COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP114-CR **Cir. Ct. No. 1996CF963312A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Larry D. Harris appeals *pro se* from a judgment entered after he pled guilty to one count of first-degree intentional homicide while using a dangerous weapon as party to a crime, and one count of attempted first-degree intentional homicide while using a dangerous weapon as party to a crime,

contrary to WIS. STAT. §§ 940.01(1), 939.32, 939.63 and 939.05 (1995-96).[1] He also appeals from an order denying his postconviction motion. Harris claims that he is entitled to plea withdrawal because he did not have knowledge of the "presumptive minimum penalty" applicable to the homicide at the time his pleas were entered. Because Harris abandoned the argument he raised earlier regarding the three-year presumptive minimum on the weapons penalty enhancer, failed to prove that he was prejudiced by any error during the plea hearing, and because the trial court complied with the obligations required of it with respect to advising Harris of the maximum potential penalties, we affirm.

BACKGROUND

¶2 On July 11, 1996, Harris and his co-defendants, Terrance C. Harris (Larry's younger brother), and Willie O. Johnson, were each charged with one count of first-degree intentional homicide as party to a crime while armed with a dangerous weapon, and one count of attempted first-degree intentional homicide as party to a crime while armed with a dangerous weapon.

¶3 The case was tried to a jury in September 1996, and Harris was found guilty on both counts. Terrance was also convicted on both counts. Harris filed a direct appeal from his conviction and we reversed and remanded for a new trial because of defects in the *voir dire* process. *See* ***State v. Harris***, 229 Wis. 2d

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. We also note that the Amended Judgment of Conviction incorrectly indicates that Harris pled "not guilty" and was convicted on September 26, 1996, by a jury. In fact, Harris entered "no contest" pleas and was convicted by a judge on April 24, 2000. We direct the trial court to correct the amended judgment.

832, 834, 601 N.W.2d 682 (Ct. App. 1999). Terrance also appealed, but his convictions were affirmed in an unpublished opinion.

¶4 On remand, Harris entered into a plea agreement with the State, wherein he agreed to plead no contest to the two counts in the information; in exchange, the State agreed to recommend parole eligibility of thirty years and to modify Terrance's sentence. The plea hearing occurred on April 24, 2000, and Harris was represented by Attorney Nikola P. Kostich. Prior to the plea hearing, Harris had completed a plea questionnaire/waiver of rights form. The trial court conducted the following plea colloquy:

> THE COURT: All right. It's my understanding that the defendant wants to plead no contest to the charges in the information along with the penalty enhancers; is that correct?
>
> MR. KOSTICH: Yes, Your Honor.
>
> [PROSECUTOR]: Yes.
>
> THE COURT: And do you understand what you're charged with, sir, the first degree intentional homicide party to a crime while armed?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And the attempt[ed] first degree intentional homicide party to a crime while armed with a dangerous weapon?
>
> THE DEFENDANT: Yes, sir.
>
> ….
>
> THE COURT: And you understand the penalties the Court can impose, up to a life sentence with or without the eligibility of parole. Do you understand that's the Court's prerogative?
>
> THE DEFENDANT: Yes, sir.
>
> ….

> THE COURT: You understand the penalty the Court can impose for the attempt[ed] first degree intentional homicide party to a crime while armed?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And that's 40 years plus the enhancer, do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> ….
>
> THE COURT: You understand the charges that you're pleading guilty to?
>
> THE DEFENDANT: Yes, I do.

¶5 Harris then entered no contest pleas to both counts. The prosecutor then sought clarification from the court about the penalties Harris faced and the following exchange occurred:

> [PROSECUTOR]: … [T]here are presumptive minimums in this case and I would ask if you would ask if the defendant is aware of those also. I don't believe you covered the penalty for attempted first degree intentional homicide which is 40 years.
>
> THE COURT: I think the Court did do that.
>
> MR. KOSTICH: Yes.
>
> [PROSECUTOR]: We are corroborating here.
>
> THE COURT: I see that. Okay. You understand, sir, on the first degree intentional homicide which the Court already went th[r]ough with you, the Court can impose a life sentence without the eligibility of parole. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you understand that the Court can set a parole eligibility date or provide no such date at all and just a life sentence. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

> ….
>
> [PROSECUTOR]: The presumptive minimum [for parole eligibility], Judge, is 30 years on this offense.
>
> THE COURT: Okay. He knows that.

¶6 At the sentencing hearing on June 22, 2000, the court sentenced Harris to life imprisonment on the first count of intentional homicide with a parole eligibility date of 2034, and on the second count of attempted intentional homicide the court sentenced Harris to forty years in prison, to run concurrent to the life sentence, with the eligibility of parole in 2034. The court did not apply the statutory "while armed" penalty enhancers to Harris's sentence. Harris did not file any motions for postconviction relief within twenty days after sentencing.

¶7 Sometime in early 2004, Harris filed a motion with this court seeking an extension to file his notice of intent to pursue postconviction relief. We initially denied the motion, but subsequently granted it after Harris filed a motion for reconsideration. On March 30, 2004, Harris filed a *pro se* notice of intent to pursue postconviction relief. He then filed a motion seeking to withdraw his plea on the basis that the plea was not knowingly, voluntarily or intelligently entered due to defense counsel "misinforming" Harris of the State's thirty-year recommendation and defense counsel's failure to list the three-year presumptive minimum regarding the weapons penalty enhancer on the plea questionnaire form.

¶8 On December 20, 2005, the court conducted a hearing on Harris's postconviction motion to withdraw his plea. After the hearing concluded, the trial court denied Harris's motion, finding that defense counsel had communicated to Harris the terms of the plea agreement. An order denying the motion was entered and Harris now appeals.

DISCUSSION

¶9 Harris now argues that he is entitled to withdraw his pleas because he did not know that "the presumptive minimum" sentence for first-degree intentional homicide was approximately thirteen years, four months. We reject his contention.

¶10 WISCONSIN STAT. § 971.08(1)(a), which governs pleas of guilty and no contest provides, in pertinent part, that: "Before the court accepts a plea of guilty or no contest, it shall do all of the following: (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted."

¶11 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. *See* ***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, 434-35, 433 N.W.2d 595 (Ct. App. 1988). A plea is "involuntary" if the pleading defendant does not know the presumptive minimum sentence he or she faces. *See* ***State v. Mohr***, 201 Wis. 2d 693, 700-01, 549 N.W.2d 497 (Ct. App. 1996).

¶12 The defendant has the initial burden of making "a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures …." ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). The burden then shifts to the State to show "by clear

and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered …." ***Id.***

¶13 Harris's argument at the circuit court level was that he was not informed of the correct three-year presumptive minimum sentence, contained in WIS. STAT. § 939.63, for the "while armed" penalty enhancer. On appeal, he abandons that argument, and thus, we deem it waived. *See* ***State ex rel. Peckham v. Krenke***, 229 Wis. 2d 778, 782 n.3, 601 N.W.2d 287 (Ct. App. 1999). Even if this argument had not been waived, the trial court did not impose any sentence related to the penalty enhancer and therefore, Harris was not prejudiced by any failure to advise him of the presumptive minimum sentence.

¶14 On appeal, Harris changes his argument. Relying on ***State v. Borrell***, 167 Wis. 2d 749, 765-67 n.6, 482 N.W.2d 883 (1992), he argues that he should have been advised that the presumptive minimum sentence for first-degree intentional homicide is thirteen years and four months. In ***Borrell***, the supreme court discusses WIS. STAT. § 973.014(1), which "specifies the absolute minimum period of time that a person convicted of a crime and sentenced to life imprisonment must actually be confined in prison before becoming eligible for parole release: approximately thirteen years and four months." ***Borrell***, 167 Wis. 2d at 765.

¶15 Harris's reliance on ***Borrell*** is misplaced. ***Borrell*** does not address presumptive minimum *penalties*. Presumptive minimum penalties are created by statute. ***State v. Duffy***, 54 Wis. 2d 61, 64-65, 194 N.W.2d 624 (1972). The only presumptive minimum penalty which applied to Harris, was the one related to the use of a dangerous weapon penalty enhancer located in WIS. STAT. § 939.63(2)

("The minimum term for the first application of this subsection is 3 years. The minimum term for any subsequent application of this subsection is 5 years.").

¶16 The time period discussed in ***Borrell*** was a time period relating to parole eligibility, not a presumptive minimum penalty. To the extent that Harris is arguing that he should have been advised of the thirteen year, four-month parole eligibility minimum set forth in WIS. STAT. § 973.014(1) (1995-96), he is wrong again. The statutory eligibility date is not applicable when the sentencing court chooses to "establish a later parole eligibility date that is more consistent with the circumstances of the case and the characteristics of that particular defendant." ***Borrell***, 167 Wis. 2d at 766 n.6. This is what happened in Harris's case—the sentencing court set a parole eligibility date of 2034, pursuant to § 973.014(1)(b). Therefore, the thirteen-year, four-month parole eligibility date was not applicable to Harris, and thus, there was no error in failing to advise him of it.

¶17 Finally, in reviewing the plea hearing transcript, we are not convinced that the trial court violated WIS. STAT. § 971.08. The trial court clearly advised Harris of the maximum term of imprisonment, which in this case was life in prison with no possibility of parole. Harris was repeatedly advised of that penalty and personally indicated that he understood the maximum penalty and that the trial court was not obligated to follow the terms of the plea agreement. Thus, the trial court met its obligations. *See* ***State v. Sutton***, 2006 WI App 118, 294 Wis. 2d 330, 718 N.W.2d 146.

¶18 Based on the foregoing, we conclude Harris has failed to establish that any manifest injustice exists which requires granting his motion for plea withdrawal. The trial court did not err in denying his motion. We affirm.

By the Court.—Judgment and order affirmed.

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