COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-3418

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY D. OLIVER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Anthony D. Oliver, *pro se*, appeals from the judgment of conviction for possession of a firearm by a felon, disorderly conduct while armed, and battery, as well as from the order denying his motion to

withdraw his no contest plea to each charge. He contends that he should be allowed to withdraw his plea because: (1) his right to be free from double jeopardy was violated when the trial court accepted his no contest plea to both possession of a firearm by a felon and disorderly conduct while armed; (2) trial counsel was ineffective by failing to object when Oliver did not "enter a plea on record," thus enabling the trial court to sentence Oliver "although he was never officially convicted of a crime in this case"; (3) the trial court erroneously exercised sentencing discretion by imposing the maximum sentence for each offense; and (4) plea withdrawal is necessary to correct a manifest injustice. We affirm.

BACKGROUND

¶2 According to the criminal complaint, at about 2:30 a.m. on January 8, 1994, Oliver attacked a woman who had been walking along a street, grabbing her from behind and pulling her toward a vacant lot. As the woman struggled, Oliver punched her repeatedly in the face and choked her. Two citizens flagged down a police car and reported that they had just observed a woman being beaten, and that they stopped their car to assist her but then drove off when the attacker pulled a gun and cocked it. The officers immediately proceeded to the crime scene, observed Oliver dragging the victim through an alley, chased and captured him, and also recovered a cocked semiautomatic pistol with four live rounds in the clip and one live round in the firing chamber. Oliver admitted that the pistol was his and that he was a felon, but he refused to provide his name, date of birth, or other booking information and refused to be fingerprinted following his arrest.

¶3 Oliver was charged with possession of a firearm by a felon, carrying a concealed weapon, and battery. Because he had been convicted of delivery of cocaine on February 3, 1992, Oliver qualified as a repeater under the statute

providing increased penalties for habitual criminality. Oliver waived a preliminary hearing and the State filed an information alleging the same counts alleged in the criminal complaint.

¶4 At the plea hearing of February 28, 1994, the State asked the trial court to allow Oliver to plead to disorderly conduct while armed, instead of carrying a concealed weapon. The trial court granted the State's request. Oliver signed a guilty plea questionnaire and waiver of rights form, indicating that he wished to enter a plea of either guilty or no contest[1] to the offenses of "POSSESSION OF FIREARM BY FELON / DISORDERLY CONDUCT W/ ARMED BATTERY / HABITUAL CRIMINALITY." Following a colloquy, the trial court accepted Oliver's plea of no contest to the charges as amended, finding that Oliver was a repeater under the habitual criminality penalty enhancement statute.

¶5 On May 13, 1994, the trial court sentenced Oliver to prison for three consecutive terms totaling fourteen years: eight years for felon in possession of a firearm, three years for disorderly conduct while armed, and three years for battery. On September 25, 1998, Oliver filed a *pro se* motion to withdraw his plea. On November 16, 1998, the trial court denied the motion.

[1] The introductory paragraph of the form indicates that Oliver wished to enter a guilty plea, but the typewritten text of paragraph eight was altered to indicate his desire to enter a no contest plea. We note, however, that paragraph nine of the form states: "If the Court allows a plea of no contest, I understand that I will be giving up all of the same rights, defenses and motions that I would give up with a plea of guilty."

DISCUSSION

¶6 Oliver first argues that his right to be free from double jeopardy was violated when the trial court accepted his no contest plea to both possession of a firearm by a felon and disorderly conduct while armed. He contends that "[b]oth charges are the same in law due to the fact they both go to the eliment [sic] of possession of a firearm." Oliver is wrong.

¶7 As our supreme court has explained:

> In order to effectively protect the double jeopardy interests of the defendant, Wisconsin utilizes a two-fold analysis to determine whether multiple punishments may be imposed upon the defendant. The first component of the test for multiplicity involves the application of the ***Blockburger*** [***v. United States***, 284 U.S. 299 (1932)] "elements only" test.

State v. Sauceda, 168 Wis. 2d 486, 493, 485 N.W.2d 1 (1992). Further, the supreme court has explained:

> Under the "elements only" test, an "'offense is a ["]lesser included["] one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the ["]greater["] offense.'" "[A]n offense is not a lesser-included one if it contains an additional statutory element." If one of the charged offenses is not considered a lesser included offense of the other, then this court will find that the legislature intended to permit cumulative punishments for both offenses unless other factors clearly indicate a contrary intent.

State v. Kuntz, 160 Wis. 2d 722, 754-55, 467 N.W.2d 531 (1991) (citations omitted).

¶8 Regarding possession of a firearm by a felon, WIS. STAT. § 941.29 (1991-92)[2] stated, in relevant part:

> **Possession of a firearm. (1)** A person is subject to the requirements and penalties of this section if he or she has been:
>
> (a) Convicted of a felony in this state.
>
> ….
>
> **(2)** Any person specified in sub. (1) who, subsequent to the conviction for the felony or other crime, as specified in sub. (1), or subsequent to the finding of not guilty or not responsible by reason of insanity or mental disease, defect or illness, possesses a firearm is guilty of a Class E felony.

Regarding disorderly conduct while armed, two statutes come into play. WISCONSIN STAT. § 947.01 stated that "[w]hoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." WISCONSIN STAT. § 939.63 outlined enhanced penalties for a person who "commits a crime while possessing, using or threatening to use a dangerous weapon."

¶9 In this case, as in ***Sauceda***, "the pertinent statutes each require proof of a fact that the other does not." *See* ***Sauceda***, 168 Wis. 2d at 495. Oliver's convictions for possession of a firearm by a felon and disorderly conduct while armed therefore satisfy the "elements only" test, *see* ***id.*** at 495-96, and "[t]he statutes presumptively allow for multiple punishments," ***id.*** at 496. Ordinarily, to complete our two-part multiplicity analysis, we would "inquir[e] into other factors which would evidence a contrary legislative intent." *See* ***id.*** at 495. Oliver,

[2] All references to the Wisconsin Statutes are to the 1991-92 version unless otherwise noted.

however, has not addressed this component and, therefore, we decline to do so. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court "may decline to review issues inadequately briefed"). Accordingly, the presumption stands and we conclude that Oliver's right to be free from double jeopardy was not violated.

¶10 Next, Oliver argues that trial counsel was ineffective by failing to object when he did not "enter a plea on record." He contends that this enabled the trial court to sentence him "although he was never officially convicted of a crime in this case." Oliver is wrong again.

¶11 The State concedes that Oliver did not explicitly state, "I plead no contest." The absence of such a statement, however, does not invalidate a judgment of conviction if "the only inference possible from the totality of the facts and circumstances in the record is that the defendant intended to plead no contest." *See* ***State v. Burns***, 226 Wis. 2d 762, 764, 594 N.W.2d 799 (1999).

¶12 The plea hearing contains the following colloquy:

> THE COURT: Do you understand by entering this plea of no contest, you're giving up the following constitutional rights, your right to remain silent, your right to cross-examine the State's witnesses, your right to call your own witnesses, your right to a jury trial, that's where 12 people sit in the jury box and all 12 have to agree you're guilty in order to find you guilty, and your right to make the State prove the case against you beyond a reasonable doubt. Do you understand that?
>
> [OLIVER]: Yes, sir.
>
> THE COURT: Has anyone made any threats or promises outside of what the district attorney said to make you give up your constitutional rights and plead no contest?
>
> [OLIVER]: No, sir.
>
> THE COURT: You understand you're giving up the same rights, defenses and motions and constitutional rights with this no contest plea as you would with a guilty plea?

> [OLIVER]: Yes, sir.
>
> THE COURT: Do you understand I do not have to follow the recommendation of the presentence report or the district attorney[']s office and you're facing a maximum term of eight years[']imprisonment, a $10,000 fine on the felon in possession of a firearm because you're an habitual offender, also three years, $1,000 fine on disorderly conduct while armed because you're habitual and three years, $10,000 fine or both on a battery again because of habitual, so you're facing 14 years in prison or $21,000 fine.
>
> [OLIVER]: Yes, sir, I understand.
>
> THE COURT: And you still want to go ahead and enter this no contest plea?
>
> [OLIVER]: Yes, sir.
>
> THE COURT: Counsel, in your—after discussions with your client and going through this form do you believe your client's plea to be freely, voluntarily and intelligently made?
>
> [DEFENSE COUNSEL]: Yes.
>
> ….
>
> THE COURT: Okay. The Court will find the plea to be freely, voluntarily and intelligently made ….

Thus, "the only inference possible from the totality of the facts and circumstances in the record is that [Oliver] intended to plead no contest." *See* ***id.*** Accordingly, we cannot invalidate his conviction on this basis.

¶13 Next, Oliver argues that the trial court erroneously exercised sentencing discretion by imposing the maximum allowable sentence for each offense. He contends that the trial court failed to consider mitigating factors and failed to state the justification for the length of each sentence. Oliver also contends that "the alledged [sic] victim[']s statements on record was a form of questioning a witness and Mr. Oliver did not have a chance to question her in a form of cross exsamination [sic] to test the validity of her story." Once again, Oliver's argument fails.

¶14 The trial court is required to "articulate the basis for the sentence imposed on the facts of record." *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The primary sentencing factors are "the gravity of the offense, the character of the offender, and the need for protection of the public." *See* ***id.*** Additional sentencing factors the trial court may consider include:

> (1) [p]ast record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentence [sic] and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. The weight to be attached to each above factor is a determination particularly within the wide discretion of the trial court.

Harris v. State, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). When reviewing a trial court's sentencing decision, we determine only whether there was an erroneous exercise of discretion. *See* ***Harris***, 119 Wis. 2d at 622. There is a strong public policy against interference with the trial court's sentencing discretion; sentences are therefore presumptively reasonable. *See* ***id.***

¶15 At Oliver's sentencing hearing, the trial court stated:

> For sentencing purposes, I have to consider the nature of the offense, this is possession of a firearm by a felon, which is extremely dangerous. When he was arrested he said, "So what? I'm a convicted felon." He knew he shouldn't have possessed it. Disorderly conduct while armed, which is I think count 2, and battery, which is the severe beating of this woman, and the inference from the facts and circumstances from the witnesses and the police officer and his prior record that he was going to sexually assault her one way or another, and it could be because of the influence of cocaine or alcohol, but that seems to be the nature of what happened that evening.

> As to his character, there is a criminal history here. I read the juvenile incident also which involved the gang rape. I've read or the State has put on the record his other convictions.
>
> As to his needs for rehabilitation, obviously if he's mixing cocaine and alcohol and carrying a gun, he has extensive needs. I should also add defense counsel stated that the gun was found or he said he had it in his jacket pocket. In the presentence report, he referred to the fact that the gun was in his—the waistband of his pants, and that's where he hid it, which seems to be somewhat inconsistent.
>
> He has been also in prison previously. Assault by a prisoner, five years, Wisconsin State Prison in '83. Three years in '91 for delivery of controlled substance. He's been at the Ethan Allen School for Boys also for a year and recommitted. So he's been sentenced four times to institutions including twice at the Ethan Allen School for Boys at Wales.
>
> So there's a need here also for the protection of the public, and there's a need also for punishment. Somehow he doesn't seem to learn, and when we have an individual who mixes alcohol and cocaine and who carries a gun, we—in my opinion, we have the most dangerous individual on the streets.
>
> So considering all the factors for sentencing including deterrence, and I think we have to set an example here, and the recommendation of the presentence writer for the maximum period of incarceration ….
>
> ….
>
> … To sentence you one day less than the maximum would denigrate the seriousness of this offense, and I think you have to be locked up to protect the public here.

¶16 The trial court properly considered both the primary sentencing factors and additional ones. Oliver has not overcome the presumption that the trial court's sentencing decision was reasonable. His argument that the victim's statements at the sentencing hearing "on record was a form of questioning a witness and [he] did not have a chance to question her in a form of cross exsamination [sic] to test the validity of her story" is without merit. *See* WIS. STAT. § 972.14(3)(a) ("Before pronouncing sentence in a felony case, the court

shall also allow a victim … to make a statement or submit a written statement to be read in court.").

¶17 Finally, Oliver argues that plea withdrawal is necessary to correct a manifest injustice. Yet again, Oliver is wrong.

¶18 Because Oliver moved to withdraw his plea after sentencing, he must show by clear and convincing evidence that plea withdrawal is essential to correct a manifest injustice. *See* ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. Oliver argues only that he "raised several valid issues that the court shold [sic] have strongly considered" and that review of the transcripts will show that the trial court "was very much so out of line" when it denied the motion for plea withdrawal. Elaborating no further, he has not met his burden to show that plea withdrawal is needed to correct a manifest injustice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).