COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0120-CR **Cir. Ct. No. 00 CF 4851**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY O. BATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON and DANIEL L. KONKOL, Judges. *Affirmed.*

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

¶1 PER CURIAM. Jeffrey O. Bates appeals from a judgment of conviction entered after he pled guilty to one count of theft of movable property,

see WIS. STAT. § 943.20(1)(a) (1999–2000).[1] He also appeals from an order denying his postconviction motion to withdraw his plea or, in the alternative, to modify his sentence. Bates alleges that: (1) his plea was not knowingly, voluntarily, and intelligently entered because it was based on an illusory plea bargain; (2) the trial court sentenced him based on inaccurate information; and (3) an illusory forgery charge is a new factor warranting sentence modification. We affirm.

I.

¶2 Bates pled guilty to one count of theft after he cashed a financial-aid check that he admits was issued to his son, Jeffrey O. Bates II. Indeed, in his reply brief, Bates Sr. "admits now that the money was not his." At the time of the incident, Bates II was a student at the University of Wisconsin-Milwaukee. The University mailed a financial-aid check for $2,192.20 to 3335 North 49th Street. The check was payable to "Bates. Jeffrey O'Neal." Bates II no longer lived at that address, however, because he had moved to the eastside of Milwaukee to be closer to his classes at the University.

¶3 When the check arrived, Bates Sr., who was then living at 3335 North 49th Street, cashed the check at Big Deal Check Cashiers. He endorsed the check "Jeffrey Bates," and used his own picture identification and social security card as identification.

¶4 Bates Sr. was initially charged with one count of uttering a forged writing, a Class C felony punishable by up to fifteen years in prison. *See* WIS.

[1] All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

STAT. §§ 943.38(2) and 939.50(3)(c). The case was plea-bargained and the State reduced the charge to theft of movable property, a Class E felony punishable by up to five years in prison.[2] *See* WIS. STAT. §§ 943.20(3)(b) and 939.50(3)(e). Bates Sr. pled guilty and the trial court sentenced him to four and one-half years in prison, to consist of eighteen months of initial confinement and three years of extended supervision.

II.

¶5 Bates Sr. alleges that his plea was not knowingly, voluntarily, and intelligently entered because it was based on what he argues was an illusory plea bargain. To withdraw a guilty plea after sentencing, the defendant has the initial burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***Birts v. State***, 68 Wis. 2d 389, 392–393, 228 N.W.2d 351, 353 (1975). A manifest injustice occurs when the defendant enters a guilty plea that is not knowing, voluntary, and intelligent. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815, 817 (Ct. App. 1995). Whether a defendant has presented a *prima facie* case that a plea was entered knowingly, voluntarily, and intelligently is a question of constitutional fact that we review *de novo*. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12, 30 (1986).

¶6 Bates Sr. alleges that the plea bargain was illusory because the charge of uttering a forged writing cannot be legally sustained because the name that he wrote was his name. We thus turn to examine what is a forged writing under WIS. STAT. § 943.38(2). Interpretation of a statute is a question of law that

[2] Theft of movable property is a Class E felony if the value of the property exceeds $1000, but is not more than $2500. WIS. STAT. § 943.20(3)(b).

we also review *de novo*. ***State v. Entringer***, 2001 WI App 157, ¶6, 246 Wis. 2d 839, 631 N.W.2d 651.

¶7 WISCONSIN STAT. § 943.38(2) provides "[w]hoever utters as genuine or possesses with intent to utter as false or as genuine any forged writing or object mentioned in sub. (1), knowing it to have been thus falsely made or altered, is guilty of a Class C felony." There are four elements to uttering a forged writing: (1) the writing is one by which legal rights or obligations are created or transferred; (2) the writing was falsely made or altered; (3) the defendant uttered the writing as genuine; and (4) the defendant knew the writing was falsely made or altered. WIS JI—CRIMINAL 1492.

¶8 Bates Sr.'s allegations concern the second element, that the writing was falsely made or altered. This element "requires that the endorsement was forged, that is, falsely made." WIS JI—CRIMINAL 1492; *see also* ***State v. Lampe***, 26 Wis. 2d 646, 650, 133 N.W.2d 349, 352 (1965) ("To constitute forgery … the information must charge the check made by the defendant purported to have been made by another person."). Here, Bates Sr. contends that he did not create a forged writing because he signed his own name and used his own identification to cash the check. Thus, he claims that he could not have been guilty of forgery because he "did not pretend to be someone else of the same name … at worst [he] took advantage of an ambiguity but there was nothing on the check itself that 'purported to be what it is not.'" We disagree.

¶9 Bates Sr. does not allege that he believed that the check was issued to him.[3] Thus, when Bates Sr. signed the check, he endorsed it not in his name, but in the name of the payee, his son. This satisfies the requirement that a writing be falsely made—the check was made to appear as though another person, the legitimate payee, Bates II, had endorsed it. *See* ***State v. Czarnecki***, 2000 WI App 155, ¶13, 237 Wis. 2d 794, 615 N.W.2d 672; *see also* ***United States v. Young***, 282 F.3d 349, 351 (5th Cir. 2002) ("'[F]orgery' always includes signing one's own name with the intent of having the signature taken as that of another person with the same name.").

¶10 Contrary to Bates Sr.'s contention, the facts that he has the same name as the payee and that he used his own identification to cash the check does not alter the essential fact that he falsely endorsed the check. *See* ***Peoples Bank & Trust Co. v. Fidelity & Cas. Co. of New York***, 57 S.E.2d 809, 815 (N.C. 1950) ("There is no logical reason whatever that we can see that would confer immunity from the charge of forgery upon a person who signs his own name to a check with the fraudulent intent that it should be taken as the act of another person of like name."); *see also* ***Young***, 282 F.3d at 352 ("That [the defendant] was fortunate enough to find someone with an identical name, making the deception easier to accomplish and more difficult to detect, does not provide any reason for treating her differently from other people who endorse checks that do not belong to

[3] In his reply brief, Bates Sr. alleges that he could not have been guilty of forgery because the University mistakenly made him the payee of the check. He also "admits," however, "that the money was not his and [he] has no objection to repaying it." This argument is unsupported and undeveloped—Bates Sr. does not allege why the University's alleged mistake exempts him from the forgery statute, especially in light of his admission that the "money was not his." Accordingly, we decline to address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court can "decline to review issues inadequately briefed").

them."). Thus, the plea bargain was not illusory—Bates Sr. was properly charged with uttering a forged writing. Accordingly, Bates Sr. fails to show by clear and convincing evidence that his plea was not entered knowingly, voluntarily, and intelligently.

¶11 Bates Sr. also alleges that the trial court erroneously sentenced him when it considered the allegedly inaccurate information that he could have been sentenced for up to fifteen years if the case had not been plea bargained. He also appears to claim that the trial court "overstated" the significance of the dismissed forgery charge when it sentenced him. Again, we disagree. The trial court acted well within its discretion when it considered a charge, albeit briefly at most, that was supported by what Bates Sr. admitted he had done but because of the plea bargain was reduced to a less serious charge.[4] *See* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377, 381 (1990) (evidence of unproven offenses may be considered by the sentencing court).

¶12 Moreover, the trial court considered the appropriate sentencing factors. The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[5]

[4] Contrary to Bates Sr.'s allegation that it is "clear" that the trial court relied on the State's sentencing recommendation, the only reference the trial court made to the possible fifteen-year sentence was when it stated: "The Court is going to do the following, and the Court is going to give some consideration, however, to Mr. Bates' request and I'm going to deviate somewhat from the recommendation here." Earlier in the sentencing proceeding, the State had informed the court that the "case was originally charged as a felony forgery. It was amended to a Class E felony theft." The State then recommended the maximum sentence of five years in prison.

[5] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the (continued)

State v. Sarabia, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984). The weight to be given to each of these factors is within the wide discretion of the sentencing court. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984). Here, the trial court considered the seriousness of the offense: "certainly this may have been an act of desperation because of your involvement with alcohol and drugs, it certainly doesn't excuse your behavior." The trial court also considered Bates Sr.'s character, including his: prior convictions, age, education, psychological history, and employment history. The trial court further considered the interests of the community: "I cannot place you on probation … at this time because you have demonstrated that you cannot be supervised in the community … your problems with drugs and alcohol are out of control." Finally, there is no evidence that the trial court "overstated" the significance of the dismissed forgery charge. Accordingly, the trial court did not erroneously exercise its sentencing discretion.[6]

By the Court.—Judgment and order affirmed.

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

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victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989).

[6] Bates Sr. also alleges that the trial court's reliance on the allegedly illusory forgery charge is a new factor warranting sentence modification. We disagree. As noted above, the plea bargain was not illusory because Bates Sr. was properly charged with uttering a forged writing. Moreover, this factor existed at the time of sentencing and was properly considered by the trial court, albeit briefly, at sentencing. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975) (A new factor is a "fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.").