COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 95-0496-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT GORDON,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed.*

Before Sullivan, Fine and Schudson, JJ.

FINE, J. Robert Bryant Gordon appeals, *pro se*, from judgments convicting him of two counts of attempted first-degree intentional homicide, *see* §§ 940.01(1) & 939.32, STATS., one count of first-degree recklessly endangering safety, *see* § 941.30(1), STATS., and one count of robbery, as party to a crime, *see* §§ 943.32(1)(a) & 939.05, STATS., and from the trial court's order denying him postconviction relief. Although the judgments were purportedly entered on

Gordon's guilty plea, the record reveals that he did not, in fact, plead guilty to any of the crimes charged. Accordingly, we reverse.

I.

On August 4, 1993, an Information was filed by the Milwaukee County district attorney charging Gordon with two counts of attempted first-degree intentional homicide, one count of recklessly endangering safety, and one count of robbery, as party to a crime. On November 23, 1993, Gordon signed a guilty plea questionnaire and waiver of rights form, indicating that he wished to plead guilty to all of the charges, and appeared before the trial court, the Honorable Robert W. Landry.[1] At that appearance, Gordon's trial counsel told the trial court that it was his "understanding that pleas will be entered today as to all four counts as they appear in the information." After recounting the charges, the trial court had the following colloquy with Gordon:

> THE COURT: ... It's my understanding that after discussing this matter with your attorney, you wish to enter a guilty plea to all four of these counts; is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you doing this freely and voluntarily?
>
> THE DEFENDANT: Yes.
>
> ....
>
> THE COURT: You understand that by pleading guilty you're giving up rights that you have under the constitution, very important rights....

[1] Judge Landry conducted the guilty-plea hearing. Judge Kremers imposed sentence and denied Gordon's motion for postconviction relief.

THE DEFENDANT: Yes.

THE COURT: Are you pleading guilty to this offense?

THE DEFENDANT: Pleading guilty because-- Because I'm--

THE COURT: Are the contents -- are the contents of the criminal complaint which you-- Have you gone over the contents of the criminal complaint--

THE DEFENDANT: Yes.

THE COURT: --with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: Are they substantially true and correct?

THE DEFENDANT: Yeah, they true.

....

THE COURT: Can the attorneys agree and stipulate the contents of the criminal complaint are substantially true and correct?

MR. MURPHY [the assistant district attorney]: Yes, Your Honor.

THE COURT: Mr. Hart [Gordon's trial counsel], have you gone over all of the elements of the offense -- each one of the separate offenses with your client?

MR. HART: Yes, I have, Your Honor.

THE COURT: And are you satisfied that taking specially into account his experience, his youth, and all the other factors, the complexity of four counts,

> are you satisfied that all of these things have been fully explained to him?
>
> MR. HART: Yes, Your Honor....
>
> ....
>
> THE COURT: Very well. Based upon the stipulation previously referred to, the statement of the witness, the contents of the complaint, and the information, and based further upon the entire record in these proceedings, including the colloquy between court and the -- Mr. Robert Bryant Gordon, the Court makes a finding of guilty to each one of the four counts. Judgement may be entered accordingly....

II.

In Wisconsin, a judgment of conviction may only be "entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest." Section 972.13(1), STATS.[2] A defendant who pleads guilty crosses the Rubicon; it is extremely difficult to retreat. *See* ***State v. Walberg***, 109 Wis.2d 96, 103, 325 N.W.2d 687, 691 (1982) ("Once the defendant waives his constitutional rights and enters a guilty plea, the state's interest in finality of convictions requires a high standard of proof to disturb that plea."), *denial of habeas corpus reversed on other grounds*, ***Walberg v. Israel***, 766 F.2d 1071 (7th Cir. 1985), *cert. denied*, 474 U.S. 1013. A guilty plea is not to be lightly taken; it may not be inferred from ambiguous conduct.

There is no dispute here but that Gordon intended to plead guilty, and that the trial court ascertained that Gordon's desire to plead guilty was

[2] The Wisconsin Supreme Court has also accepted the so-called "***Alford*** plea"—derived from ***North Carolina v. Alford***, 400 U.S. 25 (1970) (In a capital case, the Constitution is not violated when a defendant accepts conviction even though he or she simultaneously claims to be innocent.). *See* ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995).

voluntary. The simple fact, however, is that Gordon did *not* plead guilty, either to all of the charges for which he was convicted or to any of them. At most, his response "Pleading guilty because-- Because I'm--" was an explanation as to why he wanted to plead guilty. As Gordon's reply brief cogently puts it: "A wish to enter a plea is not an entry of that plea. Until the defendant's [*sic*] enters his plea, no Judgment can be rendered. He or she is entitled to change his or her mind at any time prior to that affirmative entry of the plea." (Emphasis added.) We agree.[3]

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[3] We thus reject the State's attempt to characterize this case as being one where a defendant seeks to withdraw a plea subsequent to imposition of sentence, where "manifest injustice" must be shown. *See* ***State v. Reppin***, 35 Wis.2d 377, 385–386, 151 N.W.2d 9, 13–14 (1967). Gordon is not seeking to withdraw his guilty pleas; he seeks vacatur of judgments entered on guilty pleas that were not made.

This is not the first time that we have seen this issue on appeal. If Judge Landry had taken an extra moment, and if the prosecutor had been more alert, this issue would not be here. Trial courts should ask defendants whether they wish to plead guilty to charges that are specifically identified, and should require a definite response (For example: "Do you wish to plead guilty to the charge of (specific crime charged)? How do you plead to that charge?"). To paraphrase Justice Oliver Wendell Holmes, trial courts "must turn square corners" when they accept guilty pleas. *See* ***Rock Island, A. & L. R. Co. v. United States***, 254 U.S. 141, 143 (1920).

The two concurring opinions object to what they term the "personalization" of the observations in this footnote. Judge Schudson correctly observes that "[t]his court's opinions most often use generic terms such as `the trial court,' `the prosecutor, and `defense counsel.'" Here, however, there are *two* trial judges; failure to specify the judge who presided over the guilty-plea hearing would, in my view, lead some readers of this opinion to conclude falsely that it was Judge Kremers who cut off the defendant as he attempted to explain why he wanted to plead guilty. Moreover, I reject the proposition lurking in both concurring opinions that those of us in the justice system are not accountable for what we do; we are.

Judicial opinions routinely identify by name not only witnesses inadvertently caught up in the legal system but police officers as well—even when the officers have, to use Justice Benjamin Nathan Cardozo's word, "blundered," thereby forcing the release of those who are guilty. *See* ***People v. DeFore***, 150 N.E. 585, 587 (N.Y. 1926), *cert. denied*, 270 U.S. 657. Moreover, all of the judges of this panel have been identified by name in the body of many decisions by the Wisconsin Supreme Court, *see e.g.*, ***Armor All Products v. Amoco Oil Co.***, 194 Wis.2d 35, 47, 533 N.W.2d 720, 724 (1995) (Judge Schudson identified as author of majority opinion issued by this court); ***Popp v. Popp***, 82 Wis.2d 755, 759, 264 N.W.2d 565, 567 (1978) (Judge Sullivan identified for action he took as a trial court judge); ***Johnson v. Calado***, 159 Wis.2d 446, 450 n.2, 464 N.W.2d 647, 649 n.2 (1991) (this writer identified for action taken as a trial court judge), and Judge

By the Court.—Judgments and order reversed.[4]

Publication in the official reports is recommended.

(..continued)
Schudson, writing for this court, identified both trial counsel and Judge Landry in the body of the opinion in ***State v. Haste***, 175 Wis.2d 1, 18, 500 N.W.2d 678, 685 (Ct. App. 1993). The public whom judges serve has a right to know which judge does what. The public's right to know, and the concomitant need for accountability, cannot be vindicated, as Judge Sullivan supposes, by relegating the readers of judicial opinions to file folders stored in some musty archive.

Judge Schudson's concurrence also opines that the "defense counsel shared responsibility with the prosecutor and judge for what should have been a lawful plea hearing." We disagree. As I have pointed out elsewhere, the plea-bargaining process all too often aligns defense lawyers with prosecutors, and against the interests of their own clients. RALPH ADAM FINE, ESCAPE OF THE GUILTY 73–75 (1986). We should not draft defense lawyers as court-room enforcers of what are either judicial or prosecutorial responsibilities. *See* § 971.08, STATS. (duty of judge); ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986) (duty of judge); § 978.05(1), STATS. (duty of district attorney to prosecute "criminal actions").

[4] We do not discuss the other issues that Gordon has raised. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

SULLIVAN, J. (*concurring*). I also agree with the majority's legal analysis and conclusion; however, I am concerned with the "personalization" of legal issues in this case. When the members of this panel, the trial judge, and the attorneys are long gone, our published opinions will remain as a testament to the legal skills and judicial temperament of all those involved. Thus, I agree with the concurrence that "appellate decisions should prominently identify judges and lawyers by name when appropriate and necessary either to address a legal issue or to bring singular praise or criticism to members of the bench and bar when deserved." Schudson, J., concur. slip op. at 1. Such personalization is neither necessary nor appropriate in this case because the identity of the judge who conducted the plea hearing is readily available to anyone by record reference.

SCHUDSON, J. (*concurring*). Although I agree with the majority's legal analysis and conclusion, I write separately to express concern about the majority opinion's personalization of the problem in this case, and the opinion's failure to include defense counsel among those responsible for assuring a proper guilty plea.

This court's opinions most often use generic terms such as "the trial court," "the prosecutor," and "defense counsel." Here, however, the majority opinion specifically names Judge Landry and assistant district attorney Murphy, criticizing the former for not "tak[ing] an extra moment," and the latter for not "be[ing] more alert." Majority slip op. at 6 n.3. Although I believe that appellate decisions should prominently identify judges and lawyers by name when appropriate and necessary either to address a legal issue or to bring singular praise or criticism to members of the bench and bar when deserved, I do not consider such personalization appropriate in this case.

Personalizing the criticism suggests that the actions of these two individuals accounted for the difficulties in this case. Although in the most obvious sense that may be so, the underlying problem goes well beyond the hurried or inadvertent conduct of a single judge or prosecutor. As the majority notes, "[t]his is not the first time that we have seen this issue on appeal." ***Id.*** Indeed, we receive a substantial number of appeals because, amazingly, some judges frequently fail to take guilty pleas in a thorough and appropriate manner, and all too few lawyers intervene to repair the damage. While we have concluded that many of these pleas do satisfy constitutional criteria, they often do so just barely, rendering understandable concern about the clarity of the process, and producing appeals that otherwise would be unnecessary. Thus, I would not want the personalization to imply that the problem we address is unusual or peculiar to the judge or the prosecutor in this case.

Finally, I disagree with the majority's implication that the responsibility for an appropriate plea proceeding resides solely with the judge and prosecutor. Certainly, if a defendant wants to plead guilty, defense counsel is professionally responsible for helping his or her client accomplish that. If, on the other hand, a defendant has any hesitation or misunderstanding, defense counsel is professionally responsible for helping his or her client understand the proceedings and for carefully determining whether a guilty plea is appropriate and desired. Although a plea proceeding remains an adversarial one, defense

counsel certainly must not contribute to or acquiesce in an unlawful plea proceeding. Thus, in this case, defense counsel shared responsibility with the prosecutor and judge for what should have been a careful and lawful plea proceeding.