COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0528-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRY L. ROBERTSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Terry L. Robertson, *pro se*, appeals from the circuit court order denying his motion to vacate his conviction for possession of heroin as a habitual criminal. He contends that he should be allowed to withdraw his no contest plea because: (1) the circuit court failed to inquire into the factual

basis for his request for substitution of trial counsel; (2) trial counsel failed to move to suppress the heroin evidence; and (3) his no contest plea was not supported by a sufficient factual basis. We affirm.

I. BACKGROUND

¶2 On November 30, 1998, Robertson and a friend were at the home of Robertson's daughter and son-in-law when City of Milwaukee police officers arrived. The police explained that they were conducting a "knock and talk" drug investigation in response to complaints about drug activity in the neighborhood, and they asked if they could enter the home and look around. Robertson's friend consented to the officers' entry. Both Robertson and his friend told the police that they did not live in the home.

¶3 One of the officers saw Robertson remove a plastic-wrapped foil packet from his pants pocket and place it on a table. The police field-tested the contents, which tested positive for heroin. They arrested Robertson and, as they were booking him, they also recovered a plastic-wrapped foil packet from his left breast pocket, the contents of which also tested positive for heroin.

¶4 Based on these facts and on documents indicating that on June 21, 1994, Robertson had been convicted of three felony counts of delivery of cocaine, the State charged Robertson with possession of heroin as a habitual criminal. Robertson waived a preliminary hearing and initially pled not guilty.

¶5 At the final pretrial conference, on the Friday preceding the Wednesday scheduled jury trial, Robertson requested substitution of trial counsel. His attorney, Victoria McCandless, informed the court that Robertson wanted to be represented by Attorney Elvis Banks, who was in court. Attorney Banks then

advised the court that he did not expect the case to be tried, but that he wanted a brief adjournment to further evaluate the case. The court, attempting to accommodate Attorney Banks' request, suggested a final pretrial for Monday. Attorney McCandless, who confirmed that she was prepared to try the case, said she was scheduled to be in court for a different case on Monday afternoon; Attorney Banks informed the court that he would not be available Monday morning. Because a cancellation on Tuesday would not allow time for the recalling of witnesses subpoenaed for a trial scheduled the next day, the court then denied the request for new counsel.

¶6 The court called a brief recess to enable Robertson to confer with counsel. When the case was recalled, Robertson, represented by Attorney McCandless, changed his plea to no contest. The court accepted Robertson's plea, found him guilty, and sentenced him.

¶7 Robertson filed a *pro se* motion for postconviction relief. Because appellate counsel had been appointed to represent Robertson, the circuit court denied his motion without prejudice, advising that he "should address all of his postconviction concerns with appellate counsel." Ignoring this advice, Robertson filed a *pro se* notice of appeal. Proceeding on the joint request of Robertson and his appointed appellate counsel, we allowed counsel to withdraw from the case, thus enabling Robertson to represent himself. Robertson, *pro se*, subsequently moved to voluntarily dismiss the appeal. We granted Robertson's motion, and we also extended his deadline to pursue postconviction relief in the circuit court.

¶8 Robertson, *pro se*, then moved the circuit court for "dismissal of the charges" on multiple grounds. The court denied the motion without a hearing,

concluding that Robertson "failed to set forth a viable claim for relief." Robertson, *pro se*, then filed this appeal.

II. DISCUSSION

A. Request for Substitution of Trial Counsel

¶9 Because Robertson seeks to withdraw his plea of no contest after having been sentenced, he must establish, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. In other words, he must show that the "fundamental integrity" of his plea was significantly flawed. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995).

¶10 As this court has explained, when evaluating a circuit court's denial of a motion for substitution of counsel,

> we address three considerations: (1) the adequacy of the court's inquiry into a defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between a defendant and his attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.
>
> With regard to the first consideration, *there may be instances in which a court may make a decision without a full inquiry into a defendant's reasons for requesting a change of counsel*.... With regard to the third consideration, to warrant substitution of appointed counsel, *a defendant must show good cause*, such as conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict. Mere disagreement over trial strategy does not constitute good cause to require the court to permit an appointed attorney to withdraw. In addition, the right to counsel cannot be manipulated in order to obstruct the processing of a case by the courts or to interfere with the administration of justice.

> When deciding whether to grant or deny a request for substitution with the associated request for continuance, the circuit court must balance a defendant's constitutional right to counsel of choice against the societal interest in prompt and efficient administration of justice. Several factors assist in balancing the relevant interests: the length of delay requested; whether there is competent counsel presently available to try the case; whether other continuances have been requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; whether the delay seems to be for legitimate reasons or whether its purpose is dilatory.

State v. Wanta, 224 Wis. 2d 679, 702-04, 592 N.W.2d 645 (Ct. App.) (citations omitted; emphases added), *review denied*, 225 Wis. 2d 490, 594 N.W.2d 384 (1999).

¶11 Robertson contends that the circuit court erred by failing to inquire into the factual basis for his request for new counsel. He alleges that "there was a breakdown in communication between counsel and [himself] concerning strategy and failures to interview," and he argues that the court's denial of his request deprived him of "effective assistance of counsel based on the fact that [trial counsel] did not adequately prepare for trial." Additionally, he claims that the court's denial of his request forced him to accept the State's plea offer.

¶12 Robertson moved for substitution of counsel on February 12, 1999, just five days before the first scheduled day of trial. Prior to ruling on the motion, the circuit court did not ask Robertson why he sought a change of counsel, nor did it attempt to elicit this information from either the counsel of record or the proposed counsel. The court did, however, address calendaring issues, and it ascertained that although the proposed counsel was unprepared to go to trial on the scheduled trial date, the counsel of record was prepared to proceed. Additionally, the record reveals that Robertson was prepared to accept the State's plea offer on

February 12, irrespective of which attorney was allowed to represent him.[1] Accordingly, we conclude that the circuit court did balance Robertson's "constitutional right to counsel of choice against the societal interest in prompt and efficient administration of justice" prior to denying his motion.[2]

B. Suppression of Evidence

¶13 Robertson next contends that his trial counsel erred by failing to move to suppress the heroin evidence. He argues that he "had complete control of the premises" and that his friend therefore had no authority to consent to a search of the premises. He further argues that because he had "a privacy interest in his heroin" in his possession at the time of the search, he had a Fourth Amendment right "not to have his privacy invaded."

¶14 The State responds, however, that Robertson's "sole challenge is to the propriety of the police *entry* to the residence, but the propriety of the police entry is *not determinative* of the admissibility of the heroin evidence seized from defendant's person." Relying on ***State v. Phillips***, 218 Wis. 2d 180, 196-213, 577 N.W.2d 794 (1998), the State explains:

> In pleading and arguing his postconviction challenge, defendant does *not* dispute either that he voluntarily consented to a pat-down or that he pulled a

[1] The record also reveals that, prior to accepting Robertson's plea of no contest, the circuit court asked him if he was satisfied with Attorney McCandless's representation; Robertson replied, "Yes."

[2] We remind the circuit court, however, that whenever a defendant moves for substitution of counsel, it has a duty to inquire into the reasons for the motion. *See* ***State v. Wanta***, 224 Wis. 2d 679, 702-03, 592 N.W.2d 645 (Ct. App.), *review denied*, 225 Wis. 2d 490, 594 N.W.2d 384 (1999). In this case, however, for the reasons we have explained, any error in failing to do so was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (holding that error is harmless when "there is no reasonable possibility that [it] contributed to the conviction").

> bindle of heroin from his pocket and placed it on a table in plain view of the officers.
>
> ….
>
> Because defendant does not challenge the pat-down request or dispute its attenuation from the police entry to the residence, he has inadequately pleaded a claim of a search-and-seizure violation.…
>
> ….
>
> Because defendant has not pleaded sufficient facts to show that a suppression motion would have succeeded, defendant has not adequately pleaded a claim of ineffective counsel predicated on counsel's failure to file a suppression motion. His motion for plea withdrawal on such ground, therefore, also was properly denied.

(Citations and record references omitted.)

¶15 The State is correct. Even if we were to accept Robertson's theory regarding the police entry to the home, the State's arguments—with respect to consent and attenuation—would be dispositive. Thus, because Robertson offers no reply to these arguments, we deem them admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

C. Factual Basis for Plea

¶16 Robertson contends that there was an insufficient factual basis for his plea of no contest. Relying on ***State v. Johnson***, 207 Wis. 2d 239, 248, 558 N.W.2d 375 (1997), he claims that it was improper for the circuit court to accept his plea because "whether there is a stipulation or not to the criminal complaint as … a factual basis [for] the entry of the plea[,] the State still has to prove every element of the crime charged," and the State failed to prove that he possessed heroin and that he was a habitual offender. We disagree.

¶17 A plea of no contest is functionally equivalent to a plea of guilty. ***State v. Higgs***, 230 Wis. 2d 1, 9, 601 N.W.2d 653 (Ct. App.), *review denied*, 230 Wis. 2d 273, 604 N.W.2d 571 (1999). A circuit court's discretionary decision regarding the withdrawal of a guilty or no contest plea will be upheld in the absence of an erroneous exercise of discretion. *See* ***Johnson***, 207 Wis. 2d at 244. A circuit court's failure "to ascertain that 'the defendant in fact committed the crime charged' is an erroneous exercise of discretion." ***Id.*** (quoted source omitted). As the supreme court has also clarified, however, "what is admitted by a guilty or no contest plea is all the material facts alleged in the charging document." ***State v. Rachwal***, 159 Wis. 2d 494, 509, 465 N.W.2d 490 (1991).

¶18 Additionally, a defendant may be sentenced as a habitual criminal if he or she is a "repeater" as defined by WIS. STAT. § 939.62(2) (1999-2000),[3] which provides, in relevant part, that a "repeater" is one who "was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, … which conviction[] remain[s] of record and unreversed." Generally, a defendant may be sentenced as a repeater if "the prior convictions are admitted by the defendant or proved by the state." WIS. STAT. § 973.12(1).

¶19 Whether a defendant's plea establishes the factual basis satisfying the criteria under WIS. STAT. § 973.12(1) is determined "[b]ased upon the totality of the record." ***State v. Liebnitz***, 231 Wis. 2d 272, 275, 603 N.W.2d 208 (1999). Reviewing a circuit court's determination of whether the criteria have been

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

satisfied, this court applies the statute to the undisputed factual record and makes that determination *de novo*. ***Id.*** at 283.

¶20 In ***Liebnitz***, the supreme court concluded that even absent the defendant's explicit admission to the prior convictions, and even absent the State's separate proof of the prior convictions, a defendant's plea of no contest satisfied the requirements of WIS. STAT. § 973.12(1) where the complaint contained the allegations of the specific prior offenses constituting the basis for the repeater allegation. ***Id.*** at 276-80, 287-88. The "touchstone of the admission component of § 973.12(1)" is that a court's colloquy "obtain [the defendant's] express understanding that the repeater allegations increased the possible penalties." ***State v. Goldstein***, 182 Wis. 2d 251, 256-57, 513 N.W.2d 631 (Ct. App. 1994). In the instant case, the record reflects satisfaction of the statutory requirements.

¶21 At the plea hearing, the circuit court asked Robertson if he understood that he was charged with possession of a controlled substance, heroin, as a habitual criminal. Robertson replied, "Yes." The court then obtained Robertson's express understanding of the following: (1) that the habitual criminal allegation increased the possible penalties; (2) that the court was not bound to accept the recommendation of either defense counsel or the prosecution when imposing sentence; (3) that the State would have to prove that he had knowingly possessed heroin; and (4) that before the habitual criminal penalty enhancer could be imposed, the State would have to prove he had been convicted of a felony during the five-year period immediately preceding the commission of the crime of possession of heroin.

¶22 Robertson then said that he was entering a plea of no contest to the charge of possession of heroin as a habitual criminal, and he admitted that he had

signed the guilty plea questionnaire and waiver of rights form. In response to the circuit court's questioning, he claimed that he had reviewed the form with his attorney, that he understood everything on it, that all of his answers were truthful, and that he understood all the rights he would be giving up by entering his plea. He further stated that he was entering his plea freely, that he was satisfied with his attorney's representation, that he understood what the State would have to prove before he could be found guilty of the charged offense, and that he understood what the complaint alleged. The court then reviewed all the rights Robertson would be giving up by pleading no contest, and Robertson said that he understood them.

¶23 The circuit court next ascertained defense counsel's satisfaction that Robertson: (1) understood all the rights he would be giving up by entering a plea of no contest; (2) was entering the plea freely, voluntarily, and intelligently; (3) understood the elements of the offense, the facts supporting the charge, and the maximum penalties; and (4) understood "the nature and effect of a no contest plea." Robertson and his attorney then stipulated to the allegations in the criminal complaint as the factual basis for the no contest plea. The court accepted the plea and found Robertson guilty. Thus, the record refutes Robertson's arguments. Therefore, Robertson has not established that withdrawal of his plea of no contest is necessary to correct a manifest injustice.

By the Court.—Order affirmed.

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