

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2939-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STANLEY A. NEWAGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Bayfield County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Stanley Newago appeals a judgment convicting him of first-degree intentional homicide and an order denying postconviction relief. Newago argues that no factual basis supports his plea and that he was denied

effective assistance of counsel. Because the record fails to support his claims, we affirm the judgment and order.

BACKGROUND

¶2 On February 17, 2000, a criminal complaint charged Newago with first-degree intentional homicide of a juvenile. The complaint alleged that the body of Inga K., who had been reported missing on February 12, 2000, had been located and that the coroner pronounced the juvenile dead. A witness stated that on February 12 he had observed Inga and Newago leave a party together. The complaint states further that an officer from the Brown County Sheriff's Department interviewed Newago, who admitted leaving the party with Inga and breaking into a community center. Once inside, he hit her over the head with a beer bottle, causing her to fall to the ground and start crying. Newago stated that he got scared and grabbed a butcher knife from a kitchen drawer and stabbed Inga more than once.

¶3 The complaint states that an assistant medical examiner determined that the cause of death was exsanguination due to multiple sharp force injuries from an assault and the manner of death to be homicide. The body had twenty-five apparent force injuries located about the head, face, neck, trunk and upper right extremity.

¶4 Newago completed a plea questionnaire and Waiver of Rights form with the assistance of counsel. The form indicates that Newago was twenty years old, completed twelve years of schooling and had a high school diploma or its equivalent. He was not under treatment for any mental illness or disorder and had no alcohol, medications or drugs within the previous twenty-four hours. The form recited the constitutional rights Newago understood he would be giving up by

entering a plea. In addition, it stated that Newago understood that the maximum penalty for first-degree intentional homicide was life in prison without parole. The form also stated that Newago understood that the judge must impose the mandatory minimum penalty of life in prison and parole or extended supervision after twenty years served.

¶5 Attached to the plea questionnaire form was a “supplemental plea questionnaire and waiver of rights form.” It explained that Newago had never been committed to a mental institution as mentally ill or incompetent, but at the age of fifteen, he did receive psychological and/or psychiatric care. It also stated that Newago understood that by pleading guilty, he would be giving up any possible defense, including intoxication and “insanity (not guilty by reason of mental defect or infirmity).” It stated that Newago had discussed the case and all matters stated within the questionnaire with his attorney and that he was satisfied with the legal representation he received and had no questions about what had happened so far.

¶6 At the plea colloquy, the circuit court addressed Newago personally. Newago responded affirmatively that he had read the plea questionnaire and signed it of his own free will. He affirmed that he was twenty years old, had completed twelve years of education, had a high school diploma and could read and write the English language. The court carefully explained the penalty structure, and Newago stated that he understood. In response to the court’s questions, Newago explained that he had received treatment for a mental illness or disorder, but did not remember when.

¶7 Newago’s counsel advised the court that he had spoken to Newago, his family, and had a psychological evaluation performed. Counsel explained that

when Newago was fifteen, he had received treatment for depression and similar symptoms. Newago stated that he was not presently taking any medication for depression and had not taken any drugs, medications, or alcohol in the last twenty-four hours.

¶8 The court next ascertained that Newago had received no threats or promises to induce his guilty plea. The court explained sentencing procedures and the constitutional rights and potential defenses Newago would be waiving by entering a plea. In addition, the court carefully explained the elements of the offense and the State's burden of proof. The court gave Newago an opportunity to ask questions and asked Newago to explain in his own words what it meant to waive a constitutional right. The court also inquired whether Newago was satisfied with his legal representation. Newago confirmed that he was.

¶9 The court also asked that the details of any plea agreement be placed on the record. The district attorney stated the agreement as follows:

[I]t's my understanding that Mr. Newago is prepared to plead guilty to the charge of first degree intentional homicide as set forth in the information in this case.

It is my further understanding that Mr. Newago was going to plead guilty to a charge in an accompanying case [W]e were going to jointly recommend the defendant be sentenced to the maximum term of incarceration concurrent to the time he would be sentenced to in this case. In this particular case the state then agreed not to file any additional charges that could potentially have arisen out of the defendant's assault on [Inga] on February 12, 2000.

¶10 The court next inquired whether there was a factual basis for the charged homicide. The district attorney responded that the State intended to rely on the factual allegations of the criminal complaint, as well as information from the State Crime Laboratory that included positive fingerprint and palm print

identification of Newago, located in the blood found at the scene. The State also submitted a *Miranda* rights waiver form signed by Newago after he was arrested in Brown County. See *Miranda v. Arizona*, 384 U.S. 436 (1966). In addition, the State submitted Newago's two-page detailed signed confession that followed the *Miranda* warnings. The court accepted the exhibits without objection from the defense.

¶11 Defense counsel responded that while Newago agreed with part of the information set forth in the complaint, he did not recall all of the events recited therein:

[H]is recollection as to some of that information is not trustworthy at all, at least in terms of his being able to recall the events accurately. ...

[W]e believe, evidence that would, the state would be able to prove beyond a reasonable doubt that supports the plea of guilty and that it is the factual basis including but not limited to the forensic evidence that was referred to in court today as well as other evidence including some of the statements that Mr. Newago made where he does have a clear recollection.

[T]here is ample evidence that would, from my experience, would result in a guilty verdict should the case have gone to trial.

Also in terms of the defenses that the court had outlined earlier including but not limited to the possibility of a not guilty by mental infirmity or defect or intoxication, we've explored those areas as well and I think very thoroughly. We have had an independent psychological evaluation done and again, from my experience, from my conversations with my client, he does not wish to proceed and interposes those defenses and would like to go forward and state to the court that he is pleading guilty on the charges set forth by the state in the case today.

¶12 The circuit court ruled that a "factual basis that the defendant agrees happened" was required, and questioned Newago and defense counsel further.

Newago admitted that he hit the victim over the head with a beer bottle, but claimed to have forgotten obtaining the knife and stabbing her. Defense counsel stipulated that the State's case, including the forensic evidence, established guilt beyond a reasonable doubt. The court was dissatisfied, however, and stated: "[T]here has to be a factual basis for this conviction or he's going to get an appellate lawyer and we're going to ... have a trial."

¶13 The court questioned Newago further with respect to his written confession. Newago remembered the officer reading him his rights and signing a waiver. He was aware he could have terminated the questioning at any time. He understood his rights. Newago did not recall, however, the state of his sobriety at the time of the questioning. He claimed to have been "drinking a lot." Nonetheless, he stipulated that the results of a blood test taken near the time of his questioning indicated that he had no alcohol in his blood.

¶14 Upon the court's further questioning, Newago admitted that he had no drugs or alcohol within twenty-four hours of his confession. He agreed that he had been in jail for a day before the confession and had slept and was well rested. No officer told him "it would go easy" for him if he confessed. Although he knew he had a right to a lawyer, he did not ask for one to be present. Just one officer spoke to him that day. Newago denied that the officer intimidated him or pressured him in any way.

¶15 Newago stated that the officer who wrote down his statement, read it to Newago and gave him an opportunity to disagree with it after it was read. Newago stated that he did not disagree with it. Newago told the court that the confession was not in any way involuntary and that he gave it to the officer because he wanted to.

¶16 The court found that the statement was voluntarily given after Newago had been advised of his constitutional rights. The court determined that the statement admitted the intentional taking of the Inga's life. The court found that the confession, together with the forensic evidence of record, established a factual basis for the crime.

¶17 The court advised Newago that the information charged him with first-degree intentional homicide. The court inquired: "What is your plea?" Newago answered, "Guilty." On his plea, the court found Newago guilty and ordered that a judgment of conviction be entered for the crime alleged in the information.

¶18 Following that ruling, the court asked Newago a series of questions related to his understanding of the proceedings. Newago advised that he understood everything that he had been asked, that he had an adequate opportunity to consult with counsel, and that his attorney had been available for consultation while he was incarcerated and had responded promptly to all Newago's inquiries. In response to questioning, defense counsel advised the court that he was satisfied that Newago understood his constitutional rights and freely and intelligently waived them.

¶19 Following his conviction, Newago filed a motion for postconviction relief. The motion alleged that Newago was denied his constitutional rights when the court found him guilty without a proper factual finding and was denied effective assistance of counsel. After an evidentiary hearing, the trial court denied the motion.

DISCUSSION

1. Factual Basis

¶20 Newago argues that the trial court denied his constitutional rights because it accepted his guilty plea without a proper factual foundation for the crime and without him admitting that he committed the crime. He claims that there is not a shred of evidence that he had any recollection of stabbing or killing anyone. He maintains that the only conduct that he admitted was battery. He contends that there is nothing in the colloquy that indicates he had the intent to kill and no factual basis on which the plea could be constitutionally accepted. We reject Newago's arguments.

¶21 Because Newago's only challenge to the validity of his plea is that the record fails to establish a sufficient factual basis for the plea, we will limit our discussion to that single facet of the plea procedure.¹ If a defendant seeks to

¹ Newago does not assert that the trial court did not comply with other plea-taking procedures described in WIS. STAT. § 971.08, which provides in part:

- (1) 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.
 - (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

All statutory references are to the 1999-2000 version unless otherwise noted.

Additionally, the court's general duties before accepting guilty or no contest pleas have been described in *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986):

- (1) To determine the extent of the defendant's education and general comprehension;
- (2) To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries;

(continued)

withdraw his plea after sentencing, he carries a heavy burden of establishing, by clear and convincing evidence that the circuit court should permit the plea to be withdrawn to correct manifest injustice. *State v. Thomas* 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. If a “circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred.” *Id.* at ¶17.

It is significant that both the federal rule and the Wisconsin adaptation speak in terms of a *judge’s* determination that a factual basis exists. Neither the rule nor the case law interpreting the rule requires a defendant to personally articulate the specific facts that constitute the crime charged. ... All that is required is for the factual basis to be developed on the record--several sources can supply the facts.

....

A factual basis may also be established through witnesses’ testimony, or a prosecutor reading police reports or statements of evidence.

Id. at ¶¶20-21 (citations omitted).

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- (3) To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty;
 - (4) To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused;
 - (5) To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him; and
 - (6) To personally ascertain whether a factual basis exists to support the plea. (Citations omitted.)

The record establishes that the circuit court conducted an exceptionally thorough plea colloquy, carefully complying with WIS. STAT. § 971.08 and *Bangert*.

All statutory references are to the 1999-2000 version unless otherwise noted.

¶22 The record demonstrates that the circuit court properly determined that several sources provided a factual basis for first-degree intentional homicide. WIS. STAT. § 940.01.² In response to the court’s questioning at the plea hearing, Newago recalled being alone at the center with the victim and hitting her over the head with a beer bottle. The court extensively questioned Newago to ascertain that his confession was voluntarily made after Newago understood and waived his *Miranda* rights. Newago conceded giving a voluntary, signed statement.

¶23 Newago’s written confession admitted that in the early morning hours, after partying with Inga, they walked to a community center and, after he broke into the locked building, she followed him inside. After talking awhile, Newago hit Inga on the head with a beer bottle and she fell to the floor. Newago stated that he grabbed a butcher knife from the kitchen and stabbed Inga more than once. He stated that he partially disrobed her, engaged in sexual intercourse and dragged her body to a washroom. He then used a hose that was connected to a faucet to insert into her vagina and flushed out evidence of his semen. He then ran home and obtained a ride to Green Bay.

¶24 The physical evidence corroborated Newago’s confession. The medical examiner’s report states that Inga was discovered in a partial state of undress in a janitor’s closet. Examination revealed one blunt force injury on the back of the head and twenty-four sharp force injuries about the face, head, neck, hands, lung, rib cage and liver and body, causing death by exsanguination.

² WISCONSIN STAT. § 940.01(1), entitled “First-degree intentional homicide,” with exceptions not material here, provides: “[W]hoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.”

¶25 Physical evidence recovered included a kitchen knife found in a men's bathroom sink, and a piece of metal removed from a wound on the victim. The piece of metal was consistent with being the tip of the kitchen knife blade. Forensic testing revealed Inga's blood on the knife. Her blood was also identified on a table, floor, palm print and window. The State Crime Laboratory also identified three bloody palm prints as Newago's prints.

¶26 The record reflects that the circuit court followed the proper procedure for accepting a guilty plea and correctly determined that a factual basis for the plea was established. We conclude, therefore, that Newago has not demonstrated manifest injustice required to withdraw his guilty plea.

¶27 Newago contends, nonetheless, that psychological testing revealed his borderline intellectual functioning. The record fails to suggest, however, that Newago's low intellectual functioning in any way impaired the voluntariness of his plea or his ability to participate in his own defense.

¶28 Newago further argues that "[a] statement given to the police while a defendant is in custody without benefit of counsel is not sufficient to establish an element of a crime that the defendant has denied in his plea colloquy." This argument suffers from a variety of defects. First, it is unaccompanied by legal authority. See *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). Second, it rests on a faulty premise. A lack of recall is not the equivalent of a denial. There is no showing that Newago denied any element of the offense. A claimed inability to remember does not require a refusal of the plea where the evidence is clear that the defendant committed the crime. "[A]mnesia is not a legal defense to the crime." *Zebrowski v. State*, 50 Wis. 2d 715, 727, 185 N.W.2d 545 (1971). In *Zebrowski*, our supreme court held that there was credible

evidence that the defendant stabbed the deceased, and “[t]he defendant could be found guilty of murder whether or not he was later able to remember stabbing the deceased.” *Id.*

¶29 Here, Newago’s bloody palm prints unequivocally placed him at the crime scene, and Newago admitted to recalling his initial blow to Inga’s head. At the postconviction hearing, the circuit court correctly summarized the issue as follows:

The assertion is that because Mr. Newago could not remember killing [Inga], that he therefore couldn’t voluntarily [plead guilty]. But that is not what the statute requires. The statute requires that the Circuit Court make inquiry as satisfies it that the defendant in fact committed the crime charged.

¶30 We agree with the circuit court’s analysis and conclusion. Newago implies that an exculpatory inference that he lacked intent to kill may be drawn from his claim of lack of memory. While it is doubtful that a lack of memory would support the exculpatory inference, Newago’s suggestion lacks merit in any event. “[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one.” *State v. Black* 2001 WI 31, ¶16, 624 N.W.2d 363. Because inculpatory inferences as to the elements of the offense may be drawn from the facts of the record, a factual basis exists for Newago’s plea to first-degree intentional homicide.

2. Assistance of Counsel

¶31 Next, Newago argues that he was denied effective assistance of counsel. Unaccompanied either by citation to legal authority, or expert witness testimony, Newago contends that no reasonable attorney would advise his client to plead guilty to a homicide that the client did not recall committing. We are unpersuaded. In order to show ineffective assistance of counsel, a defendant must establish deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). A strategic choice made after a thorough investigation of law and facts relevant to plausible options “are virtually unchallengeable”

¶32 At the postconviction hearing, counsel testified to the scope of his investigation and his weighing of the various options. He explained his reasoning as follows:

First of all, the District Attorney had made a proposal to me that he would agree to only charge one count of first-degree intentional homicide and he would not be filing charges as to the any number of different felonies that could have been charged out, some of which had to do with alleged sexual and a number of other things ... apart from any statements that [Newago] made ... police had [Newago's] palm prints in the victim's blood, ... were able to see where her body was and where the body had been dragged back into the janitor's closet, and his palm prints, according to the State Crime Lab, appeared on either side of the body in her blood.

Additionally, there was ... other evidence that they found at the scene, including the knife and the evidence that they gathered in this janitor's closet.

....

And from a tactical perspective, it was clear to me that the chance that [Newago] was going to be convicted in this case was overwhelming. The evidence was overwhelming, aside from his confession.

¶33 Defense counsel testified that additional charges could have included kidnapping, sexual assault, and burglary. Because of Newago's intellect, age, and

potential rehabilitation in prison, counsel thought that the best chance for Newago would be a life term with the possibility of parole. “The best chance of him ever seeing the outside again as a free person was to take the course that we did.”

¶34 We agree with the circuit court that the record fails to establish deficient performance on the part of defense counsel. Accordingly, the circuit court correctly denied Newago’s claim of ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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

