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DISTRICT I

August 30, 2022

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

2020AP1538-CR State of Wisconsin v. Darius L. M. Dismuke (L.C. # 2018CF2861)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Darius L. M. Dismuke appeals from a judgment convicting him of hit and run resulting in death and reckless driving causing great bodily harm. He also appeals an order denying his postconviction motion for plea withdrawal. Dismuke contends that he was entitled to a hearing on his motion alleging that his guilty plea to the hit-and-run charge was not knowing, intelligent, and voluntary because the circuit court failed to establish that he understood the nature of the

charge. 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(1) (2019-20).[1] We affirm.

According to the criminal complaint, in June 2018, Dismuke was driving at a high rate of speed when he lost control and hit a tree. Dismuke got out of the car after the crash. Citizens who came upon the crash removed a passenger, S.F., from the car. S.F. was later taken to a hospital with life-threatening injuries. When rescue personnel arrived, a second passenger, C.E., was still in the car. C.E. died at the scene. Dismuke left the scene before emergency personnel arrived and without identifying himself or rendering aid. S.F. later identified Dismuke as the driver.

The State charged Dismuke with five counts: homicide by negligent operation of a vehicle; hit and run resulting in death; reckless driving causing great bodily harm; hit and run resulting in great bodily harm; and knowingly operating a motor vehicle while suspended, causing death. Pursuant to a plea agreement, Dismuke ultimately pled guilty to hit and run resulting in death and reckless driving causing great bodily harm.

The circuit court accepted Dismuke's pleas and sentenced him to fifteen years of imprisonment on the hit and run charge. It imposed a concurrent sentence of three years for the reckless driving charge.

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

Postconviction, Dismuke sought plea withdrawal. He asserted that his plea to hit and run resulting in death was not knowing, intelligent, and voluntary because he was not told and did not understand all the elements of the crime.

Before he entered his guilty plea to the hit and run charge, trial counsel informed Dismuke of the elements the State would have to prove if he went to trial. The applicable statute, WIS. STAT. § 346.67, was amended in 2016 to add an additional mode of commission. *See* 2015 Wis. Act 319. Trial counsel, however, relied on a pattern jury instruction relating to the earlier version of the statute, WIS. STAT. § 346.67 (2013-14). The parties do not dispute that when Dismuke committed his crimes, the amended statute applied.

A driver operating a vehicle violated the old version of the statute if he was involved in an accident on a highway that he knew resulted in injury, death, or damage to a vehicle driven or attended by a person, the driver did not immediately stop to identify himself and render reasonable assistance, and the driver was physically capable of doing so. *See* WIS JI—CRIMINAL 2670 (2014). A driver operating a vehicle violates the amended statute if he was involved in an accident on a highway, knew he was involved in an accident, and violated *at least one* of two duties after being involved in the accident. *See* WIS JI—CRIMINAL 2670 (2018).

"The first duty is to reasonably investigate what was struck. The second duty is that a driver involved in an accident involving a person or an attended vehicle must stop and provide information and render aid." ***Id.*** To prove a violation of the latter duty, the State is required to prove the following beyond a reasonable doubt: the defendant knew or had reason to know that the vehicle he was operating was involved in an accident that resulted in injury, death, or damage to a vehicle driven or attended by a person; the driver did not immediately stop to identify

himself and render reasonable assistance; and the driver was physically capable of doing so. *See* ***id.***

Dismuke argued that he did not know a person can violate the statute by failing to investigate what was struck and consequently, did not understand the nature of the crime. The circuit court denied Dismuke's postconviction motion without holding a hearing. He renews his argument on appeal.

A defendant who wishes to withdraw a guilty plea after sentencing must establish that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Annina***, 2006 WI App 202, ¶9, 296 Wis. 2d 599, 723 N.W.2d 708. "One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily." ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482.

To ensure that a defendant's guilty plea is knowing, intelligent, and voluntary, the circuit court must perform certain statutory and court-mandated duties on the record during the plea hearing. *See* ***id.***, ¶31. When, as here, a defendant alleges that the circuit court failed to perform one or more of its mandatory duties, the defendant may seek plea withdrawal pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***State v. Howell***, 2007 WI 75, ¶¶26-27, 301 Wis. 2d 350, 734 N.W.2d 48. Under the ***Bangert*** procedure, the defendant must both: (1) make a *prima facie* showing that the plea colloquy was defective because the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties; and (2) allege that the defendant lacked knowledge or understanding of the information that should have been provided at the plea hearing. *See* ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant makes both of the necessary showings, the circuit court must hold an evidentiary

hearing at which the burden is on the State to establish by clear and convincing evidence that the defendant entered his or her plea knowingly, intelligently, and voluntarily. *See* ***id.***, ¶40. We consider *de novo* the sufficiency of the plea colloquy and the need for an evidentiary hearing. *See* ***State v. Hoppe***, 2009 WI 41, ¶17, 317 Wis. 2d 161, 765 N.W.2d 794.

Circuit courts have an obligation to address the defendant personally when entering a guilty plea and to undertake a colloquy to ensure the defendant understands, among other things, the nature of the charge. ***Brown***, 293 Wis. 2d 594, ¶¶34-35; *see also* WIS. STAT. § 971.08. "An understanding of the nature of the charge must include an awareness of the essential elements of the crime." ***Bangert***, 131 Wis. 2d at 267.

We begin by noting that Dismuke has never argued that the factual basis for his plea was inadequate. During the plea colloquy, Dismuke said he had "hit a bum[p] and lost control" of his vehicle, and he "[h]it a tree at a fast speed." Next, Dismuke confirmed for the circuit court that one person died and one person was badly injured. The circuit court then asked him: "Did you leave or attempt to leave the scene without attempting to get treatment for the people who were injured?" Dismuke said he initially stayed on the scene, but "once they told me that my friend was dead, you know, I panicked and I left." Dismuke told the circuit court that he did not provide his name and address to anyone before he left.

Dismuke argues that he did not know the nature of the offense proscribed by WIS. STAT. § 346.67 because he was never informed that the statute could also be violated when a person involved in an accident fails to investigate what was struck. The comment to the jury instruction makes clear that following the amendment to WIS. STAT. § 346.67, there are two modes to violate the statute. *See* WIS JI—CRIMINAL 2670 cmt. (2018) ("The Committee concluded that

§ 346.67, as amended by 2015 Wisconsin Act 319, defines two ways to violate the statute."). "First, the offense is committed by one who is involved in an accident and fails to reasonably investigate [what was struck]. Second, the offense is committed by one who may have reasonably investigated but failed to fulfill other duties imposed by the statute." ***Id.***

Under the circumstances of this case, there was no factual basis to support a violation of the statute based on Dismuke's failure to investigate what was struck. Yet, he argues that knowing the statute could be violated in this way was critical to his understanding of the nature of the offense.[2] We disagree. Dismuke has not directed us to any legal authority mandating that a defendant be informed of alternative modes of committing a crime to which he is pleading guilty when those modes do not apply in order to adequately understand the nature of the charge.

Dismuke has not identified a failure by the circuit court to comply with the obligations imposed by ***Bangert*** and its progeny. Because he has not made a *prima facie* case that his plea colloquy was defective, further analysis is not required. *See* ***Brown***, 293 Wis. 2d 594, ¶¶39-40. The circuit court properly denied his postconviction motion for plea withdrawal without a hearing, and therefore, we affirm.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[2] According to Dismuke: "The question is not whether he knew his conduct violated the statute. It is whether he knew the 'nature' of the offense proscribed by the statute."

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

Sheila T. Reiff
Clerk of Court of Appeals