COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2569 **Cir. Ct. No. 2003CF004912**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BARRY A. VANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Barry A. Vann appeals from a judgment entered after he pled guilty to armed robbery with the threat of force, as a party to a crime, *see*

WIS. STAT. §§ 943.32(2) and 939.05, and from the trial court's orders denying his motions for postconviction relief. Vann claims that: (1) there was an insufficient factual basis to support his plea, and (2) the trial court imposed an unduly harsh sentence. We affirm.

I.

¶2 The State charged Vann with robbing a bank. According to the complaint, Vann walked up to a bank teller at the North Milwaukee State Bank in Milwaukee, put a bag with a box in it on the counter, and handed a note to the teller. The note told the teller that Vann had a bomb, and demanded money. According to the complaint, the teller opened her top cash drawer and gave money to Vann.

¶3 After the police arrested Vann, he admitted to committing the robbery. According to the complaint, Vann told the police that a "Fats" drove him to the bank, put a baseball cap on his head, and told him to "go in and get some money." Vann claimed that he was afraid that "Fats" would hurt him or his family, so he went into the bank, put a bag with a box inside of it on a shelf next to the teller's window, and gave a note to the teller. According to the complaint, Vann told the police that the teller then put money into the bag, and he ran out of the bank. When the police asked Vann if he had committed any other robberies, Vann admitted that a few months before the bank robbery he had tried to rob a man at a gas station.

¶4 The State plea-bargained the case, agreeing to recommend a sentence of six to nine years in prison. In return, Vann agreed to plead guilty to one count of armed robbery with the threat of force, as a party to a crime, and to have allegations of attempted robbery (the gas station incident) and criminal

damage to property (arising out of Vann's damaging a sprinkler in his jail cell while held on the bank-robbery charge) read-in at sentencing. *See* ***Embry v. State***, 46 Wis. 2d 151, 157–158, 174 N.W.2d 521, 524–525 (1970) (read-in procedure).

¶5 Before the plea hearing, Vann and his lawyer submitted a signed plea questionnaire and waiver-of-rights form and an addendum. On the addendum, Vann acknowledged, by signing it, that he had read the complaint. At the plea hearing, the trial court asked Vann questions about his plea. In response to these questions, Vann told the court that he understood what a read-in was, and that the trial court could consider the read-in crimes at sentencing. Vann also told the court that he had reviewed the elements of the bank-robbery crime with his lawyer, and that he understood those elements. Vann's lawyer indicated that he reviewed the elements of the complaint with Vann, and that Vann did not dispute the allegations. The trial court then found Vann guilty, and determined that there was a sufficient factual basis for his plea.

¶6 At the sentencing hearing, the State recommended an initial confinement of two to five years, and four years of extended supervision. Vann's lawyer asked the trial court to impose a sentence on the low end of the State's recommendation. The trial court sentenced Vann to twenty years in prison, with ten years of initial confinement and ten years of extended supervision. It further found Vann eligible for the Challenge Incarceration Program after he had served six years of his initial confinement. *See* WIS. STAT. § 302.045.

II.

A. *Factual Basis.*

¶7 Vann alleges that the trial court erred when it denied his motion to withdraw his plea because it did not establish on the record a sufficient factual basis for his plea. We disagree. After sentencing, a defendant is entitled to withdraw a plea if he or she establishes by clear and convincing evidence that failure to allow withdrawal would result in a manifest injustice. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 135, 624 N.W.2d 363, 368. A manifest injustice occurs when the trial court fails to establish that there is a factual basis for the plea. ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 727, 605 N.W.2d 836, 843.

¶8 To establish a factual basis, the trial court must make such inquiry as satisfies it that the defendant in fact committed the crime to which he or she is pleading guilty. ***Id.***, 2000 WI 13, ¶14, 232 Wis. 2d at 725, 605 N.W.2d at 842; WIS. STAT. § 971.08(1)(b). If the guilty plea is the result of a plea bargain, the trial court need not go to the same length to determine whether the facts would sustain the charge. ***State v. Harrell***, 182 Wis. 2d 408, 419, 513 N.W.2d 676, 680 (Ct. App. 1994).

¶9 We review a trial court's decision denying a defendant's motion to withdraw a plea for an erroneous exercise of discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). In reviewing a challenge to a plea procedure, we may consider the totality of the circumstances, including: the records of the plea hearing and sentencing; the statements of defense counsel; and other portions of the record. *See* ***Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d at 727–728, 605 N.W.2d at 843.

¶10 Vann claims that the trial court erred when it accepted his guilty plea because it did not establish a factual basis for the plea, and criticizes the trial court for not asking the parties if the complaint could have been used to support a factual basis, or, as phrased in his brief on this appeal, asking him "what conduct he undertook in order to show that the elements of the crime had in fact been committed." Vann claims that the trial court "basically found a factual [basis] based on [its] questioning of the Defendant [as to] whether or not he understood the elements of the crime[]" and that this was not sufficient to establish a factual basis. We disagree.

¶11 The standard for establishing a factual basis is not as stringent as Vann contends. "[A] judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." ***Id.***, 2000 WI 13, ¶22, 232 Wis. 2d at 730, 605 N.W.2d at 844. There is no requirement that the defendant personally articulate the factual basis; defense counsel's statements concerning the factual basis will suffice. ***Id.***, 2000 WI 13, ¶¶18–22, 232 Wis. 2d at 727–730, 605 N.W.2d at 843–844.

¶12 Here, the trial court found, in its written decision denying Vann's postconviction motion to withdraw his plea, that there was a sufficient factual basis:

> The defendant appeared before this court to enter a guilty plea to armed robbery on December 9, 2003. At that time, he filled out the Guilty Plea Questionnaire/Waiver of Rights form and the Addendum to the Plea Questionnaire and Waiver of Rights form with his attorney. On the Addendum, he checked the box stating that he had read the criminal complaint and signed the form. The defendant stated he understood what he was charged with, and I read him the charge. After doing so, I again asked him if he understood what he was charged with, and he stated that he

> did. Defendant's attorney indicated that he had been over the allegations of the complaint with the defendant and the defendant had no dispute with those allegations. I subsequently found a factual basis for the plea existed. There is no apparent defect in the defendant's understanding of the charge or the factual basis.

(Transcript references omitted.) We agree.

¶13 A review of the record in this case shows that the trial court ensured that Vann was aware of the elements of armed robbery with the threat of force, and that his conduct met those elements. Vann acknowledged on the plea questionnaire and waiver-of-rights form and its addendum that he understood the elements of his crime, and that he had read the complaint. At the plea hearing, Vann told the trial court that he had gone over the form with his lawyer, and understood all of the information on it. Vann's lawyer also told the trial court that, in his opinion, Vann understood the information on the form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987) (trial court may refer to signed plea questionnaire and waiver-of-rights form to establish defendant understood elements); *see also* ***Bradshaw v. Stumpf***, No. 04-637, slip op. at 7 (U.S. June 13, 2005) ("[T]he constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.").

¶14 Moreover, at the plea hearing, the trial court read the charge to Vann as it was stated in the complaint:

> The charge is that on May 6, 2003 at 5630 West Fond Du Lac Avenue in the City of Milwaukee, you as a party to a crime and with intent to steal by the use or threat of use of any article used or fashioned in a manner to lead the victim to reasonably believe that it is a dangerous weapon, did take property from the person of Latesha Wesley by

> threatening the imminent use of force against her with intent to compel her to acquiesce in the taking or carrying away of the property. That's the legal language involved in this charge of armed robbery as a party to the crime.

The trial court then asked Vann if he understood the charge, and Vann said that he did. Vann then told the trial court that he had discussed the elements of the crime with his lawyer and that he understood them:

> THE COURT: There are certain things that have to be proven. We call those the elements of an offense[]. Now, this is charged as a party to a crime. So the State has to prove either that you directly committed the elements of the crime or that you are guilty as a party to a crime. Now, have you discussed these things with [your lawyer]?
>
> THE DEFENDANT: Yes, I have.
>
> THE COURT: Are you satisfied you understand the things that would have to be proved before you could be found guilty?
>
> THE DEFENDANT: Yes, I am.

After Vann pled guilty, the trial court established that Vann's lawyer had reviewed the complaint with Vann and that Vann did not dispute its allegations:

> THE COURT: [H]ave you gone over the elements in the Complaint with the defendant?
>
> [VANN'S] ATTORNEY: Yes.
>
> THE COURT: Does he have any dispute with what is alleged?
>
> [VANN'S] ATTORNEY: No.

The trial court then found that there was a sufficient factual basis for Vann's plea: "I find a factual basis." The record demonstrates that the trial court based its determination of a factual basis on the allegations in the complaint. This was permissible. *See* ***Black***, 2001 WI 31, ¶12, 242 Wis. 2d at 137, 624 N.W.2d at 369 (trial court may rely on criminal complaint to establish factual basis).

¶15 Turning to the complaint, we are satisfied that it sets forth the elements of armed robbery with the threat of force, namely that: (1) the bank was the owner of the money; (2) Vann took money from the teller at the bank; (3) Vann took the money with intent to steal; (4) Vann threatened the use of force; and (5) at the time Vann took the money he threatened to use an article fashioned in a manner to lead the teller to believe that it was capable of producing death or great bodily harm. *See* WIS JI—CRIMINAL 1480A (elements of armed robbery by use of article that the victim reasonably believes is a dangerous weapon). The record supports the trial court's finding of a factual basis and its subsequent denial of Vann's challenge to the plea procedure.

B. *Sentencing.*

¶16 Vann also claims that the trial court erred when it denied his motion to modify his sentence. He contends that his sentence is unduly harsh, particularly in light of what he alleges are positive sentencing factors, including that he: cooperated with the police; was eighteen years old when he committed the armed robbery; did not have any prior felony convictions; and had a supportive family. Vann further complains that the trial court erroneously exercised its discretion because it "appeared to pay more attention to" the read-in offenses than the bank robbery.[1] We disagree.

[1] In the sentencing section of his brief, Vann also argues that his trial lawyer "in a sense added fuel to the fire during the Sentencing Hearing by essentially arguing for a prison sentence." In his postconviction motion to modify his sentence, Vann claimed that his trial lawyer was ineffective for recommending a prison sentence. On appeal, Vann does not, aside from this passing statement, argue that his trial lawyer was ineffective. Accordingly, we do not address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court can "decline to review issues inadequately briefed").

¶17 Sentencing is committed to the discretion of the trial court. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). We will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.***, 70 Wis. 2d at 185, 233 N.W.2d at 461. A strong public policy exists against interfering with the trial court's discretion in determining sentences, and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To get sentencing relief on appeal, the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶18 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

> "(1) Past 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, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted). The weight to be given to each of these factors is within the trial court's discretion. ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461. "Imposition of a sentence may be

based on any of the three primary factors after all relevant factors have been considered." ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984).

¶19 The trial court considered the appropriate factors when it sentenced Vann. It first considered the seriousness of Vann's crime, noting that armed robbery is an "extremely serious offense," and that "going into a bank and robbing it with a note that talks about a bomb is awfully serious." It also commented that the read-in charge of attempted robbery seemed to be at least as serious, if not more serious, than the charge of armed robbery: "you were picking on someone who was particularly vulnerable and then when there was some resistance to what you were trying to do, you beat him up or beat him down."[2]

¶20 The trial court also considered Vann's character. It noted that Vann was eighteen years old, that both of his parents were at the sentencing hearing, and that Vann had admitted to the read-in charge of attempted robbery. It found that Vann had a "fairly standard" juvenile record, but that his "track record on supervision … seems to be mixed." It noted that there were times when Vann was "uncooperative" and had a "bad … attitude," but that there were also "periods of time where you did impress people with some kind of intelligence, some kind of talent, some kind of cooperation and there may have even been significant periods

[2] The attempted robbery charge was based on Vann's admission to the police that he had tried to rob a man at a gas station. According to Vann, he walked up to James Spivey, who was then approximately eighty years old, at a gas station on 12th Street and North Avenue in Milwaukee, and told Spivey to give him everything he had. According to Vann, Spivey ignored him, went into the gas station, and came out to pump gas into his car. Vann told the police that he went over to Spivey and again demanded money. Spivey again refused and Vann decided to leave. Vann claimed that, as he turned to walk away, Spivey sprayed gas on him. Vann told the police that he then hit Spivey several times, knocking him to the ground, and then Vann walked away.

where you were on what counselors might call 'the right track.' But whatever it was, it wasn't nearly enough." It also noted that Vann had been institutionalized as a child, but opined that ultimately Vann was responsible for his decisions.

¶21 In its written decision denying Vann's motion to modify his sentence, the trial court considered additional treatment records and psychological reports that Vann had submitted with the motion. It wrote that, while the documents showed that Vann had been institutionalized at an early age for aggressive and impulsive behavior, "there [was] no clear and convincing evidence that identifie[d] his childhood problems as the cause for his adult offenses." It concluded that the additional material did not mitigate the gravity of Vann's offenses, or the need for deterrence and community protection, which it had opined, in its oral sentencing, was important because the "risks to the community are significant," and that Vann needed to spend a "long period of time in prison." It also commented that the attempted robbery was "the kind of thing that just makes everyone afraid to be out and about[. P]eople … choose not to move about or become prisoners in their own home for parts, sometimes all of the day because they're afraid of being preyed on like this." It noted that the victim of the attempted robbery (Spivey) wanted the maximum sentence imposed, and that while the request was "reasonable," it seemed harsh. It thus concluded that "as a matter of law, you've been found guilty of this bank robbery and I'm inclined to consider this serious offense on Mr. Spivey in deciding what the appropriate sentence on the bank robbery ought to be." This was not an erroneous exercise of discretion. *See* ***Austin v. State***, 49 Wis. 2d 727, 732, 183 N.W.2d 56, 58–59 (1971) (consideration of read-in offense may result in longer sentence for crime charged).

¶22 Moreover, Vann's sentence is well within the maximum allowed. The maximum sentence for armed robbery with the threat of force is forty years in prison. *See* WIS. STAT. §§ 943.32(2) (armed robbery with threat of force Class C felony), 939.50(3)(c) (maximum penalty for Class C felony forty years in prison). As we have seen, the trial court sentenced Vann to twenty years in prison, with ten years of initial confinement and ten years of extended supervision, and found Vann eligible for the Challenge Incarceration Program after he had served six years of his initial confinement. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411, 417–418 (Ct. App. 1983) (footnote omitted). The trial court properly denied Vann's postconviction motion to modify his sentence.

By the Court.—Judgment and orders affirmed.

Publication in the official reports is not recommended.