COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2090-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD J. LAROCHE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: MICHAEL J. MC ALPINE, Judge. *Affirmed.*

VERGERONT, J.[1] Leonard LaRoche appeals from a judgment convicting him of four counts of failure to support a child in violation of § 948.22(3), STATS., which was entered after the court accepted LaRoche's guilty

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

pleas. He also appeals the order denying his postconviction request to withdraw his pleas. LaRoche contends that the trial court erred in deciding that there was a sufficient factual basis to support his pleas. We conclude the trial court properly exercised its discretion in denying the motion and therefore affirm that decision and the judgment of conviction.

The criminal complaint charged LaRoche with five counts of failure to support in violation of § 948.22(2), STATS.,[2] a Class E felony. Each count alleged an intentional failure to provide child support for 120 consecutive days of a different, specified time period: December 1, 1991-March 31, 1992; August 1, 1992-November 30, 1992; October 1, 1993-January 28, 1994; January 29, 1994-May 28, 1994; May 29, 1994-September 25, 1994. Three subsequent paragraphs alleged that on December 20, 1989, the Marathon County court ordered that LaRoche pay a specified amount of child support for the three children of his marriage to Paulette Klimpke; that a certified copy of the Current Order and Arrearage Information from the Marathon County Child Support Agency, the agency in charge of the matter, indicated that LaRoche failed to pay the child support that he was ordered to pay for the periods December 1, 1991 through March 31, 1992; August 1, 1992 through November 30, 1992; and October 1, 1993 through September 25, 1994; and that Klimpke and the children resided in Monroe County for the period December 1, 1991, and ending September 25, 1994,

[2] Section 948.22(2), STATS., provides:

> (2) Any person who intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class E felony. A prosecutor may charge a person with multiple counts for a violation under this subsection if each count covers a period of at least 120 consecutive days and there is no overlap between periods.

and she had received no support for the children "during the above periods of time while she was a resident of Monroe County."

At the preliminary hearing Klimpke testified as follows. She lives in Monroe County. She moved there with the children in 1990. The divorce was granted in Marathon County on October 9, 1989, and LaRoche was ordered to pay specified amounts per month for child support and family maintenance. From then through November 1994, LaRoche did not consistently pay the child support and family maintenance that was order by the court. Klimpke did not receive any child support or maintenance from LaRoche for the five time periods listed in the five counts of the complaint; to her knowledge LaRoche knew he was to pay child support during each of those time periods, and each period was in excess of 120 days. From September 26, 1994, to the hearing date, which was December 2, 1994, she did not receive any child support or maintenance. There were also several periods of time between those she identified, periods of time between thirty and sixty days, when she did not receive child support or maintenance.

Patti Ruechel, a child support specialist for Marathon County, also testified at the preliminary hearing. She identified a certified copy of the Current Support Order and Arrearage Information Sheet regarding LaRoche, which was marked as Exhibit 2 and entered into evidence. She testified that for each of the five time periods described in each of the five counts of the complaint, LaRoche did not send any child support or maintenance to Marathon County. She also indicated there were other months when he did not pay, but she did not specify those dates.

Based on this and other testimony presented at the preliminary hearing, the court determined that there was probable cause that felonies had been

committed, and LaRoche was bound over for trial. At the arraignment an information was filed repeating the five original felony counts and adding six misdemeanor counts under § 948.22(3), STATS.,[3] for failure to pay support for less than 120 consecutive days during each of the following time periods: (count 6) beginning July 1991 through September 1991; (count 7) beginning May 1992 through June 30, 1992; (count 8) during the month of February 1993; (count 9) during the month of May 1993; (count 10) during the month of July 1993; and (count 11) beginning September 26, 1994 through December 2, 1994. The three additional factual paragraphs contained in the criminal complaint were not included in the information.

LaRoche and the State entered into a plea agreement pursuant to which LaRoche agreed to plead guilty to the misdemeanor counts 8, 9, 10 and 11 of the information; and the other counts would be dismissed and read in for restitution and/or sentencing purposes. After LaRoche's attorney and the prosecutor explained the plea agreement to the court at the plea and sentencing hearing, the court conducted a plea colloquy with LaRoche in which it referred to "Counts 8, 9, 10, and 11 of the criminal complaint" in describing the counts to which LaRoche stated he wished to plead. After LaRoche entered a guilty plea to counts 8, 9, 10 and 11, the court asked the State and defense counsel if it could use the criminal complaint to determine that there was a factual basis to accept the defendant's plea, and both answered "yes." The court then determined that there was "a factual basis to accept the Defendant's plea of guilty to Counts 8, 9, 10,

[3] Section 948.22(3), STATS., provides:

> (3) Any person who intentionally fails for less than 120 consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class A misdemeanor.

and 11 of the criminal complaint" and, based upon LaRoche's pleas of guilty, the court found him "guilty of those counts." The court sentenced LaRoche to six months in the Monroe County jail on count 8 and six months on count 9, consecutive, and withheld sentence on counts 10 and 11, placing LaRoche on three years' probation for those counts consecutive to the jail terms.

LaRoche moved to withdraw his guilty pleas because there was no factual basis for the pleas. LaRoche argued that the court relied on the criminal complaint to establish a factual basis but the criminal complaint did not establish a basis for counts 8-11, because those counts were not mentioned in the complaint, only in the information. The trial court denied the motion. It acknowledged that the criminal complaint did not present a factual basis for counts 8-11. However, it decided that it could properly consider the transcript from the preliminary hearing, and it determined that the testimony and exhibits presented at that hearing did establish a factual basis. Specifically, with respect to count 11 (September 26, 1994 to December 2, 1994), the court pointed to Klimpke's testimony that she received no child support or maintenance from September 26, 1994, to the hearing date of December 2, 1994. With respect to counts 8-10 (the months of February, May and July 1993), the court pointed to Exhibit 2, and observed that it showed no child support payments made in those months. The court also referred to the testimony of Klimpke that between the periods she had described in which support had not been paid for an excess of 120 days, there were "several" periods of time, between thirty and sixty days, when she also did not receive child support or maintenance, and the court referred to Ruechel's testimony to the same effect.

On appeal, LaRoche renews his argument on the lack of a factual basis for his pleas. He argues that the trial court did not establish a factual basis for the pleas at the plea hearing, and the preliminary hearing transcript does not

show a factual basis except as to count 11. This is so, he contends, because Exhibit 2 cannot provide such a basis since Ruechel was not questioned on the exhibit concerning the months February, May and July of 1993, and Klimpke's and Ruechel's testimonies on LaRoche's failure to pay during time periods other than those identified in the criminal complaint were not specific as to the time periods (other than Klimpke's testimony regarding September 26, 1994 to December 2, 1994).

Withdrawal of a plea following sentencing is permitted only if a manifest justice has occurred. ***White v. State***, 85 Wis.2d 485, 488, 271 N.W.2d 97, 98 (1978). A manifest injustice includes a trial court's failure to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads. ***State v. Smith***, 202 Wis.2d 21, 25, 549 N.W.2d 232, 233-34 (1996). The defendant has the burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***White***, 85 Wis.2d at 491, 271 N.W.2d at 100. Permitting withdrawal is within the trial court's discretion, and we reverse the trial court's denial of the motion only if the trial court erroneously exercised its discretion. ***Id.*** We consider the entire record in reviewing the motion, because the issue is not whether the plea was properly accepted but whether the court erroneously exercised its discretion in not permitting withdrawal of the plea. ***Id.*** It is also proper for the trial court, in deciding the motion, to consider the transcript from the preliminary hearing and other proceedings of record. ***Id.*** at 490.

We conclude the trial court did not erroneously exercise its discretion in denying the motion. The court could properly consider the preliminary examination as a factual basis in deciding the motion. LaRoche concedes that the transcript establishes a factual basis for count 11. We do not

understand LaRoche's argument concerning the deficiency in the court's reliance on Exhibit 2 from the preliminary hearing. Ruechel's testimony concerning her position as a child support specialist with Marathon County, her duties, her familiarity with LaRoche's case, and her identification and description of the document satisfy the hearsay exception for public records and reports. *See* § 908.03(8), STATS. In any event, Exhibit 2 was admitted into evidence without objection by defense counsel. It may therefore be used to establish the truth of the matters contained in it. Based on Ruechel's testimony concerning the time periods about which she was specifically questioned, it is apparent that for the months in 1993 that are not recorded on Exhibit 2, which include February, May and July, no support was received from LaRoche.

We conclude that Exhibit 2 is a sufficient factual basis for counts 8, 9 and 10. Klimpke's testimony on "several" other periods of nonpayment is consistent with Exhibit 2, but it is not necessary that her testimony contain the specific months alleged in counts 8-10 because Exhibit 2 does that. The trial court could therefore properly deny the motion on the ground that LaRoche had not met his burden of showing there was no factual basis for counts 8-11.

By the Court.—Judgment and order affirmed.

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