COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0479-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VONNIE D. DARBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES and KITTY K. BRENNAN, Judges. *Affirmed.*

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

¶1 PER CURIAM. Vonnie D. Darby appeals from a judgment entered after he pled no contest to fleeing an officer, possession of marijuana, and obstructing an officer. He also appeals from a postconviction order denying his

motion to withdraw his pleas. Darby claims that his pleas were involuntarily coerced by the prosecutor's "hollow" threat to dismiss the charges against him and re-issue the charges with a habitual offender penalty enhancer added. Because the prosecutor's threat was not hollow and could have been granted at the discretion of the trial court, we affirm.

I. BACKGROUND

¶2 Darby was charged with fleeing an officer, possession of marijuana, and obstructing an officer on September 18, 1995. Trial was to commence on June 25, 1997. At that time, the prosecutor advised that he discovered Darby had several convictions in outlying counties, which would justify charging him as a habitual criminal. The prosecutor indicated his intent to dismiss the current complaint and re-issue the complaint, adding the habitual criminality enhancer unless Darby pled guilty to the current charges. The prosecutor noted that adding the penalty enhancer would triple or quadruple the length of potential jail sentence. The prosecutor indicated that he was willing to wait thirteen minutes for Darby to decide whether or not he wanted to enter a plea.

¶3 After conferring with his counsel, Darby entered no contest pleas and was sentenced. Subsequently, Darby filed a postconviction motion seeking to withdraw his pleas, claiming that he was involuntarily coerced into entering the pleas. The trial court summarily denied the motion. Darby appealed that decision to this court and we reversed the order denying the postconviction motion and remanded the matter to the trial court with directions to conduct a hearing on the plea withdrawal request.

¶4 The trial court conducted a hearing as instructed. After a full hearing, the trial court again denied Darby's request to withdraw his pleas. The trial court found that the pleas were voluntary. Darby now appeals.

II. DISCUSSION

¶5 Darby claims he should be allowed to withdraw his pleas because they were not entered voluntarily. The trial court disagreed.

¶6 After sentencing, we will grant a defendant's motion to withdraw guilty pleas only if the defendant shows by clear and convincing evidence that a manifest injustice has occurred. ***State v. Krieger***, 163 Wis. 2d 241, 249, 471 N.W.2d 599 (Ct. App. 1991). If a plea was not entered voluntarily, a manifest injustice has occurred. ***Id.*** at 251 n.6.

¶7 The issue in this case is whether or not the prosecutor's statement of intent to dismiss and re-issue charges with the added penalty enhancer—unless Darby pled guilty—was a "hollow" threat. The parties agree that if the threat was "hollow," meaning that the prosecutor could not legally succeed in carrying out the threat, then the prosecutor's stated intention had a coercive effect and infected the voluntariness of Darby's pleas. Therefore, the first question for this court to answer is whether or not the prosecutor could have legally succeeded in carrying out his stated intention. We conclude that the case law in this state would have allowed the prosecutor to dismiss and re-issue the charges.

¶8 Our analysis starts with ***State v. Larsen***, 177 Wis. 2d 835, 503 N.W.2d 359 (Ct. App. 1993). In ***Larsen***, this court addressed whether the "trial court correctly allowed a post-plea dismissal without prejudice so that the state could file a new complaint to add a repeater allegation." ***Id.*** at 838. In ***Larsen***, we

distinguished the decision in ***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991), where our supreme court held that "a criminal charging document can [not] be amended to assert a repeater allegation … after a defendant has pleaded not guilty to the underlying charges at arraignment." ***Id.*** at 888. ***Martin*** was based on due process notice principles, requiring that a defendant be apprised of possible repeater sentencing at the time he or she is asked to plead guilty to the charges. ***Id.*** at 903.

¶9 Darby relies heavily on ***Martin***. However, this is not a ***Martin*** case. As pointed out in ***Larsen***, ***Martin*** applies when the state seeks to *amend* the complaint post-arraignment, not when the state seeks to *dismiss and re-issue* the complaint post-arraignment. *See* ***Larsen***, 177 Wis. 2d at 839. "This is a subtle, but important, distinction." ***Id.*** We concluded that the *dismissal/re-issue* procedure does not violate the holding in ***Martin*** because such procedure would not "'sandbag'" the defendant or "bind him to his previous plea to the original complaint. Rather, the slate has been wiped clean: the original complaint and [the defendant's] plea to it are no more." ***Id.*** at 839-40.

¶10 Moreover, this state permits the "'give-and-take'" of plea-bargaining, and allows the prosecutor to threaten to increase the charges if the defendant will not plead guilty, and decrease the charges if the defendant will plead guilty. *See* ***State v. Johnson***, 2000 WI 12, ¶42-43, 232 Wis. 2d 679, 605 N.W.2d 846, *cert. denied*, 120 S. Ct. 2730. Although the wisdom of such a practice has been questioned, our courts have consistently ruled that as long as a defendant remains free to accept or reject the "bargained-for" offer, such conduct is constitutionally permissible. ***Id.***

¶11 Accordingly, the prosecutor here could legally threaten to increase Darby's exposure if he would not plead guilty provided the facts support the increased charge and, therefore, the prosecutor's threat to dismiss and re-issue the complaint charging Darby as a repeater was legally sound.

¶12 The next question we must decide is whether a trial court would, in its discretion, have granted the motion, and whether such an exercise of discretion would have been affirmed on appeal. ***Larsen***, 177 Wis. 2d at 840. "Prosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss." ***Id.*** In determining whether to exercise discretion in favor of allowing the state to dismiss and re-issue, the trial court must consider the facts, the pertinent legal principles, and reach a reasonable conclusion.

¶13 In ***Larsen***, we concluded that the trial court properly exercised its discretion in permitting the dismissal/re-issuance because the failure to detect the basis for a repeater charge was a result of "an understandable and excusable human error." ***Id.*** The mistake occurred because the individual investigating Larsen's criminal history had misspelled his name as L-A-R-S-*O*-N and, therefore, his past crimes were not discovered until after he entered a not guilty plea at the arraignment. ***Id.***

¶14 The facts in this case are somewhat more complicated, and frankly present a closer case. Prosecutor Jack Stoiber was responsible for reviewing the facts and issuing charges against Darby. Here, before issuing the charges, a criminal background check was conducted, but it was limited only to Milwaukee County. The reason for the limitation had to do with access to resources. A prosecutor can independently check Milwaukee County, but must make a request

of an investigator in order to conduct an all-county or national background check. The check revealed that Darby had thirteen prior convictions in Milwaukee County between 1981 and 1986. In addition, Darby had other criminal contacts in Milwaukee County in 1986, 1989, 1994, and 1995. The prosecutor who issued the charges in this complaint was one of the most experienced prosecutors in the office and was known for issuing every charge possible.

¶15 Prosecutor Thomas Potter was then assigned to Darby's case. He testified at the remand hearing with regard to why an all-county background check was not initially conducted. He indicated that upon reviewing the file, he saw the "JUSTIS" printout documenting Darby's criminal contact within Milwaukee County. Potter reviewed the pattern to determine whether or not there were any substantial gaps which might indicate a need to look to other counties. Potter concluded that there were no substantial gaps in criminal activity to warrant a broader investigation. Potter also relied on the fact that he knew the police officers involved in this matter to be thorough in their investigation. He believed that if there was criminal activity in other counties, the police officers would have discovered that information and disclosed it to his office. He also relied on the fact that Attorney Stoiber had charged the case, and described Stoiber as "meticulous" in determining what charges to bring.

¶16 Potter testified that his first suspicion of possible out-of-county convictions arose when Darby missed a court appearance. Potter was advised by Darby's counsel that Darby could not be charged with bail-jumping for missing the court appearance because Darby was incarcerated in another county at the time. After some correspondence between Potter and Darby's counsel, Potter discovered that Darby was in jail in another county, which triggered the need to request that an investigator run a "N.C.I.C." search to see whether Darby had

convictions in other counties. In order to have a N.C.I.C. check performed, a written request is made and one of the three investigators in the district attorney's office conducts the search. The search takes approximately three days and a written report is generated and returned to the prosecutor who made the request.

¶17 After Potter received the report from the investigator, he discovered that Darby had five convictions in other counties, including two that would justify charging Darby as a habitual criminal. This discovery occurred in late October 1996, and was immediately disclosed to Darby's counsel. Potter testified that there were repeated discussions between Darby's counsel and himself about resolving the case short of a trial, and that Darby's counsel indicated that Darby would take the best offer Potter could give. Potter was confident that the case would be resolved without a trial because the evidence was overwhelming. Potter believed that the knowledge that he could now dismiss and re-issue the case with the repeater enhancer would cause Darby to plead guilty to the current charges rather than risk conviction as a habitual criminal.

¶18 Potter testified that he waited until the trial date before raising this issue with the court for two reasons. First, he believed from his prior experience with this particular trial court that, if he advised the trial court that the case could be re-issued as a repeater, this trial court would not allow any negotiations to dismiss the repeater. Second, he believed that Darby would plead to the original charges and would not elect to proceed to trial.

¶19 This fact scenario presents two problems. The first is the late discovery of the other convictions, which supported the habitual criminality charge. The second is the timing of the stated intention to dismiss and re-issue. We conclude that despite the problems presented, a trial court could have granted

the motion to dismiss and re-issued the charges, and that such a decision would have been affirmed on appeal.[1]

¶20 "Prosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss 'in the public interest.'" ***State v. Kenyon***, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978). Although this standard is admittedly broad, relevant factors may vary depending on the specifics of each case. ***Id.*** at 47. In addition to the factors specific to individual cases, some finding must also be made

> with respect to the impact of the ruling on the public interest in proper enforcement of its laws and the public interest in allowing the prosecutor sufficient freedom to exercise his legitimate discretion, to employ to the best effect his experience and training, and to make the subjective judgment implicit in the broad grant of [statutory] authority ….

Id.

¶21 First, the delay in discovering the outlying convictions was not a result of negligent conduct or sloppiness. An investigation was conducted, and a reasonable decision was made regarding requesting a more extensive search. The large number of convictions in Milwaukee County, and the pattern that those convictions presented, led the prosecutors to believe that Darby limited his criminal activity to Milwaukee County. This belief was bolstered by reliance on the police officers involved. It was not until the prosecutor discovered that Darby was incarcerated in another county that a red flag went up and the more extensive

[1] We reach such a conclusion despite the findings made by the trial court during the remand of this matter.

N.C.I.C. check was requested. Under these circumstances, a trial court could, in its discretion, excuse the delay.

¶22 Second, we address the timing in this case. At first glance, the timing in this case appears inexcusable. In general, the sooner the discovery and request to dismiss/re-issue is made, the more likely the request will be considered a proper exercise of discretion. However, the particular facts in this case present a situation which would not preclude granting the motion to dismiss/re-issue even at the late date it was requested here. Both the prosecutor and Darby's counsel had discussed the possibility that Darby could be charged as a habitual criminal long before the trial date. The information that this case could be dismissed and re-issued with a habitual criminality charge was utilized as a bargaining chip in an attempt to encourage Darby to enter a plea. This is permitted in our state. *See* ***Johnson***, 2000 WI at ¶42-43. The offer was made one last time on the date the trial was supposed to start. This was not a situation where the dismissal/re-issuance was sprung on Darby for the first time on the date of trial. There was repeated communication between the prosecutor and Darby's counsel on this matter for several months before the ultimatum occurred. Moreover, the timing did not prejudice Darby. The prosecutor here exercised legitimate discretion, used his experience, and made a reasonable subjective judgment. Under these circumstances, the timing would not have precluded a trial court from exercising its discretion to grant the motion to dismiss/re-issue.

¶23 Based on the foregoing, we conclude that a trial court could have properly exercised its discretion to grant the prosecutor's motion to dismiss/re-

issue, and that such discretion would be affirmed on appeal.[2] Therefore, we conclude that the prosecutor's "threat" to dismiss and re-issue the case with the added habitual criminality charge was not a hollow threat and did not infect the voluntariness of Darby's pleas.

By the Court.—Judgment and order affirmed.

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

[2] We are not persuaded by Darby's argument that our conclusion will obliterate the holding in ***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991), and give prosecutors unfettered discretion. First, as noted, the ***Martin*** case discusses untimely *amendments*, not dismissals. Second, cases such as Darby's are unusual. As Attorney Potter testified during the remand hearing, in his ten years of working as a prosecutor, this is the only case where the subject arose. If a case raises the suspicion that habitual criminality may be charged, the arraignment is delayed to allow for the broader investigation. Darby's case presented unique circumstances and, therefore, must be judged on those circumstances.