COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1501-CR **Cir. Ct. No. 2010CT1889**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN ROBERT FELIX SCHURK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

¶1 CURLEY, P.J. Stephen Robert Felix Schurk appeals the judgment convicting him of operating a motor vehicle while intoxicated, third offense, and duty upon striking an occupied or attended vehicle ("hit and run"), contrary to

WIS. STAT. §§ 346.63(1)(a) and 346.67(1) (2011-12).[1] He also appeals the order denying his postconviction motion. Schurk contends that he should have been allowed to withdraw his guilty pleas for two reasons. First, the trial court failed to advise him that the court was not bound by any plea negotiations, which constituted a ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) violation that would permit him to withdraw his guilty pleas. Second, Schurk contends that because the trial court failed to ask him whether anyone had made any promises or threats to him to enter his pleas, and because the plea negotiations were "forced" upon him, his pleas were not entered freely, intelligently and voluntarily. Although the trial court did not specifically advise Schurk that the trial court was not bound by any plea negotiations, nor did the trial court ask Schurk if anyone had made any promises or threats to get him to plead guilty, Schurk admitted signing the guilty plea questionnaire, which spelled out both of those admonitions. In addition, he stated that he had gone over the guilty plea questionnaire with his attorney and he had no questions. Consequently, Schurk has failed to show a manifest injustice that would permit him to withdraw his pleas, and this court affirms.

BACKGROUND

¶2 On August 4, 2010, Schurk was charged with operating a motor vehicle while under the influence of an intoxicant (second offense), operating with a prohibited alcohol concentration (second offense), and duty upon striking an

[1] Although this case has been treated as a misdemeanor case, at the time of the guilty plea and sentencing the trial court also sentenced Schurk on a felony case that he had pled guilty to earlier. Because Schurk is not challenging the propriety of the earlier guilty plea or the sentence, his case was heard by one judge, pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

occupied or attended vehicle (property damage only). According to the amended complaint, on July 19, 2010, Schurk was involved in a hit and run accident in the intersection of West Burnham Avenue and South 60th Street in West Allis, Wisconsin. The complaint explained that shortly thereafter, a parked police officer observed a car drive by making a "loud rubbing noise." Believing the car may have been involved in an accident, the officer followed it. As the officer was pulling out to follow the car, he was dispatched to the hit and run accident. The car the officer followed matched the description of the one involved in the hit and run accident. The officer observed that the car he was following had been parked, and Schurk and another man were standing next to it. The officer approached the men and detected a strong odor of alcohol on Schurk's breath. Schurk admitted drinking and admitted that his car was involved in an accident, but he denied that he was the driver. The passenger in Schurk's car told the police that Schurk was driving and Schurk was arrested.

¶3 While the case was pending, Schurk was charged with operating a motor vehicle while under the influence of an intoxicant causing injury, a felony, and misdemeanor bail jumping. Ultimately, both cases were consolidated and heard by Judge David Hansher. Schurk pled guilty to the felony—operating while intoxicated causing injury, second offense—in front of Judge Hansher, but sentencing was put over. On September 12, 2011, an amended complaint was filed charging Schurk with operating a motor vehicle while intoxicated ("OWI") (third offense), operating with a prohibited alcohol concentration (third offense), and duty upon striking an occupied or attended vehicle (property damage only). Pursuant to plea negotiations, which required only that Schurk serve time in the House of Correction with work release privileges, Schurk pled guilty to operating a motor vehicle while intoxicated (third offense) and duty upon striking an

occupied or attended vehicle (property damage only). The operating with a prohibited alcohol concentration charge was dismissed by operation of law.

¶4 The trial court proceeded to sentence Schurk on the earlier felony conviction and the two new amended misdemeanor charges. After hearing the recommendation of the State, the recommendation of Schurk's attorney, Schurk's mother, his girlfriend, and Schurk, the trial court adopted the State's recommendation and sentenced Schurk to: (1) three years of confinement and three years of extended supervision on the felony operating a motor vehicle causing injury, with the court staying the sentence and placing Schurk on probation for three years, with a condition of one year at the House of Correction with work release privileges; (2) fifty-five days at the House of Correction for the operating a motor vehicle while intoxicated (third offense), consecutive to the one-year House of Correction sentence; (3) six months at the House of Correction, consecutive to the one year House of Correction OWI sentence, stayed, and Schurk was placed on probation for one year on the duty upon striking occupied or attended vehicle (property damage only). Other conditions, including fines, not relevant to this appeal, were also imposed.

¶5 On April 25, 2012, Schurk filed a postconviction motion. He argued that the trial court failed to advise him that it was not bound by the plea negotiations and failed to inquire whether he had been coerced or pressured into entering a plea. He argued that he felt forced to enter the plea because had he not pled guilty that day, the State was going to recommend a prison sentence. After hearing arguments of the parties, the court acknowledged that it failed to ask Schurk if he understood that the court did not have to follow the recommendation of the State and did not ask him if he was coerced or pressured. However, the court noted that it did follow the recommendation of the State, so Schurk would

have no complaint for that omission. With regard to the issue of whether Schurk was coerced, the trial court stated that if Schurk entered his plea because he wanted to keep his job, that was his decision and there was no coercion. The trial court also pointed out that two provisions in the guilty plea questionnaire covered both areas. These provisions read:

> I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty….
>
> ….
>
> I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court….

Those provisions, in combination with Schurk's statement that he signed the questionnaire after going over it with his attorney, resulted in the trial court finding no manifest injustice. As a result, the court denied the motion on June 25, 2012.[2] This appeal follows.

ANALYSIS

¶6 As noted, Schurk contends he should have been allowed to withdraw his guilty pleas because the trial court failed to inform him that the court was not bound by any plea negotiations and the court failed to inquire whether anyone had promised or coerced him into entering his pleas.

[2] There was some reference in the record to the felony case which was not addressed in the original motion to withdraw his plea. Schurk's attorney urged the court to suspend the remainder of his felony House of Corrections sentence pending appeal because Schurk had lost his Huber privileges due to failing the breathalyzer test at the House of Correction. The trial court declined to suspend the sentence.

¶7 A defendant seeking to withdraw a guilty plea after sentencing "'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. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177 (citations and one set of internal quotation marks omitted). Various cases have contributed examples of what is a manifest injustice. *See* ***id.***, ¶26. Examples include: (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) an involuntary plea; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement. *See* ***id.*** (collecting cases).

¶8 Ordinarily the decision to permit or deny withdrawal of a guilty plea is left to the trial court's discretion, "subject to the erroneous exercise of discretion standard on review." ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. "In reviewing a discretionary decision, we examine the record to determine if the court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999).

¶9 However, where "a defendant establishes a denial of a relevant constitutional right ... withdrawal of the plea is a matter of right." ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). Therefore, if the defendant demonstrates that the plea is constitutionally infirm, "[t]he trial court reviewing the motion to withdraw in such instance has no discretion in the

matter." *See* ***id.*** In such cases, this court independently reviews the trial court's determination. *See* ***State v. Cross***, 2010 WI 70, ¶14, 326 Wis. 2d 492, 786 N.W.2d 64, *cert. denied*, 131 S.Ct. 1044 (2011). For a plea to satisfy the constitutional standard, a defendant must enter it knowingly, voluntarily and intelligently. ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). This means a defendant who pleads guilty must understand both the constitutional rights being relinquished as well as the nature of the crimes to which he or she is pleading. ***State v. Brandt***, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999).

¶10 WISCONSIN STAT. § 971.08 procedurally implements this constitutional mandate. Under the ***Bangert*** line of cases, a trial court must address defendants personally and satisfy the duties set out in § 971.08 and by judicial mandate. *See* ***State v. Brown***, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. The ***Bangert*** court suggested a nonexhaustive list of various methods the trial court might use to satisfy the statute. *See* ***id.***, 131 Wis. 2d at 268. The court need not engage in an extensive verbal colloquy with every defendant, however. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 826-27, 416 N.W.2d 627 (Ct. App. 1987). Rather, it has the "discretion to tailor the colloquy to its style and to the facts of the particular case provided that it demonstrates on the record that the defendant knowingly, voluntarily and intelligently entered the plea." ***Brandt***, 226 Wis. 2d at 620.

¶11 Relevant to the issues raised here, the trial court conceded that the specific admonitions concerning plea negotiations and coercion were not asked of Schurk. But the trial court did inform Schurk that:

> THE COURT: Do you understand on the operating while intoxicated the Court can sentence you to a minimum of 45 days and the maximum of one year? The minimum fine is 600 dollars. The maximum fine is 2,000 dollars. I

> can revoke your license up to three years. And on Count 2, the hit and run, the maximum I believe, if I'm reading counsel's handwriting, is six months at the House of Correction. Is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. And I can run these consecutive to your felony case. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you're also giving up additional rights which are on the addendum to the plea questionnaire and waiver of rights form. Did you go through those rights again with your attorney?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Counsel, do you believe the two pleas to be freely, voluntarily, and intelligently made?
>
> [DEFENSE COUNSEL]: Yes, Judge.

This colloquy advised Schurk that with regard to certain aspects of the sentencing, the court was free to decide what amounts he could be fined, how long his license would be revoked, and that the sentences could be consecutive. Thus, besides having been advised in the guilty plea questionnaire that the trial court was free to craft the sentences, Schurk knew that the trial court was free to decide other aspects of the sentences. Moreover, the trial court did follow the plea negotiation, so Schurk obtained what he requested. Given this scenario, no manifest injustice occurred.

¶12 Next, Schurk argues that "the plea offer was forced upon him when the cases were consolidated before Judge Hansher." He claims that the State would have recommended prison if Schurk had not accepted the deal. As noted, the guilty plea questionnaire included a statement titled "Voluntary Plea," which read: "I have decided to enter this plea of my own free will. I have not been

threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." Schurk admitted to having read the guilty plea questionnaire. In addition, a desire to accept a plea negotiation that insures a lesser sentence is not coercion:

> [A] plea otherwise valid is not involuntary because induced or motivated by the defendant's desire to get the lesser penalty. A voluntary and intelligent choice always involves two or more alternatives, each having some compelling power of acceptance. The fact that a defendant must make a choice between two reasonable alternatives and take the consequences is not coercive of the choice finally made. The distinction between a motivation which induces and a force which compels the human mind to act must always be kept in focus.

Rahhal v. State, 52 Wis. 2d 144, 151, 187 N.W.2d 800 (1971).

¶13 Finally, this court observes that Schurk had pled guilty weeks before this guilty plea proceeding to the felony charge. Consequently, he was given the identical admonitions then and he was familiar with the procedure used when one pleads guilty.

¶14 In sum, there was no statutory or constitutional violation at the time of his guilty plea. For the reasons stated, this court affirms.

By the Court.—Judgment and order affirmed.

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