COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP62-CR **Cir. Ct. No. 2015CM3015**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANTOS LEE HERNANDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

¶1 BRENNAN, P.J.[1] Santos Lee Hernandez appeals from a judgment of conviction entered on his guilty plea and an order denying his postconviction

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

motion without a hearing.[2] Hernandez seeks to withdraw his plea on the grounds that for several reasons it was not knowingly and voluntarily entered, and he argues that his motion alleged sufficient facts to entitle him to a hearing to prove that plea withdrawal is warranted.

¶2 We disagree and affirm the circuit court.

BACKGROUND

¶3 The charges in this case stemmed from an incident reported by two citizens separately to police. The reports were that a man, later identified as Hernandez, was walking down Greenfield Avenue naked from the waist down. Police responded and found Hernandez as described. Hernandez was arrested and administered a blood alcohol test; his blood alcohol content (BAC) was .24.

¶4 Hernandez entered a plea of guilty to two counts of lewd and lascivious behavior, and a charge of disorderly conduct was dismissed on the State's motion. Hernandez completed a plea questionnaire and waiver of rights form, which contains a statement for defendants to complete: "I [box] have not [box] have had any alcohol, medications, or drugs within the last 24 hours." On Hernandez's completed form, there is a check in the box indicating "have not." The second page of the form requires a defendant's signature under a section titled "Defendant's Statement." That section states, "I have reviewed and understand this entire document and any attachments.… I have answered all questions

[2] The plea hearing was presided over by the Honorable J.D. Watts. The postconviction motion was denied by the Honorable Dennis R. Cimpl.

truthfully and either I or my attorney have checked the boxes." Hernandez signed the statement.

¶5 The plea colloquy included the following exchanges between the trial court and Hernandez regarding the plea questionnaire and waiver of rights form and an addendum:

> The Court: As to these two forms, did you read, understand, sign and date them?
>
> [Hernandez]: Yes
>
> The Court: Are the answers to the questions on these forms and the information you and your attorney put on these forms true?
>
> [Hernandez]: Yes.
>
> ….
>
> The Court: Have you had any alcohol, medicine or drugs within the last 24 hours?
>
> [Hernandez]: No.

¶6 The record reflects that the trial court asked Hernandez, in ascertaining the factual basis for the plea, "So did you expose your genitals on or about Saturday, September 12th, 2015, in the area of the 4500 block of Greenfield Avenue?" Trial counsel responded to the court's question to explain that due to Hernandez's intoxication, Hernandez could not clearly remember but that he was "in no position to deny that the allegations in the complaint are true." The trial court followed up with the following questions:

> The Court: Will he agree to the facts alleged in the criminal complaint?
>
> [Trial counsel]: Yes.

> The Court: Is that true, Mr. Hernandez, you read the complaint; you'll agree that those allegations are true for the factual basis?
>
> [Hernandez]: Yes.

¶7 At sentencing, the State took no position on whether the trial court should require Hernandez to register as a sex offender pursuant to WIS. STAT. § 973.048, which states that when a trial court is imposing sentence or placing a person on probation for violations under WIS. STAT. ch. 944,[3] the court "may require the person to comply with the reporting requirements under [§] 301.45," the sex offender registration statute. The trial court did not impose the sex offender registration requirement; it imposed a withheld sentence and placed Hernandez on probation for two years.

¶8 Hernandez filed a postconviction motion seeking to withdraw his plea. The motion asserted that "some of the responses that Santos Hernandez gave to the court were inaccurate at the time that he responded to the court's questions." Specifically, he asserted that contrary to what he had said on the record, (1) he was so intoxicated at the time of the plea hearing that he had "limited recollection" of it, (2) he did not understand "any" of the things he told the court he understood about the plea, and (3) he did not agree that a factual basis existed for the charges because his genitals were never exposed because he was wearing underwear. He also alleged that he had been unaware that the crimes to which he was pleading guilty are categorized by the Department of Corrections as sex crimes and that this categorization affects the rules of his probation.

[3] Hernandez was convicted of a violation of WIS. STAT. § 944.20(1)(b), which makes lewd and lascivious behavior a misdemeanor offense.

¶9 The postconviction court denied the motion in a written decision without a hearing. This appeal follows.

DISCUSSION

I. Hernandez has not demonstrated that he is entitled to a hearing on his plea withdrawal motion.

A. Standard of review and legal principles relevant to plea withdrawal.

¶10 "It is both statutorily … and constitutionally required that the record show that the trial court, before accepting a plea of guilty, personally questioned the defendant to make sure that *the plea was voluntary* and that *there was an understanding of the nature of the crime* and of the potential punishment, and, in addition, there must have been a personal inquiry which was reasonably sufficient *to satisfy the court that the defendant in fact committed the crime charged*." ***State v. Schill***, 93 Wis. 2d 361, 379, 286 N.W.2d 836 (1980) (emphasis added).

¶11 "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Taylor***, 2013 WI 34, ¶¶ 24-25, 347 Wis. 2d 30, 829 N.W.2d 482. "One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily." ***Id.*** "A plea not entered knowingly, intelligently, and voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right. Whether a plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact that is reviewed independently." ***Id.***

¶12 When a defendant moves for plea withdrawal, "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***State v. Bentley***, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996) (quoting ***State v. Nelson***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972)). When reviewing such a denial, this court uses the deferential erroneous exercise of discretion standard. ***Brookfield v. Milwaukee Metropolitan Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

¶13 If, on the other hand, 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. ***Nelson***, 54 Wis. 2d at 497. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. ***Bentley***, 201 Wis. 2d at 310–11.

¶14 ¶14 Absent legally sufficient grounds for plea withdrawal, a plea is binding. "If a plea of guilty could be retracted with … ease, defendants would be encouraged to plead guilty and subsequently assert innocence in the event the sentence, or the consequences of probationary violations, proved to their disliking." ***State v. Booth***, 142 Wis. 2d 232, 239, 418 N.W.2d 20 (Ct. App. 1987). "[C]ourts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads, he may be held bound." ***Id.*** (quoting ***Kercheval v. United States***, 274 U.S. 220, 223-24 (1927)). "Entry of a plea is not some empty ceremony, and statements made to a … judge in open court are not trifles that defendants may elect to disregard." ***United States v. Stewart***, 198 F.3d 984, 987

(7th Cir. 1999). "[W]hen the judge credits the defendant's statements in open court, the game is over." ***Id.***

B. Hernandez's argument.

¶15 Hernandez argues that his postconviction motion stated facts that entitled him to a hearing on his motion. The facts he asserted, through counsel, were that three of his own statements to the trial court were "inaccurate." He says in truth he was highly intoxicated, he did not understand what rights he was giving up, and he did not agree that a factual basis existed for his plea. As explained below, the record contradicts his assertions, and his conclusory assertions are insufficient to establish that the plea withdrawal is necessary to prevent a manifest injustice.

Intoxication.

¶16 Hernandez represented to the trial court—on a signed written form and in response to a direct question—that he had had no alcohol for the prior twenty-four hours. His postconviction motion said those statements were not true. The postconviction motion, however, presented nothing more than conclusory allegations by counsel. The motion did not attach an affidavit with factual assertions.

¶17 In addition to Hernandez's affirmative statements to the court on this question at the hearing, there is a total absence of evidence in the record that anyone present in the courtroom at the hearing observed that Hernandez was intoxicated. The record reflects that Hernandez responded appropriately to questions asked both by trial counsel and the court in a way that indicated that he was engaged and understanding the conversation. For example, the trial court

asked Hernandez, "Did you review the police reports with your attorney?" He responded "No." When the trial court sought to clarify, Hernandez explained, "But I got them on my own. I got a copy."

¶18 Because the record contradicts his conclusory statements about intoxication, he has not shown that this reason warrants a hearing.

Lack of understanding.

¶19 A plea entered without understanding results in a manifest injustice. *See* ***Schill***, 93 Wis. 2d at 379. Hernandez represented on the written form and in direct questioning by the trial court that he understood the rights he was giving up. Hernandez asserted in his postconviction motion that he, in fact, did not. However, his belated assertion is conclusory and self-serving. Where the record contradicts a defendant's assertions, a conclusory statement about misunderstanding is not sufficient to constitute a manifest injustice such that plea withdrawal is warranted. *See* ***id.*** at 380 (rejecting defendant's unsupported claim that trial court failed to establish defendant's understanding of plea).

Challenge to the factual basis.

¶20 "[I]f a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred." ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836. "[A] defendant need not personally articulate his or her agreement with the factual basis presented." ***Id.***, ¶19. The focus of a reviewing court is whether the trial court has made a proper determination that a factual basis exists. ***Id.***, ¶20. "All that is required is for the factual basis to be developed on the record—several sources can supply the facts." ***Id.***, ¶20. "On a motion to withdraw, a court may look at the

totality of the circumstances to determine whether a defendant has accepted the factual basis presented underlying the guilty plea." ***Id.***, ¶23. "A review of the entire record may include a sentencing hearing record and a defense counsel's statements concerning the factual basis." ***Id.***, ¶24.

¶21 A review of the entire record in this case supports the conclusion that that the trial court properly "establish[ed] the factual basis on the record" as required. *See* ***id.***, ¶21. At the plea hearing on February 8, 2016, Hernandez answered in the affirmative on the record when the trial court asked if he agreed that the allegations in the complaint were true for the factual basis. At the sentencing hearing on April 14, 2016, Hernandez again was confronted with the conduct and did not deny it then either. The sentencing court addressed Hernandez directly about the conduct underlying the offense:

> The Court: Here's the deal. You can't walk around without pants on, okay?
>
> [Hernandez]: I know.
>
> The Court: That's what you're being accused of.
>
> [Hernandez]: It was a dress, but I –
>
> The Court: I understand, but if you're going to do that, then *you got to have underwear on.*
>
> [Hernandez]: Yeah.
>
> …
>
> The Court: …. You're going to offend people if you do it.
>
> [Hernandez]: I didn't do it on purpose.
>
> The Court: Yeah. You know what? You don't have to do it on purpose. *All you got to do is publicly and indecently expose your genitals, and that you did* and it ain't going to work.

(Emphasis added.)

¶22 In this case, the trial court followed the proper procedure for accepting the guilty plea and established a factual basis for the plea. At the plea hearing, Hernandez agreed that the complaint provided a factual basis for the charges that he exposed his genitals in public. At the sentencing hearing two months later, when again confronted with the conduct, he responded only that the conduct was unintentional; he did not dispute what had happened. We conclude that Hernandez has not demonstrated the "manifest injustice" required to withdraw his plea.

II. Hernandez's argument regarding unwarned consequences of his plea is raised for the first time in his appeal, and we do not address it.

A. Relevant principles of law.

¶23 "Defendants have a due process right to be notified about the 'direct consequences' of their pleas." ***State v. Byrge***, 2000 WI 101, ¶¶ 60-61, 237 Wis. 2d 197, 614 N.W.2d 477 (citing ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199). "A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment." ***Id.*** "If a defendant is not aware of the direct consequences of a plea, he or she is not appraised of 'the potential punishment[.]'" ***Id.*** "Information about 'collateral consequences' of a plea, by contrast, is not a prerequisite to entering a knowing and intelligent plea." ***Id.*** "Collateral consequences are indirect and do not flow from the conviction." ***Id.***

¶24 The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal. ***State v. Gove***, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989). This court has frequently stated that even the claim of a constitutional right will be deemed waived unless timely raised in the

circuit court. ***Id.*** The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court. ***Young v. Young***, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985). "By limiting the scope of appellate review to those issues that were first raised before the circuit court, this court gives deference to the factual expertise of the trier of fact, encourages litigation of all issues at one time, simplifies the appellate task, and discourages a flood of appeals." ***State v. Caban***, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997). "[W]hen a party seeks review of an issue that it failed to raise before the circuit court, issues of fairness and notice, and judicial economy are raised." ***Id.***

B. Hernandez failed to raise the issue in the trial court.

¶25 The threshold question is whether Hernandez preserved for appeal his argument that he was not warned of a direct consequence of his plea. The State argues that Hernandez is raising it for the first time on appeal. As a result, the State argues, he cannot raise this issue on appeal. *See* ***Gove***, 148 Wis. 2d at 940-41. Hernandez counters, in his reply brief, that the trial court, in denying his postconviction motion, stated that the application of DOC's rules for sex offenders to Hernandez was "a collateral consequence of the defendant's pleas" and as such was not a sufficient ground for plea withdrawal. This statement, Hernandez argues, means that "the postconviction court believed that it was raised and thus preserved."

¶26 We agree with the State that this argument is being raised for the first time on appeal. Hernandez's postconviction motion contains the following paragraph:

> After being placed on probation and meeting with a probation agent, Santos Hernandez became aware that the charges to which he pled guilty were "sex crimes" and that the Department of Correction would treat him as a "sex offender" and would require him to follow the Department's onerous "sex offender" rules.

¶27 That constitutes the sole mention of the DOC probation rules in the postconviction motion. The paragraph contains no argument that this consequence was a direct consequence of his plea. It contains no citations to authority about notice of penalties as required by due process and no citations to authority about the difference between direct and collateral consequences. It does not say which category this consequence falls into and why. The fact that the postconviction court described the application of the DOC rules to Hernandez as a "collateral consequence" does not change the fact that Hernandez did not make the argument in his postconviction motion. Because the issue was not raised in his postconviction motion, we will not address it for the first time on appeal.

By the Court.—Judgment and order affirmed.

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