights form, the court accepted Gillen's no contest plea and ordered the parties to file memoranda regarding the number of Gillen's previous OWI offenses. The court ultimately found that Gillen had "been convicted on at least four prior occasions … [and] that this matter is properly regarded as a fifth or

subsequent offense." The court sentenced Gillen to thirty-five months' initial confinement followed by twenty-five months' extended supervision. Gillen's postconviction motion to reduce his sentence and/or withdraw his plea was denied. This appeal follows.

ANALYSIS

A. FIFTH OR SUBSEQUENT OFFENSE

¶5 Gillen argues the trial court erred by finding that his offense was a "fifth or subsequent" OWI. The trial court concluded that Gillen had at least four prior convictions – two Wisconsin convictions and two South Dakota convictions – the South Dakota convictions arising from incidents that occurred in 1994 and 1995. Gillen does not challenge the Wisconsin convictions but, rather, contends that the South Dakota convictions may not be counted for purposes of classifying Gillen's present OWI as a fifth or subsequent offense. We are not persuaded.

¶6 Gillen contends that under South Dakota law, a circuit court may take a plea and, without entering a judgment of guilt, suspend imposition of a sentence. Gillen claims that because he received a "suspended sentence" for the 1994 offense, the offense was not a "conviction," as required under WIS. STAT. §§ 346.65(2) and 343.307(1)(d). The circuit court found that the South Dakota convictions were "sufficient to meet the statutory criteria for out-of-state drinking and driving incidents." Acknowledging Gillen's claim that the "suspended sentence" was somehow incompatible with a "conviction," the circuit court concluded that "[t]he statutory scheme and form of judgment itself … make clear that the proceedings and record keeping are premised first on a finding of guilt." The court concluded that the 1994 conviction was comparable to the Wisconsin procedure of placing someone on probation and withholding sentence after a

finding of guilt. Moreover, the circuit court noted that the "statewide records" from South Dakota report a conviction and the "local records available are supportive of not only a plea of guilt but also supportive of a Court issued determination of guilt." The record supports the court's conclusion.

¶7 Gillen also claims, without reference to applicable authority, that under South Dakota law, offenses dating back more than five years are not counted as priors. Gillen thus argues that neither the 1994 nor 1995 offense was properly counted for purposes of classifying Gillen's present OWI as a fifth or subsequent offense. Even assuming Gillen's characterization of South Dakota law is correct, the circuit court properly noted that there is no authority to suggest that Wisconsin's law does not govern for purposes of counting prior offenses. We agree that had the legislature wished to do so, it could have stated an intent to count only those prior offenses that would be counted in their respective jurisdictions. WISCONSIN STAT. § 346.65(2), however, "does not express any pre-requisites for counting out-of-state OWI convictions as prior convictions for sentencing purposes." ***State v. White***, 177 Wis. 2d 121, 126, 501 N.W.2d 463 (Ct. App. 1993).

B. PLEA WITHDRAWAL

¶8 Gillen argues that the trial court erred by denying his motion for plea withdrawal. Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Gillen has the burden of proving by clear and convincing evidence that a

manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶9 Here, Gillen contends that his claimed misunderstanding of the potential penalties he faced rendered his no contest plea unknowing and involuntary. Defense counsel, however, strongly advocated for the type of plea conducted in this case, despite initial concerns raised by both the prosecutor and the court. Because Gillen invited the plea structure in the trial court, he will not be permitted to challenge it on appeal. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974) (An appellate court will generally not review an issue raised for the first time on appeal.). Further, we conclude that Gillen is judicially estopped from raising this issue on appeal. A position on appeal that is inconsistent with that taken at trial is subject to judicial estoppel. ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987).

¶10 To the extent Gillen challenges the factual basis for his plea, the record establishes that Gillen understood what he was pleading to and the potential penalties he faced. Gillen was informed of the maximum and minimum possible penalties depending on whether the court found that the present offense was a third, fourth or fifth or greater offense. On the plea questionnaire and waiver of rights form, Gillen confirmed his understanding that he was pleading to OWI, that the maximum incarceration period for "OWI 5+" was five years and "if lesser offense," was one year. Gillen has failed to establish a manifest injustice warranting plea withdrawal.

C. 9-1-1 AND DISPATCH TAPES

¶11 Finally, Gillen argues that the 9-1-1 and dispatch tapes relevant to his offense should not have been destroyed until the final disposition of his case.

Gillen challenges the Outagamie County system that allows the recordings of telephone conversations and dispatches to be destroyed after thirty days. This general objection to county policy does not constitute grounds for plea withdrawal. To the extent Gillen intimates his trial counsel was ineffective for failing to request the recordings before they were destroyed, Gillen fails to establish how the recordings would have been exculpatory had they "been preserved for use at a potential Suppression Hearing."[2]

By the Court.—Judgment and order affirmed.

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

[2] At a pretrial motion hearing, police officer Stephen LaVigne testified he responded to an Outagamie County dispatch regarding a possible intoxicated driver. LaVigne ultimately stopped Gillen's vehicle after he observed erratic driving. LaVigne testified that Gillen admitted he had been drinking. Gillen performed poorly on field sobriety tests and a subsequent blood draw revealed a BAC of .295%. It is unclear how the recordings would refute this testimony.