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DISTRICT II

March 9, 2022

To:

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Electronic Notice

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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2020AP2091-CR State of Wisconsin v. Mark E. Adams (L.C. #2019CF200)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mark E. Adams appeals a judgment of conviction for fourth-offense operating while intoxicated (OWI) and an order denying his postconviction motion. He argues the circuit court's application of an alcohol concentration fine enhancer was not supported by a sufficient factual basis and must be vacated. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm and remand for further proceedings consistent with this order.

Adams was charged with fourth-offense OWI and operating with a prohibited alcohol concentration (PAC). According to the complaint's probable cause statement, Adams was arrested after he drove his vehicle to an oil change service center while intoxicated. Adams failed field sobriety tests, and a preliminary breath test (PBT) showed he had an alcohol level of .213. The complaint also stated that, pursuant to WIS. STAT. § 346.65(2)(am)4. and (2)(g), as a fourth-time offender Adams was subject to a $600 minimum fine that could be doubled, tripled, or quadrupled depending on his alcohol level. As relevant here, this alcohol concentration fine enhancer triples the fine if the defendant's blood alcohol concentration (BAC) is between .20 and .249 and quadruples it if the defendant's BAC is .25 or above. Sec. 346.65(2)(g)2.-3.

Adams entered into a plea agreement whereby he agreed to plead guilty or no contest to fourth-offense OWI in exchange for dismissal of the PAC charge and a bail jumping charge in another case. The State agreed to recommend a four-year term of imprisonment consisting of one year of initial confinement and three years' extended supervision, with conditions that included "4 x $600 plus costs." The plea questionnaire Adams completed similarly suggested a quadrupling of the applicable fine was appropriate, acknowledging he was subject to a $2,400 minimum fine and a maximum fine of $40,000.

The circuit court did not review the minimum fine or alcohol concentration fine enhancer provisions with Adams at the plea hearing. It did, however, question Adams about the plea

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

questionnaire, which Adams acknowledged reading and understanding. The court established that Adams had no objection to the facts stated in the probable cause section of the complaint and determined that those facts were sufficient to establish a factual basis for Adams's plea.

The court then accepted Adams's no-contest plea and proceeded immediately to sentencing. During the State's sentencing argument, the prosecutor stated that the results of a blood draw taken after Adams was transported to a hospital showed a .255 BAC. Based on this, the prosecutor requested that the court "quadruple the minimum fine of $600," and the court ultimately imposed a $2,400 fine after noting the dangerous situation Adams presented by operating his vehicle in a parking lot with a .255 BAC.

Adams filed a postconviction motion seeking to vacate the alcohol concentration fine enhancer and reduce the fine for his OWI to $600. He asserted a factual basis was lacking for application of the fine enhancer because the criminal complaint did not reference the .255 BAC blood test result. Moreover, he argued the .213 PBT result stated in the complaint was insufficient to establish a factual basis because it is a qualitative test and the results are admissible in Wisconsin courts only for the limited purposes specified by WIS. STAT. § 343.303.

The circuit court granted Adams's motion in part and denied it in part without holding a hearing. The court declined to reduce the fine to $600, but did grant partial relief by ordering the judgment of conviction amended to reflect a $1,800 fine, apparently a tripling of the minimum fine based on the .213 PBT result discussed in the complaint. Adams now appeals.

This appeal presents an interesting quandary because Adams is clear he "is not arguing that the underlying OWI conviction lacked a factual basis, and he does not wish to withdraw his plea." Rather, relying on ***White v. State***, 85 Wis. 2d 485, 493, 271 N.W.2d 97 (1978), he asks

that we vacate only the alcohol concentration fine enhancer and any additional penalties that resulted from the enhancer, while leaving the plea agreement and the other aspects of his sentence intact. Adams exclusively relies on the manifest injustice standard and cases applying it, which is used when a person seeks to withdraw his or her plea after sentencing. *See, e.g.*, ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836; ***State v. Higgs***, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999).

We first note Adams does not challenge his plea as being unknowing or involuntary. Rather, he argues that the alcohol concentration fine enhancer was lacking a sufficient factual basis at the time of his plea. While we question Adams's framing of this as a factual-basis challenge, we nonetheless address his claim that the circuit court failed to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b). The failure to establish a factual basis results in a manifest injustice. ***Thomas***, 232 Wis. 2d 714, ¶17. We review the underlying question of whether a factual basis exists using the clearly erroneous standard. ***State v. Tourville***, 2016 WI 17, ¶18, 367 Wis. 2d 285, 876 N.W.2d 735.

We agree with Adams that nothing in the criminal complaint's factual allegations demonstrates that he is subject to the quadrupling provision of WIS. STAT. § 346.65(2)(g)3. Nonetheless, both the plea agreement term sheet and the plea questionnaire demonstrate that Adams acknowledged he faced a $2,400 minimum fine—a minimum fine that could only be applicable if Adams engaged in the most severe conduct described in the statute of having a BAC in excess of .25. And any ambiguity on the issue of whether Adams's BAC was *actually* in excess of .25 was eliminated during the sentencing hearing, which occurred immediately after

the plea hearing and during which the prosecutor represented that Adams's BAC was .255 on the date of the offense.

Adams agrees that our review in a factual-basis challenge encompasses the entire record, including the sentencing hearing. *See* ***Thomas***, 232 Wis. 2d 714, ¶18. He argues, however, that our review of the totality of the circumstances cannot in this instance include the prosecutor's remarks during the sentencing hearing, because Adams did not admit or stipulate that he had a .255 BAC. We cannot accept this position, as it ignores the procedural posture of this case. Under the manifest-injustice standard, the issue is no longer whether the circuit court should have accepted the plea, but rather whether the court erred in denying the postconviction motion. *See* ***White***, 85 Wis. 2d at 491. Here, the totality of the circumstances demonstrates that an adequate factual basis for the alcohol concentration fine enhancer existed, such that the imposition of the increased fine does not result in a manifest injustice.

Additionally, in emphasizing the absence of his admission or stipulation to the blood draw test results, Adams ignores that there is no requirement that a defendant personally articulate the specific facts establishing the basis for his or her plea. *See* ***Thomas***, 232 Wis. 2d 714, ¶20. "All that is required is for the factual basis to be developed on the record—several sources can supply the facts." ***Id.*** A stipulation is merely one way for the court to fulfill its duty under WIS. STAT. § 971.08(1)(b). ***Thomas***, 232 Wis. 2d 714, ¶21. The more general requirement is that the judge ensure that a defendant realizes that his or her conduct meets the elements of the crime charged. ***Id.*** Again, given the totality of the circumstances here, including

the parties' plea negotiations and the prosecutor's comments at sentencing, we conclude this obligation was satisfied insofar as the alcohol concentration fine enhancer is concerned.[2]

Finally, the State goes further than merely opposing Adams's attempt to have the alcohol concentration fine enhancer vacated. It affirmatively argues that the circuit court erred by reducing Adams's fine to $1,800, and it asserts the original $2,400 fine should be reinstated. The State is allowed to appeal orders granting postconviction relief. *See* WIS. STAT. § 974.05(1)(b). The State failed to file a cross-appeal from the order granting Adams a reduction in the amount of his fine. Under these circumstances, we perceive no basis for overturning the circuit court's postconviction order.

We note that although the circuit court's postconviction order clearly anticipated an amendment to Adams's judgment of conviction, no such amended judgment appears in the appellate record. We therefore remand so that the circuit court may take such further action as is appropriate to effectuate its postconviction order that Adams's fine be reduced to $1,800.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed and the cause remanded to the circuit court for further proceedings consistent with this order.

[2] Even if we were to conclude there was an insufficient factual basis for the $2,400 fine, the criminal complaint's statement that the PBT results were .213 would have been a sufficient basis for the $1,800 fine the circuit court ultimately imposed. We reject Adams's assertion that the circuit court could not consider this fact because of the statutory provisions governing the limited admissibility of PBT test results.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals