COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2505-CR **Cir. Ct. No. 2006CF5835**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA LEE OLIVAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joshua Lee Olivar pled guilty to second-degree reckless homicide, party to a crime, *see* WIS. STAT. §§ 940.06(1) and 939.05

(2005-06).[1] The court imposed a bifurcated sentence of twenty years, comprised of fifteen years of initial confinement and five years of extended supervision. Olivar filed a postconviction motion to withdraw his guilty plea in which he argued that the plea colloquy was defective because the court did not adequately inform Olivar that it was not bound by the sentencing recommendations of the parties, *see* ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14 (a circuit court is required to personally advise the defendant it is not bound by a plea agreement), and that his trial counsel was ineffective.[2] After an evidentiary hearing, the circuit court denied Olivar's motion. Olivar appeals. Because the plea colloquy satisfied statutory and case law requirements, we affirm.

BACKGROUND

¶2 On October 14, 2006, Olivar was one of several persons involved in a gang-related street fight in which Gabriel Lyons was beaten to death. The criminal complaint alleged that Olivar kicked Lyons in the head and ribs and that when asked by a bystander what he was doing, Olivar replied, "I'm stomping his fucking head in, what does it look like I'm doing." Olivar also rifled through Lyons's pockets and took a package of cigarettes. Olivar was initially charged with being party to the crime of first-degree reckless homicide.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Olivar does not raise a challenge to the effectiveness of trial counsel on appeal. Therefore, we deem that issue abandoned. *See* ***State ex rel. Peckham v. Krenke***, 229 Wis. 2d 778, 782 n.3, 601 N.W.2d 287 (Ct. App. 1999), *overruled on other grounds by* ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611 (An issued raised in the trial court but not argued in a party's appellate brief is deemed abandoned and will not be considered.).

¶3 Olivar pled guilty to an amended charge of second-degree reckless homicide, party to a crime. In exchange for Olivar's guilty plea to the amended charge, the State agreed to "leav[e] sentencing to the court." Olivar expressly agreed with the State's recitation of the plea agreement.

¶4 The court then conducted the following colloquy with Olivar:

> THE COURT: Mr. Olivar, I will be asking a lot of questions. If you don't understand a question let me know. If you need to stop and talk to your attorney at anytime, you may do so; do you understand that?
>
> THE DEFENDANT: Yes, sir, your Honor.
>
> THE COURT: Okay. You are charged with second-degree reckless homicide on October 14th, 2006, at 1502 West Arthur Avenue in the City of Milwaukee that you recklessly caused the death of Gabriel Lyons, another human being, contrary to Wisconsin Statutes Sec. 940.06(1); do you understand that charge?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: What is your plea to that charge?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: And do you understand if I accept your plea and find you guilty you face a maximum penalty of 25 years in prison and a fine of up to $100,000; do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And do you understand the court has the power to impose any penalty up to and including the maximum in this case?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: The State has made a recommendation but, and do you understand the court has the power—I will

> listen to what the State tells me, listen to what your attorney says and the court has the power to impose any penalty up to and including the maximum, correct?
>
> THE DEFENDANT: Yes.
>
> ….
>
> THE COURT: And in front of me I have a couple of documents. This is an Addendum to the Plea Questionnaire as well as the Plea Questionnaire itself. They appear to have signatures. Are those your signatures on the documents?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Did you sign them because you went over them line-by-line with the assistance of your attorney?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: She was pretty thorough with you, wasn't she?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Now are you able to read English?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And because you didn't complete high school, correct?
>
> THE DEFENDANT: No.
>
> THE COURT: But you are able to read a lot of these documents, and if there was something you didn't understand, did you ask your attorney to explain it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you sign these documents and answer these questions because you are being truthful?
>
> THE DEFENDANT: Yes.

The Plea Questionnaire referred to by the court included the following "understanding[]": "I understand that the judge is not bound by any plea

agreement or recommendations and may impose the maximum penalty."[3] The Questionnaire also contains the following "statement" of Olivar, appearing immediately above Olivar's signature: "I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney (if represented). I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty."

DISCUSSION

¶5 To withdraw a no contest plea after sentencing, Olivar must satisfy two threshold requirements. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 140-41, 569 N.W.2d 577 (1997). First, he must make a prima facie showing that his plea was accepted without the trial court's conformance with WIS. STAT. § 971.08 and other court-imposed mandatory duties. *See* ***Van Camp***, 213 Wis. 2d at 140-41. Second, he must allege that he did not know or understand the information that should have been provided at the plea hearing. *See* ***id.*** at 141. Among the court's mandatory duties is to "[e]stablish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement." ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (footnote omitted). The sufficiency of a plea colloquy presents a question of law. ***State v. Hoppe***, 2009 WI 41, ¶17, __ Wis. 2d __, 765 N.W.2d 794.

[3] Olivar's trial counsel inserted an incorrect amount for the maximum fine—$25,000 instead of the correct fine of $100,000. *See* WIS. STAT. § 939.50(3)(d) (2005-06). Because Olivar's sentence did not include a fine, counsel's error did not prejudice Olivar.

¶6 Olivar contends that the circuit court "did not adequately inform the defendant that it was not bound by the sentencing recommendations of the parties." In ***Hampton***, 274 Wis. 2d 379, ¶20, the supreme court held that "the circuit court must advise the defendant personally on the record that the court is not bound by any plea agreement and ascertain whether the defendant understands the information." The court must "make personal inquiry of the defendant to determine whether the defendant understands that the court is not bound by the terms of the plea agreement." ***Id.***, ¶43. The court must "assure that the defendant has enough information and understanding of the court's independent role in sentencing, notwithstanding any plea agreement." ***Id.*** The court need not recite "magic words" or follow "an inflexible script." ***Id.***

¶7 Olivar contends that the circuit court "did not … specifically advise the defendant that it could reject the sentencing recommendations of the parties." Olivar states that the court did "not address, in any substantive way, the interrelationship between the recommendations that the parties will make to the court and the court's power, authority and, if circumstances warrant it, the court's duty to exceed those recommendations" and that the court did "not inform the defendant that the [c]ourt's sentencing options are *not* limited to a choice between the State's recommendation or any recommendation of the pre-sentence report and the defense attorney's recommendation." (Emphasis in original.)

¶8 The record of the colloquy defeats Olivar's contention. On three occasions, the circuit court expressly informed Olivar that it could impose the maximum penalty. The court expressly told Olivar that it would "listen to what the State tells me, [and] listen to what your attorney says" but that it "ha[d] the power to impose any penalty up to and including the maximum." Although the court did not utter the precise word "recommendation," the court clearly advised

Olivar that it was not required to impose any recommended sentence and, stated conversely, that it could reject any recommended sentence. Accordingly, the plea colloquy was adequate and, therefore, the circuit court properly denied Olivar's motion to withdraw his guilty plea.[4]

By the Court.—Judgment and order affirmed.

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

[4] Even though the colloquy was not deficient on its face, the circuit court held an evidentiary hearing at which Olivar and his trial attorney testified. After that hearing, the circuit court reached the same conclusion as we do, that is, "[t]he plea colloquy was adequate and shows the plea was entered in compliance with the requirements that the defendant made a knowing and intelligent waiver of his rights and entered the plea." Additionally, the court found that Olivar's credibility was "undermined by … selective recall," and the court rejected Olivar's postconviction testimony that he did not understand that the court was not bound by the plea agreement. The circuit court is the sole judge of witness credibility. *See* ***State v. Plank***, 2005 WI App 109, ¶11, 282 Wis. 2d 522, 699 N.W.2d 235.