COURT OF APPEALS DECISION DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2005AP1061
2005AP1271

Cir. Ct. Nos. 1989CF890277
1987CF008036

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ISMAEL TAVARES LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ismael Tavares Lopez appeals *pro se* from orders denying his WIS. STAT. § 974.06 (2003-04)[1] motion. Lopez claims: (1) the trial court erroneously exercised its discretion by denying Lopez's motion to withdraw his guilty pleas; (2) there was an insufficient factual basis to support his guilty pleas; and (3) he was not adequately informed of his appeal rights. Because the trial court did not erroneously exercise its discretion, there is a sufficient factual basis for the guilty pleas, and he was given a written copy of his appeal rights, we affirm.

BACKGROUND

¶2 Lopez is a Mexican national who lived in Wisconsin for approximately five years before committing his first sexual assaults in 1987. On March 7, 1987, Lopez sexually assaulted an adult woman in her home without her consent "by threat of use of a dangerous weapon." He was charged with three counts of first-degree sexual assault. On March 27, 1987, he was released on bail and remained free on bail until his arrest in 1989 for sexually assaulting a fourteen-year old girl. Lopez was charged with recklessly endangering safety in the first degree, abduction, and first-degree sexual assault.

¶3 On March 23, 1988, Lopez entered a negotiated ***Alford***[2] plea to the 1987 case. He pled guilty to the second count of the information and the State dismissed the other two counts. The parties agreed to adopt the complaint as the factual basis for the plea. Sentencing was repeatedly rescheduled. On

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

September 29, 1988, Lopez appeared in court with a Spanish language interpreter, and the record reflects that a discussion was held on the deportation issue.

¶4 Before Lopez could be sentenced on the 1987 sexual assaults, he was arrested and charged for the 1989 crimes. On April 18, 1989, he pled guilty to all three counts in the 1989 case. The parties stipulated that the facts in the complaint were true and correct and could be used as a basis for his guilty pleas. Lopez signed plea questionnaires in both cases, stating that the criminal complaint and the information had been read to him, and he understood what he was charged with, what the penalties were, and why he was charged. The form also indicated that he understood the elements of the crimes and their relationship to the facts in his case. Lopez also signed a form and initialed statements to the effect that the complaint established a factual basis for the plea and that the form advised him of his postconviction rights.

¶5 Lopez signed an additional form, acknowledging:

> If you are not a citizen of the United States of America, you are advised that upon a plea of guilty or no contest and a finding of guilty by the Court for the offense(s) with which you are charged in the Criminal Complaint or Information, may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

¶6 This form was signed by Lopez on April 28, 1989, and witnessed by his defense attorney. On May 30, 1989, Lopez was sentenced on both the 1987 and 1989 cases. On that same day, Lopez and his defense counsel signed the "SM-33" form, providing Lopez with information on postconviction relief. On July 24, 1989, Lopez filed a motion for reconsideration and sentence modification.

¶7 On March 22, 2005, Lopez filed a *pro se* motion seeking postconvicton relief. He raised the three issues, which are the subject of this appeal. The trial court denied the motion. Lopez now appeals.

DISCUSSION

A. Plea Withdrawal.

¶8 Lopez claims the trial court should have granted his motion for plea withdrawal on the basis that he did not know he could be deported for pleading guilty. When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). Here, the trial court did not erroneously exercise its discretion in denying Lopez's motion seeking plea withdrawal.

¶9 Lopez's motion was based on the Wisconsin Supreme Court's decision in ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. In that case, the court held that a defendant is entitled to an automatic vacatur of any judgments imposed after a guilty plea if the trial court failed to orally inform the defendant of the immigration consequences of his plea using the language set forth in WIS. STAT. § 971.08(1)(c). ***Douangmala***, 253 Wis. 2d 173, ¶46.

¶10 Lopez's case, however, is not governed by ***Douangmala*** because the holding does not apply retroactively to this matter. After ***Douangmala*** was decided, the issue arose as to whether it would apply retroactively and to which cases. In ***State v. Lagundoye***, 2003 WI App 63, ¶10, 260 Wis. 2d 805, 659 N.W.2d 501, *aff'd*, 2004 WI 4, 268 Wis. 2d 77, 674 N.W.2d 526, this court decided that the ***Douangmala*** holding would not apply retroactively to any cases where the time for direct appeal expired before ***Douangmala*** was decided. Thus, for Lopez, whose direct appeal was decided long before the decision in ***Douangmala***, pre-***Douangmala*** law applies to his motion seeking to withdraw his guilty plea. Prior to the ***Douangmala*** law, this issue was subject to a harmless error analysis, which allowed the judgment to stand if the circuit court's failure to advise the defendant about the deportation consequence of the plea did not prejudice him. *See* ***State v. Chavez***, 175 Wis. 2d 366, 370-71, 498 N.W.2d 887 (Ct. App. 1993), *overruled for certain cases by* ***Douangmala***, 253 Wis. 2d 173, ¶42. There is no prejudice under ***Chavez*** if the defendant knew of the deportation consequences of pleading guilty. ***Douangmala***, 253 Wis. 2d 173, ¶¶37-40.

¶11 Thus, because Lopez's direct appeal rights expired before ***Douangmala*** was decided, we apply the harmless error rule to his motion seeking to withdraw his guilty pleas on the basis that he did not know of the deportation consequences. Because of the age of this case, the plea hearing transcripts no longer exist. Nevertheless, from the documents in the record, we conclude that Lopez was not prejudiced by any failure of the trial court to orally inform him of the deportation consequences of pleading guilty because he had actual knowledge of the same.

¶12 In the 1987 case, the court reporter's notes indicate that discussion was held on deportation issues. Such notation reflects that Lopez, his attorney and

the trial court discussed deportation consequences. This evidence demonstrates clearly and convincingly that Lopez did in fact know that he could be deported if he entered guilty pleas.

¶13 In the 1989 case, the record demonstrates that Lopez signed a form, witnessed by his attorney, which set forth the deportation consequences of his guilty plea. This notification was not buried among a variety of paragraphs of notifications as in ***State v. Issa***, 186 Wis. 2d 199, 202-04, 519 N.W.2d 741 (Ct. App. 1994), *overruled by* ***Douangmala***, 253 Wis. 2d 173, ¶¶37-38, 42. Rather, the deportation notification was set out on a separate page at the end of the form and was dated and signed by Lopez. Thus, this provides clear and convincing evidence that Lopez knew the deportation consequences he faced. Accordingly, we conclude that Lopez was not prejudiced by any failure of the trial court to orally inform him of the same. Any error was harmless and the trial court did not erroneously exercise its discretion when it denied his motion seeking to withdraw his guilty pleas.

B. Factual Basis for Guilty Pleas.

¶14 Lopez's next argument is that there was an insufficient factual basis to support his pleas because neither the 1987 case nor the 1989 case involved a "dangerous weapon." Accordingly, he seeks to withdraw his plea on that basis. We reject his argument. The same standard of review noted above applies here. Lopez must prove by clear and convincing evidence that a manifest injustice exists in order to have his pleas withdrawn. ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994).

¶15 WISCONSIN STAT. § 940.225(1)(b) (1987-88) and (1989-90) makes it a Class B felony to: "ha[ve] sexual contact or sexual intercourse with another

person without consent of that person by use or threat of use of a dangerous weapon *or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon*" (emphasis added).

¶16 Here, in the 1987 case, Lopez used a serrated knife and pointed it at the victim in a threatening manner. In the 1989 case, Lopez used a key ring to slap the victim. As a result of the key ring slapping, the victim received "a two inch laceration under her right eye and a five and one-half inch laceration along her right jaw line…. [and] three lacerations to her right hand and two lacerations to her left hand." Lopez admitted that he may have had his car keys in his hand when he slapped her.

¶17 Lopez contends that neither item constituted a dangerous weapon and that neither assault occurred because he used those weapons. We reject his contentions. The factual basis for a guilty plea may be established by reference to the allegations set forth in the criminal complaint. *See* ***Christian v. State***, 54 Wis. 2d 447, 456-57, 195 N.W.2d 470 (1972) (trial court's inquiry must be sufficient to establish factual basis for plea). In both the 1987 and 1989 cases, all parties agreed to use the facts in the criminal complaint as the factual basis for the pleas.

¶18 With respect to the serrated knife, clearly this was a dangerous weapon used in the commission of the 1987 sexual assaults. The victim took off her clothes in response to Lopez's pointing the serrated knife at her, which made her fear for her safety. Thus, the serrated knife was used as a dangerous weapon to accomplish the sexual assaults. These facts provide a sufficient factual basis to support the guilty pleas. *See* ***Lewis v. State***, 592 S.E.2d 405 (Ga. 2004) (similar knife deemed a dangerous weapon).

¶19 With respect to the key ring, we acknowledge that in the ordinary course of life, a key ring would not likely be deemed to be a dangerous weapon. Based on the facts in the complaint, however, the key ring here was used in a manner to lead the victim to reasonably believe it was a dangerous weapon. The victim here actually perceived and experienced the harm this key ring caused to her face and arms. *See* ***State v. Smith***, 721 A.2d 847 (R.I. 1998) (per curiam). This key ring, based on how Lopez used it to assault the victim, legally constituted a dangerous weapon. Lopez attacked the victim with the key ring, causing the victim to fear for her safety, resulting in an inability to resist the sexual assault. Clearly these facts provide a sufficient factual basis for the guilty pleas.

¶20 Based on the foregoing, we reject Lopez's assertion that the trial court erred in ruling that there was a sufficient factual basis for the pleas he entered in both cases. Accordingly, the trial court did not erroneously exercise its discretion in denying Lopez's motion seeking plea withdrawal on this basis.

C. Appeal Rights.

¶21 Lopez's last claim is that the trial court failed to inform him of his appellate rights. The record belies his claim.

¶22 The record contains the SM-33 form signed by Lopez and his defense counsel in both the 1987 and 1989 matters. Those forms indicated that Lopez was undecided about what postconviction relief to pursue, but that he understood that the decision had to be made and the attorney informed of the decision so that notice could be filed within twenty days of sentencing.

¶23 Thus, these forms show that defense counsel discussed Lopez's appellate rights with him. Lopez signed the form acknowledging such. Thus, the

requirements of WIS. STAT. § 973.18 were met. *See* ***State v. Argiz***, 101 Wis. 2d 546, 561-62, 305 N.W.2d 124 (1981) (trial court not required to personally advise defendant of appellate rights, but must provide the SM-33 form to the defendant).

¶24 Based on the foregoing, we affirm the orders of the trial court.

By the Court.—Orders affirmed.

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