COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3140-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PHILLIP GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and MICHAEL J. BARRON, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

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[1] The Hon. Patricia D. McMahon presided over the plea and sentencing hearings and entered the judgment of conviction; the Hon. Michael J. Barron entered the order denying Green's motion for postconviction relief.

SCHUDSON, J. Phillip Green appeals from the judgment of conviction entered after he pled guilty to second-degree intentional homicide. *See* § 940.05(1), STATS. He also appeals from an order denying his motion for postconviction relief. Green claims that he should be permitted to withdraw his guilty plea because, he contends, it was coerced by the State's filing of an Information for first-degree intentional homicide after having charged him only with first-degree reckless homicide in the criminal complaint. He also claims that the trial court erroneously exercised sentencing discretion by failing to consider mitigating factors and by relying on inaccurate information. We affirm.

I. BACKGROUND

At approximately 1:20 a.m. on June 12, 1995, Green stabbed Jean Nimmer to death with a butcher knife after an alleged "coke date" went afoul. The State charged Green with first-degree reckless homicide. Following the preliminary hearing, however, the State filed an Information charging Green with first-degree intentional homicide. Green ultimately pled guilty to second-degree intentional homicide. At the plea proceeding, the State voiced its agreement with Green's account of his excessive self-defense leading to Nimmer's death, thus justifying the amended charge. The trial court sentenced Green to the maximum penalty–forty years' imprisonment.

II. ANALYSIS

Green first claims that he should be allowed to withdraw his guilty plea because it was coerced. He contends that he felt compelled to accept the prosecutor's offer to plead guilty to the amended charge of second-degree intentional homicide because he did not want to risk receiving the life sentence

that would be mandatory if he were convicted of first-degree intentional homicide. Consequently, he maintains that his plea was involuntary.

A plea of guilty or no contest is presumptively valid. *See* ***State v. Walberg***, 109 Wis.2d 96, 103, 325 N.W.2d 687, 691 (1982). Consequently, a postconviction motion for plea withdrawal may be denied without a hearing unless the defendant specifically "alleges facts which, if true, would entitle the defendant to relief." ***Levesque v. State***, 63 Wis.2d 412, 421, 217 N.W.2d 317, 321 (1974) (quoting ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972)). A post-sentencing motion for plea withdrawal is addressed to the discretion of the trial court, and we will not upset the trial court's decision absent an erroneous exercise of discretion. *See* ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). When a postconviction motion is denied without a hearing, however, our review is governed by the standard set forth in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996).

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle the defendant to relief is a question of law that we review de novo.
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> However, if the motion fails to allege sufficient facts, the circuit court has discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson***.

Bentley, 201 Wis.2d at 310-311, 548 N.W.2d at 53 (citations omitted).

After sentencing, a defendant may withdraw a guilty plea in order to correct a manifest injustice. *See* ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A plea is manifestly unjust if it is involuntary. *See* ***Hatcher v. State***, 83 Wis.2d 559, 564, 266 N.W.2d 320, 323 (1978). The defendant has the heavy burden of showing, by clear and convincing evidence,

that the withdrawal is necessary. *See* ***State v. Washington***, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). First, the defendant must make a *prima facie* showing that his or her constitutional rights were denied. *See* ***State v. Van Camp***, 213 Wis.2d 131, 141, 569 N.W.2d 577, 582 (1997). Second, the defendant must allege lack of knowledge of the constitutional or statutory rights. See ***id.*** at 141, 569 N.W.2d at 582-83. If the defendant satisfies these criteria, the burden shifts to the State to show by clear and convincing evidence that the plea complied with the statutory and constitutional guidelines. *See* ***id.*** at 141, 569 N.W.2d at 583.

Essentially, Green argues that the prosecutor had no basis for increasing the charge following the preliminary hearing. He alleges that the prosecutor did not want to go to trial and, therefore, wrongly increased the charge to coerce him into pleading guilty to the lesser charge. Neither the law nor the record supports his argument.

A prosecutor is vested with great discretion in determining whether to prosecute. *See* ***Thompson v. State***, 61 Wis.2d 325, 328-29, 212 N.W.2d 109, 111 (1973). It is an abuse of that discretion, however, "to charge when the evidence is clearly insufficient to support a conviction," or "to bring charges on counts of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." ***Id.*** at 330, 212 N.W.2d at 111. In this case, however, the record does not substantiate Green's allegation that the State increased the charge in order to coerce him into pleading guilty.

Evidence at the preliminary hearing established that Green stabbed Nimmer three times in the chest, causing deep lung and heart wounds that left little doubt about intent. Green's absolute self-defense theory rested upon his

version of the events, which the prosecutor did not have to accept. Thus, the State exercised lawful discretion in filing an Information charging Green with first-degree intentional homicide.

Moreover, as the State notes, defense counsel conceded that the increase in the charge was based "upon further consideration of the case. Indeed, the original complaint alone without the preliminary hearing … would have been enough to increase the charge." Although defense counsel made this comment at the guilty plea proceeding in support of the proposed reduction of the first-degree charge, it further confirms the State's theory that first-degree intentional homicide was a sustainable charge. The record simply does not support Green's conclusory allegation that the prosecution modified the charge to coerce his plea. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 358 (1978) (defendant's due process rights not violated when "a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged").[2]

[2] The dissenting opinion offers many comments with which I, the author of the majority opinion, fully agree. The dissenting opinion, however, quickly bridges to an issue not raised in this case: whether the plea agreement caused a guilty plea from a man who either claimed innocence or refused to admit the facts constituting the crime.

I have written in the past to explain why conscientious trial judges should never accept ***Alford*** pleas. *See* ***State v. Smith***, No. 94-2894-CR, unpublished slip op. (Wis. Ct. App. July 5, 1995) (Schudson, J., dissenting), *rev'd*, 202 Wis.2d 21, 549 N.W.2d 232 (1996). I have implored trial judges to include in their plea colloquies the crucial question, "Are you pleading guilty because you really did the crime?" As a trial judge for ten years, I frequently rejected plea agreements when defendants apparently were attempting to plead guilty while maintaining their innocence. As a result, I, like Judge Fine, presided over many more jury trials than those judges who carefully avoided asking crucial questions during plea colloquies precisely because, in the midst of their heavy caseloads, they made the mistake of elevating case-flow over justice.

(continued)

Green also challenges the forty-year sentence, claiming that the trial court failed to consider mitigating factors and relied on inaccurate information. The record, however, refutes these claims.

Our review is limited to determining whether the trial court erroneously exercised discretion in imposing sentence. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors that must be considered in sentencing a defendant are: (1) "the gravity of the offense," (2) "the character of the defendant," and (3) "the need for protection of the public." ***Id.*** at 427, 415 N.W.2d at 541. The weight to be given each factor is within the trial court's discretion. *See* ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 67-68 (1977).

The record reflects the trial court's careful consideration of all the required sentencing criteria. The trial court referred to Green's prior offenses, including his prior armed robbery, to the gravity of the instant offense, and to the

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Accordingly, I share Judge Fine's passionate opinion that injustice often flows from courts that seem eager or at least content to grease the wheels of unfair plea agreements. The record in this case, however, does not suggest that the defendant pled guilty while maintaining innocence or denying the facts of the crime. Thus, while some of what Judge Fine has written is theoretically sound, its application to this case is skewed and would only risk the "escape of the guilty."

Additionally, although I hesitate to prolong this exchange, I do note that Judge Fine has grossly misrepresented "the thrust" of this footnote by claiming that, somehow, it stands for the proposition "that upping the ante to get a guilty plea is okay if the defendant in fact succumbs to the threat and pleads guilty." Dissent slip op. at 3. That is neither my thrust nor my point.

Finally, frustrating and tiresome though this may seem, I would only note that Judge Fine has added to his dissent in reply to this footnote. In doing so, he has continued to inaccurately or incompletely state the majority opinion and this footnote in several ways. Rather than responding to each new flaw in his analysis, I would ask only that the reader carefully compare the actual statements of this opinion and footnote to the way in which they have been paraphrased by the dissent.

need to protect the public from what it deemed to be Green's "escalation of violence." The court referred to aggravating factors in this case: Green's decision to go on a "coke date" with hope of "scam[ming Nimmer], tak[ing] advantage of her, [and] deceiv[ing] her … while [his] significant other was at work;" the sheer brutality of Green's actions; and Green's behavior after the stabbing – he left the scene, never sought medical assistance for Nimmer, returned home, washed his clothes, and went to bed without "a recognition of the harm that was caused." Although the court acknowledged that it may have been the victim who first drew the knife, it nevertheless concluded that this factor was outweighed by the gravity of the crime and the need to protect the public from Green's violence. The court also considered Green's character and rehabilitative needs, and acknowledged various mitigating factors. Given the brutality of this crime and Green's prior convictions, we conclude that the sentencing court did not erroneously exercise discretion in imposing the maximum sentence.

Next, Green claims that the trial court relied on inaccurate information in imposing sentence. Green contends that the trial court erroneously believed that he had time to contemplate the effect of his actions on the victim's family while he was killing her. From this, Green speculates that the court did not understand the facts of the homicide. Once again, the record does not support his contention.

On appeal, a defendant who claims that a sentence was based on inaccurate information must show both that the information was inaccurate and that the trial court relied on the inaccurate information in imposing sentence. *See* ***State v. Harris***, 174 Wis.2d 367, 378, 497 N.W.2d 742, 746 (Ct. App. 1993). The defendant has the burden of proving both of these facts by clear and convincing

evidence. *See* ***State v. Littrup***, 164 Wis.2d 120, 131-32, 473 N.W.2d 164, 168 (Ct. App. 1991).

> Quoting the court out-of-context, Green writes:
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> > Some of the trial court's remarks were puzzling. For example, the trial court stated:
> >
> > > Mr. Green didn't stop to think of the impact on [Ms. Nimmer's] Family, that she was the mother of someone or could be the mother of someone or she had other people who cared about her, and the impact was not thought of.
> >
> > One reads this passage and wonders how the court could have imagined that there was an opportunity for Green to "stop and think of the impact on Ms. Nimmer's family" before reacting to her aggression.

Green grossly mischaracterizes the court's statement. By omitting the clause which preceded "Mr. Green," and by omitting the comma which followed, Green attempts to suggest that the trial court failed to consider the forensic evidence and the police reports which supported his contention that he had no time to think, only time to react to Nimmer's aggression. In reading the statement and paragraphs which preceded and followed it, however, it is clear that the court was merely attempting to emphasize the devastating impact of Green's actions on Nimmer's family. Green has failed to establish that the court relied on erroneous information.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 96-3140-CR(D)

FINE, J. *(dissenting)*. Once again, this court approves attempts (mostly successful) by the district attorney of this county to force defendants in criminal cases to give up one of the most precious rights recognized by the United States and Wisconsin constitutions—the right to a jury trial. Again, I respectfully dissent.[3]

The complaint in this action charged Phillip Green with first-degree reckless homicide, a Class B, 40-year felony. *See* §§ 940.02(1) & 939.50(3)(b), STATS. After a preliminary examination, Green was bound over for trial. The State did not then file an Information against Green, however. Rather, it waited until the arraignment, when it filed an Information charging Green with first-degree intentional homicide, a Class A, mandatory-life felony. *See* §§ 940.01, 939.50(3)(a) & 973.014, STATS.

At a hearing that the transcript designates as the "Final Pretrial" in this case, the trial court held an in-chambers, off-the-record conference with the attorneys. After that unreported discussion with the lawyers, the trial court noted that it was setting "another final pretrial" and that: "If there are any [plea bargaining] negotiations, that would be resolved at that date, *otherwise* [the case] would proceed on the charge of first degree intentional homicide." (Emphasis added.) Three days before the scheduled date for trial, and eight days after the ultimate "final pretrial" was held, the prosecutor announced that the case had been plea-bargained:

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[3] The prior decisions are ***State v. Webb***, No. 96-1717 (Wis. Ct. App. May 6, 1997), 1997 WL 222310, and ***State v. McDaniel***, No. 95-1451 (Wis. Ct. App. July 23, 1996), 1996 WL 408574. Neither was published. Accordingly, they are not precedent. *See* RULE 809.23(3), STATS.

> Your Honor, I would advise the Court [that] there have been negotiations in this case, the substance of which is as follows: *In return for a guilty plea*, the state would file an amended information charging the defendant with second degree intentional homicide in violation of Wisconsin Statute section 940.05(1). That's a class B, as in boy, felony. The maximum penalty upon conviction is imprisonment for not more than 40 years.

(Emphasis added.) In support of his motion to withdraw his guilty plea, Green alleges that because the State "would only amend the [first-degree intentional-homicide (mandatory life)] charge to a lesser crime if I agreed to plea [*sic*] guilty, I felt I had no choice but to plead guilty to avoid the possibility of spending the rest of my life in jail."[4] In my view, based on the law discussed below, Green is entitled to an evidentiary hearing on whether the State extorted a guilty plea from him as a *quid pro quo* to lowering the ante to the Class B felony encompassed by the original charge.[5]

Green contends that the prosecutor in this case upped the ante only because Green demanded what both the Sixth Amendment to the United States

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[4] Green's allegation is contained in an unexecuted affidavit over his name. The record does not reveal whether the affidavit was ever executed. I would condition any remand on Green's execution of the affidavit *nunc pro tunc*.

[5] The trial judge in ***McDaniel***, the Honorable David A. Hansher, described what he saw as the practices of the Milwaukee County District Attorney, practices that are similar to what Green alleges happened here:

> [Y]ears ago it used to be State was amending down [to get a guilty plea], now for some reason I see more and more cases with different [assistant] D.A.'s [*sic*] seem to be amending up and I don't know if there's been a change in the District Attorney's policies but I'd like to see charges issued that the State can, I believe, prove and there not be amendments down or amendments up.

McDaniel, 1996 WL 408574 at ***5 n.2 (Fine, J. dissenting). Judge Hansher's recommendation is, in my view, a prescription for justice that is mandated by the Wisconsin Constitution's guarantee of a jury trial to every person charged with a crime.

Constitution and Article I, section 7, of the Wisconsin Constitution says is his inviolate right: the right to a trial before a jury of his peers, and only lowered the ante when Green agreed to plead guilty and give up that right. Statements by the trial court and the prosecutor quoted above, and the sequence of events, support Green's contention. Thus, I find puzzling the majority's assertion that "the record does not substantiate Green's allegation that the State increased the charge in order to coerce him into pleading guilty." Majority at 4.[6] But, putting aside the quiddities and quillities of legal legerdemain, that *is* exactly what was done here. The sentencing transcript and Green's "affidavit" reveal a defendant who claimed self-defense but was afraid to go to trial because he faced a mandatory life sentence if he was convicted on the up-the-ante charge of first-degree intentional homicide. In my view, as explained below, Green had the right under the Wisconsin Constitution to have the viability of his defense tested before a jury of his peers. If he prevailed, that would not be "escape of the guilty," as Judge Schudson surmises, but justice. If Green was convicted, he would not "escape" at all. The only advantage proferred by the district attorney, and now this court, is expediency—a desire not to do what prosecutors, defense lawyers, and judges are, presumably, paid to do—try cases.

The United States Supreme Court—by a five-to-four vote—held that the United States Constitution permits a prosecutor to add more charges if a defendant rejects the prosecutor's proposed plea bargain. ***Bordenkircher v. Hayes***, 434 U.S. 357, 358, 365 (1978). Upping the ante for defendants who insist on a trial, however, can extort guilty pleas from the innocent as well as the "guilty":

[6] I also find puzzling the thrust of Judge Schudson's comment in footnote 2 of the majority opinion that upping the ante to get a guilty plea is okay if the defendant in fact succumbs to the threat and pleads guilty without simultaneously claiming his or her innocence.

> Underlying many plea negotiations is the understanding—or threat—that if the defendant goes to trial and is convicted he will be dealt with more harshly than would be the case if he had pleaded guilty. An innocent defendant might be persuaded that the harsher sentence he must face if he is unable to prove his innocence at trial means that it is to his best interest to plead guilty despite his innocence.

U.S. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE, COURTS 43 (1973), *quoted in* Ralph Adam Fine, PLEA BARGAINING: AN UNNECESSARY EVIL, 70 MARQ. L. REV. 615, 622 (1987). Thus, a report issued thirty years ago by President Lyndon B. Johnson's Commission on Law Enforcement recognized that a prosecutor's threat to punish a defendant who does not plead guilty places "unacceptable burdens on the defendant who legitimately insists upon his right to trial." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967), *quoted in* Fine, 70 MARQ. L. REV. at 621–622. I have discussed this problem at length in *Escape of the Guilty* at 59–84 (1986), which gives examples of innocent persons who wanted to plead guilty because of prosecutors' threats to up the ante. Judge Schudson contends in footnote 2 of the majority opinion that the foregoing analysis does not apply to Green because he did not proclaim his innocence while offering his plea. I disagree. The fact that a defendant does not profess his or her innocence while pleading guilty (thus transforming the plea into the "***Alford***" plea to which Judge Schudson refers in footnote 2) does not preclude the possibility that the defendant is innocent, yet is pleading guilty because of a prosecutor's threat to up the ante. Further, even those who are "guilty" are entitled to trials, if that is what they want; no constitutional provision of which I am aware conditions the right to a trial on a defendant taking the stand and professing his or her innocence.

The only reason given by the five-to-four majority in ***Hayes*** for permitting prosecutors to extort guilty pleas from defendants is that expediency demands it:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Hayes, 434 U.S. at 364 (internal citation omitted) (brackets by ***Hayes***). "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." ***Stanley v. Illinois***, 405 U.S. 645, 656 (1972).

In other contexts, of course, the chilling of a defendant's rights would be unthinkable. Thus, ***United States v. Jackson***, 390 U.S. 570 (1968), struck down a statute that permitted the death penalty only if the defendant chose a jury trial because it "impose[d] an impermissible burden upon the assertion of a constitutional right"—the defendant's right to a trial by jury. ***Id.***, 390 U.S. at 583. ***Blackledge v. Perry***, 417 U.S. 21 (1974), held that it was unconstitutional to up the ante and charge a defendant with a felony following the defendant's exercise of his statutory right to de novo review of his misdemeanor conviction, when both

the misdemeanor conviction and the felony charge were based on the same conduct. The following analysis is applicable here:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.
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> There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case [***North Carolina v. Pearce***, 395 U.S. 711 (1969)], however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Id., 417 U.S. at 27–28. ***Pearce*** held that imposition of a more severe sentence following a new trial ordered after a successful appeal, unless there were circumstances that justified the more severe sentence, "would be a flagrant violation of the rights of the defendant" because a "defendant's exercise of a right of appeal must be free and unfettered," even though the right to an appeal is purely statutory. ***Pearce***, 395 U.S. at 724–726 (internal quotation marks and citations omitted). In my view, the legal system's enchantment with plea bargaining cannot

trump a defendant's right under the Wisconsin Constitution to "a speedy public trial by an impartial jury." WIS. CONST. art. I, § 7.

I cannot believe that those who wrote Wisconsin's constitution would have tolerated today's result; after all, the Wisconsin Supreme Court, a mere generation after that great document was written to secure all of our liberties, condemned plea bargaining as "a direct sale of justice." ***Wight v. Rindskopf***, 43 Wis. 344, 354 (1877). They knew, as ***Stanley*** recognized more than one-hundred years later, that "speed and efficiency" are not to be elevated over fundamental rights. ***Stanley***, 405 U.S. at 656. There is no more fundamental right in this country than the right to a trial by jury—a right secured by the sacrifice of millions of men, women, and children since the time the nobles at Runnymede secured it for themselves from King John in June of 1215. As inheritors and guardians of that sacred legacy, we must prefer what is right to what is expedient. How can the forced deprivation of the constitutional right to a jury trial be just or fair?

I would remand for an evidentiary hearing on Green's contention; if what he says is true, he is, in my view, entitled to a trial on the charge to which he was forced to plead guilty.