COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2461-CR **Cir. Ct. No. 2007CF1048**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSIE L. HOLLIMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Jessie L. Hollimon has appealed from a judgment convicting him of one count of failing to comply with the requirements of the sex

offender registry in violation of WIS. STAT. § 301.45(6)(a)1. (2007-08),[1] and from an order denying his motion for postconviction relief. We affirm the judgment and the order.

¶2 Hollimon was convicted upon a plea of no contest. The trial court sentenced him to three years, consisting of one year of initial confinement and two years of extended supervision, consecutive to a nine-month sentence imposed after revocation of probation for misdemeanor battery in another case. The nine-month sentence was imposed at the same time as the sentence for failing to comply with the requirements of the sex offender registry.

¶3 After sentencing, Hollimon moved to withdraw his plea of no contest or, alternatively, for modification of his sentence. The trial court held a hearing on Hollimon's motion and denied it in its entirety.

¶4 Hollimon moved for plea withdrawal after sentencing and, therefore, was required to demonstrate by clear and convincing evidence that plea withdrawal was necessary to correct a "manifest injustice." *See* ***State v. Nawrocke***, 193 Wis. 2d 373, 378-79, 534 N.W.2d 624 (Ct. App. 1995). The "manifest injustice" test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea. ***Id.*** at 379. Under a manifest injustice standard of review, the trial court's exercise of its discretion when deciding a postsentence motion for plea withdrawal will be affirmed if the record shows that legal standards were correctly applied to the facts and a reasoned conclusion was reached. ***Id.*** at 381.

[1] All references to the Wisconsin statutes are to the 2007-08 version.

¶5 Hollimon's motion for plea withdrawal was of the "***Nelson*/*Bentley*** variety." *See* ***State v. Basley***, 2006 WI App 253, ¶4, 298 Wis. 2d 232, 726 N.W.2d 671 (citing ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)). That is, Hollimon did not argue that the plea colloquy failed to satisfy the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), but instead sought to withdraw his plea for reasons that are not apparent from the plea colloquy record. ***Basley***, 298 Wis. 2d 232, ¶4. As explained in ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48, "[a] defendant invokes ***Bangert*** when the plea colloquy is defective; a defendant invokes ***Nelson*/*Bentley*** when the defendant alleges that some factor extrinsic to the plea colloquy … renders a plea infirm." Under ***Nelsen*/*Bentley***, the defendant must show by clear and convincing evidence that the plea represents a manifest injustice. ***State v. Brown***, 2006 WI 100, ¶42, 293 Wis. 2d 594, 716 N.W.2d 906.

¶6 A plea of no contest violates due process if the defendant did not have a full understanding of the nature of the charge against him. ***State v. Bollig***, 2000 WI 6, ¶47, 232 Wis. 2d 561, 605 N.W.2d 199. To be guilty of failing to comply with the requirements of the sex offender registry, a defendant must knowingly fail to comply. WIS. STAT. § 301.45(6)(a). *See also* WIS JI—CRIMINAL 2198.

¶7 In support of his motion for plea withdrawal, Hollimon alleged that his no contest plea was unknowingly and unintelligently entered because he did not understand that to be guilty of the charged offense he had to knowingly fail to comply with the requirements of the sex offender registry. He repeats this argument on appeal, contending that a manifest injustice occurred because the trial court proceeded to sentencing despite statements made by Hollimon to the

presentence report (PSI) writer and his counsel indicating that he did not understand that his failure to comply with the sex offender registration requirements had to be a knowing failure. Because a manifest injustice occurs if a defendant enters a no contest plea without understanding the charge, Hollimon contends that he is entitled to withdraw his no contest plea. He also contends that, because his statements as set forth at the sentencing hearing support a conclusion that he is innocent of violating WIS. STAT. § 301.45(6)(a)1., the trial court violated his due process rights by proceeding to sentencing, entitling him to withdraw his no contest plea.

¶8 No basis exists to disturb the trial court's order denying relief. When a defendant alleges a reason for plea withdrawal, he must also show that the reason actually exists. ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). "In order to assess whether a reason actually exists, the circuit court must engage in some credibility determination of the proffered reason." ***Id.*** Not every defendant who states that he did not understand his plea is entitled to withdraw the plea. ***Id.*** Because the reason given for withdrawal must be genuine, the trial court must determine whether the defendant's reason is credible, plausible or believable. ***Id.*** at 291-92.

¶9 In denying Hollimon's motion, the trial court implicitly found that he had failed to prove that he did not understand that his failure to comply with the sex offender registry requirements had to be a knowing failure. The trial court noted that, at the plea hearing, Hollimon acknowledged that he had reviewed the plea questionnaire and waiver of rights form, which included an attached jury

instruction form setting forth the elements of the charge.[2] The trial court noted that the elements were circled on the form, and that element number three expressly stated that the State was required to prove that the defendant "knowingly failed" to provide the required information. The trial court pointed out that, at the plea hearing, it asked Hollimon whether he understood that he was giving up his right to a trial at which the State would have the burden of proving beyond a reasonable doubt each of the three elements that Hollimon had reviewed, and Hollimon indicated he understood.

¶10 In expressing its disbelief that Hollimon did not knowingly enter his plea, the trial court also pointed out that although Hollimon chose not to speak at sentencing, he had written a letter to the trial court prior to sentencing requesting leniency. The trial court noted that nothing in the letter indicated that Hollimon did not understand the reporting requirements.

¶11 It is also noteworthy that Hollimon chose not to testify at the postconviction hearing. He thus did not testify under oath that he did not understand the charge against him. Instead, he relied on statements made by him to the PSI writer and to his trial counsel as related by his trial counsel at sentencing, indicating that he misunderstood the requirements of the sex offender registry. However, in light of Hollimon's failure to testify at the postconviction hearing and the remainder of the record, the trial court was entitled to find that his statements were incredible. As indicated in its prior sentencing comments, the

[2] Although the guilty plea questionnaire and waiver of rights form refers to an attached sheet explaining the elements of the offense, the attachment is not included with the form that was transmitted to this court as part of the record on appeal. However, neither party has disputed the trial court's statement that the jury instruction setting forth the elements was attached, and we therefore accept that statement as true.

trial court believed that Hollimon's failure to comply with the registry requirements resulted from his decision to abscond from probation and avoid detection by his agent, rather than a failure to understand his obligations under the sex offender registry law. It therefore found that Hollimon was more credible at the plea hearing, when he acknowledged understanding the elements of the offense. Based on the record and its findings, the trial court properly concluded that Hollimon failed to prove by clear and convincing evidence that plea withdrawal was necessary to correct a manifest injustice. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶65-66, 317 Wis. 2d 161, 765 N.W.2d 794.

¶12 Hollimon also contends that he is entitled to resentencing because the trial court considered an inherently biased PSI. In support of this claim, he relies on the fact that the PSI writer was the agent who supervised him on probation for the battery and was the person who initiated the complaint to the department of corrections sex offender registry that led to this prosecution. He contends that actual bias was also demonstrated by the agent's statements in the PSI, indicating that he believed Hollimon failed to comply with the sex offender registry requirements because he had absconded from probation supervision and wanted to avoid being found, not because he did not understand his registry obligations.

¶13 A PSI must be accurate, reliable and objective. ***State v. Suchocki***, 208 Wis. 2d 509, 518, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. "Because of the requirement that the report be objective, it is of vital importance that the author of the report be neutral and independent from either the prosecution or the defense." ***Suchocki***, 208 Wis. 2d at 518.

¶14 A PSI cannot be considered inherently biased merely because the PSI writer is also the defendant's supervising agent. *See* ***State v. Thexton***, 2007 WI App 11, ¶5 and n.4, 298 Wis. 2d 263, 727 N.W.2d 560. Moreover, standing alone, the mere fact that a defendant's supervising agent takes steps to investigate whether the defendant is committing a crime by failing to fulfill his legal obligations and reports a violation to the pertinent authorities does not demonstrate inherent bias.

¶15 Hollimon contends that even if the PSI does not demonstrate inherent bias, it reveals actual bias. In support of this argument, he relies on the PSI writer's expressed belief that Hollimon avoided complying with the sex offender registry requirements because he had absconded and did not want to be found, not because he did not understand the requirements. However, actual bias is not shown merely because a PSI writer relates his or her impressions of the defendant's truthfulness or culpability for the offense. Moreover, Hollimon was free to address the contents of the report and to present whatever additional information he wanted the trial court to consider at sentencing. Since he did not establish that any information provided by the PSI writer was inaccurate, no basis exists to conclude that he is entitled to resentencing based on the PSI. *Cf.* ***Tiepelman***, 291 Wis. 2d 179, ¶2 (a defendant who moves for resentencing on the ground that the trial court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate and that the trial court actually relied on the inaccurate information).

¶16 Hollimon's final argument is that the trial court failed to consider proper sentencing criteria, resulting in a sentence that was excessive. Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v.***

Gallion, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this court follows a strong and consistent policy of refraining from interference with the trial court's decision. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant. ***Id.***

¶17 To properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. The sentence imposed in each case should "call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶44 (citation omitted). Probation should be considered as the first alternative and should be the disposition unless confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense. ***Id.*** Nevertheless, the weight to be given each sentencing factor remains within the wide discretion of the trial court. ***Stenzel***, 276 Wis. 2d 224, ¶9. In addition, the trial court need discuss only those factors relevant to the particular case. ***Ziegler***, 289 Wis. 2d 594, ¶23.

¶18 Applying these standards here, we conclude that no basis exists to disturb the sentence. The trial court fulfilled its responsibility of providing a rational explanation of its sentencing decision, founded on proper sentencing factors. It based its decision on Hollimon's extraordinarily lengthy criminal history, his repeated failure to comply with conditions of supervision, and the seriousness of the sexual assault underlying the sex offender registry reporting

requirement. While noting that in some cases failure to comply with registry requirements could be "viewed just as kind of a paper offense," it believed the crime was more serious here, particularly in light of Hollimon's lengthy criminal history and his repeated failures to satisfy the requirements of supervision and avoid revocation. Based on these factors, it concluded that the protection of the public necessitated confinement and ordered initial confinement of one year followed by two years of extended supervision.

¶19 Because the trial court considered relevant sentencing factors and reached a conclusion that a reasonable judge could reach, no basis exists to conclude that it failed to properly exercise its discretion. The mere fact that the trial court failed to give particular factors the weight that Hollimon wished does not constitute an erroneous exercise of discretion.[3] *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶20 In upholding Hollimon's sentence, we also reject his claim that his sentence was excessive. To establish that a sentence is excessive, a defendant must show that the sentence is so excessive and unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Hollimon's sentence was well within the limits of the maximum sentence that could have been imposed in

[3] We also reject Hollimon's argument that, because the sentencing after revocation for the misdemeanor battery and the sentencing in this case occurred together, the trial court gave too much emphasis to the fact that Hollimon absconded from supervision on the battery. Hollimon's absconding was a proper factor for the trial court to consider. In addition, the parties had agreed that the two sentencings could occur together. Hollimon therefore waived any right to object to the joint hearing on appeal. *See* ***State v. Lipke***, 186 Wis. 2d 358, 369 n.3, 521 N.W.2d 444 (Ct. App. 1984).

this case and therefore cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

By the Court.—Judgment and order affirmed.

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