STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 04-2993-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MONTRELL McDADE,

Defendant-Appellant.

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APPEAL FROM A JUDGMENT OF CONVICTION AND MOTION DENYING APPELLANT'S POSTCONVICTION MOTION DATED NOVEMBER 1, 2004, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

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# DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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## TABLE OF AUTHORITY

## TABLE OF CONTENTS

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is factual in nature and is governed by well-settled law and, therefore neither oral argument nor publication is recommended.

## STATEMENT OF THE ISSUE

I. Whether the trial court erred in denying the appellant's postconviction motion to withdraw his guilty plea.

ANSWERED BY THE TRIAL COURT: No.

II. Whether the sentence imposed by the trial court is unduly harsh.

ANSWERED BY THE TRIAL COURT: No.

## SUMMARY OF THE ARGUMENT

The trial court abused its discretion in denying McDade's motion to withdraw his plea- and particularly since the court did so without conducting a hearing. McDade's motion pointed out that the transcript of the plea hearing was defective in that the judge failed to ascertain that McDade understood the nature of the crime to which he was pleading guilty. Further, McDade alleged in his motion that he did not, in fact, understand the nature of first degree reckless homicide. As such, the trial court was obligated to conduct a "Bangert" hearing into whether McDade's plea was actually knowingly and voluntarily entered.

The sentence imposed by the court was unduly harsh. The transcript of the sentencing hearing indicates that the sentence was imposed almost exclusively due to the trial judge's understandable revulsion over the nature of the crime; however, the judge focused exclusively on the nature of the offense- to the exclusion of all other sentencing factors. As such, the trial court abused its sentencing discretion in sentencing McDade to thirty-five years of initial confinement.

## STATEMENT OF THE CASE[1]

The defendant, Montrell McDade ("McDade") was charged with first degree reckless homicide arising out of the death of seventeen month-old Asanti Flanagan on May 5, 2000. The criminal complaint (R:2) alleged that McDade and Rhea Flanagan (Asanti's mother) began living together in February, 2000. Flanagan worked as a bank teller first shift and McDade worked third shift. He frequently provided child care during the day for Asanti[2]

On May 5, 2000 Flanagan took Asanti to Children's Hospital because she was unconscious though she was still breathing. Asanti died shortly after arriving at the hospital. Doctors determined that Asanti died as a result of numerous depressed skull fractures and consequent brain damage. The doctors believed that Asanti had been struck in the head as many as ten times.

McDade gave three statements to police over the course of the three days following Asanti's death. Ultimately, McDade told the police that because of the fact that he worked third shift he was very tired and impatient with taking care of Asanti. On several occasions she approached him wanting to play and he knocked her back onto the floor where she may have struck her head. On another occasion McDade threw Asanti onto the bed and he admitted that she may have struck her head on the wall. McDade also described shaking Asanti when she would not stop crying.

Ultimately, McDade reached a plea agreement with the state under which he would plead no contest to first degree reckless homicide and the state would recommend "substantial prison" leaving the amount up to the court. (R:27-6) McDade entered the no contest plea and the matter was set for sentencing.

At the plea hearing the court asked McDade, regarding the

1For the sake of clarity, because the issue on appeal involves a guilty plea and the denial of a postconviction motion without a hearing, the procedural background and the factual background will be set forth under the one heading, "Statement of the Case." Unless otherwise noted , the "facts" are taken from the factual allegations in the criminal complaint.

2 McDade is not Asanti's biological father

elements of the offense:

> THE COURT: State would have to prove you guilty beyond a reasonable doubt as to each and every single element of the offense.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Have you gone over the elements of the offense with your lawyer?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you understand them?
>
> THE DEFENDANT: Yes.

(R:27-4) There was no further discussion during the plea hearing concerning the nature of the offense.

At sentencing the court focused almost completely on the grave nature of the crime and the apparent lack of compassion that McDade showed for the child during the nearly forty-eight hours the incident lasted. Consequently, the court sentenced McDade to thirty-five years of initial confinement and twenty years of extended supervision. (R:28)

McDade, proceeding *pro se*, obtained an order from the Court of Appeals extending his time for filing the notice of intent to pursue postconviction relief. By order dated July 29, 2004 the Court of Appeals established the deadline for filing the notice of appeal or postconviction motion to sixty days after that date.

McDade timely filed a postconviction motion to withdraw his no contest plea. In the motion McDade alleged that the transcript of the plea hearing did not demonstrate that the court determined that McDade understood the nature of charge to which was pleading no contest; and, further, that McDade did not understand the elements of first degree reckless homicide (R:19) Further, McDade alleged that the plea was entered based upon a mistake of facts (to wit, that the child died of injuries received within forty-eight hours of death)

In the alternative, McDade moved to modify his sentence for the reason that the sentence imposed by the court was unduly harsh.

(R:19).

On November 1, 2004, by memorandum decision, the trial court denied both of McDade's motion with hearing. Regarding the motion to withdraw the plea the court wrote (R:20):

> At the plea hearing, the court asked the defendant if he had gone over the plea questionnaire with his lawyer and if he went over the elements of the offense with his lawyer. The defendant answered each question in the affirmative. (Tr. 8/7/00, pp. 3-4). He further indicated by his signature on the plea questionnaire fonn that he had read the entire form and understood what it said. The document itself sets forth the very elements of the offense to which he entered a no contest plea and are numbered in succession. On this basis, the court rejects his current claim of noncomprehension of the nature of the offense and finds that he knowingly, intelligently and voluntarily entered a valid no contest plea.
> The defendant further contends that his plea was entered on the basis of mistake. He states that he understood that the injuries to the child were caused within 48 hours of the autopsy rather than within 48 hours of her death. He submits that if the injuries were caused within 48 hours of her death (rather than when the autopsy was performed), he was not the only person caring for the child during that period of time.
>
> This claim is wholly conclusory and without support. However, even if other people had cared for the child during the 48 hour period prior to her death, the fact of the matter is that thedefendant admitted to physically abusing the child while she was in his care immediately prior to her death. _*(See page three of the Criminal Complaint).* - The defendant has not set forth a valid basis for plea withdrawal.

## ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING McDADE'S POSTCONVICTION MOTION TO WITHDRAW HIS NO CONTEST PLEA.

A defendant must be permitted to withdraw his plea, even after sentencing, where it is necessary to correct a manifest injustice. One such manifest injustice is where the plea is not knowingly and voluntarily entered. As will be set forth in more detail below, the transcript of the plea hearing is defective in that it fails to establish that the court determined that McDade had an understanding of the nature of the crime to which he was pleading no contest. Moreover, McDade entered the plea based upon a mistake of fact (i.e. the time when the fatal injuries were sustained). Thus, McDade could not have had a clear understanding of how the evidence fit into the framework of the elements of the offense.

The standard for withdrawing pleas is well-known. Recently, in ***State v. Nawrocke***, 193 Wis.2d 373, 534 N.W.2d 624, 626, (Wis.App. 1995) the court of appeals explained:

> A defendant may withdraw a presentence plea for any "fair and just" reason. ***State v. Canedy***, 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). This is not an absolute right; the defendant has the burden of showing the "fair and just reason" by a preponderance of the evidence. *Id*. at 582-83, 469 N.W.2d at 170-71.
>
> However, after sentencing the criterion of "manifest injustice" is required to withdraw a plea. ***State v. Truman***, 187 Wis.2d 622, 624, 523 N.W.2d 177, 178 (Ct.App.1994). 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. ***Libke v. State***, 60 Wis.2d 121, 128, 208 N.W.2d 331, 335 (1973). Defendants seeking a postsentence withdrawal must show the manifest injustice by clear and convincing evidence. ***Truman***, 187 Wis.2d at 624, 523 N.W.2d at 179.

The ***Nawrocke,*** *Ibid* p. 627, court went on to explain why there is a difference between the two standards:

> In a discussion of the "fair and just" and "manifest injustice" standards, the Supreme Court of West Virginia succinctly articulated the justification for the difference.
>
> The basis for the distinction between these two rules is three-fold. First, once sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and therefore wish to have it set aside. Second, at the time the sentence is imposed, other portions of the plea bargain agreement will often be performed by the prosecutor, such as the dismissal of additional charges or the return or destruction of physical evidence, all of which may be difficult to undo if the defendant later attacks his guilty plea. Finally, a higher post-sentence standard for withdrawal is required by settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea. ***State v. Olish***, 164 W.Va. 712, 266 S.E.2d 134, 136 (1980).

In, ***State v. Smith***, 202 Wis.2d 21, 549 N.W.2d 232, 233-234 (Wis. 1996), the court stated,

> Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice. See ***State v. Rock***, 92 Wis.2d 554, 558-59, 285 N.W.2d 739 (1979). Historically, one type of manifest injustice is the failure of the trial court to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads. See ***White v. State***, 85 Wis.2d 485, 488, 271 N.W.2d 97 (1978). . . . . in the context of a negotiated guilty plea, this court has held that a court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." See ***Broadie v. State***, 68 Wis.2d 420, 423-24, 228 N.W.2d 687 (1975). The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous. See ***Broadie***, 68 Wis.2d at 423, 228 N.W.2d 687.

One of the situations where plea withdrawal is necessary to correct a manifest injustice is when the plea was entered without knowledge of the charge. ***State v. Trochinski***, 253 Wis.2d 38, 644 N.W.2d 891 (2002).

The requirements for acceptance of a guilty or no contest plea

are prescribed by statute. Sec. 971.08(1), STATS., provides that, "Before the court accepts a plea of guilty or no contest, it shall do all of the following: (a) Address the defendant personally and determine that the plea is made voluntarily ***with understanding of the nature of the charge*** and the potential punishment if convicted." (emphasis provided).

The failure to go over the elements of the crime to which a defendant is pleading no contest has been described by the Supreme Court as "woefully inadequate." In, ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12, 22 (Wis. 1986), the Supreme Court noted, "Both the state and the defendant agree that the plea colloquy is woefully inadequate. Nothing in the plea hearing transcript remotely establishes that Bangert understood the nature of the second-degree murder charge. The court neither recited the elements nor characterized the nature of the crime in a general manner."

Consequently, the ***Bangert*** court required that, "An understanding of the nature of the charge must include an awareness of the essential elements of the crime." 389 N.W.2d at 23.

***Trochinski*** and ***Bangert***, when read together, require that a defendant seeking to withdraw his plea on the grounds that he did not understand the nature of the offense must show the following: (1) Establish that the record of the plea hearing was inadequate; and, (2) Affirmatively allege that the defendant did not know the nature of the charges. If this is accomplished, the court must then conduct a hearing into whether the plea was validly entered.

***A. The transcript of the plea colloquy is woefully inadequate to establish that the trial court determined that McDade understood the nature of the charge to which he was pleading guilty.***

Here, the transcript of the plea hearing is woefully inadequate because the trial court made no attempt to explain the nature of the offense to McDade- much less did the court determine on the record that McDade *understood* the nature of the offense. The most the judge did was to ask McDade whether he went over the elements of

the offense with his lawyer. Without question the record of the plea is inadequate.

***B. McDade's motion alleges that he did not, in fact, understand the nature of the charges and, therefore, the trial court erred in denying the motion without a hearing.***

The next question, then, is whether the McDade alleged in his motion facts sufficient to require the court to conduct a hearing into whether he actually understood the nature of the offense. The motion here alleged that McDade did not actually know the elements of first degree reckless homicide and, to this day, that he does not know the elements of the offense. Morever, McDade alleged that his plea was entered based upon a mistake of fact. According to McDade, his lawyer told him that all injuries were caused within forty-eight hours *of the autopsy* (rather than within forty-eight hours of death) and only in this way was the child placed solely within McDade's care. This is not true, the injuries were caused within forty-eight hours of *death* and, if this is the case, the child was not solely within McDade's care during the period when the fatal injuries were sustained. McDade plainly did not have a clear understanding of how the evidence fit into the framework of the elements of the offense.

In order to warrant an evidentiary hearing on a postconviction motion, counsel must allege facts which, if true, warrant the relief sought. ***State v. Bentley***, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996). If the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its discretion deny the motion without a hearing. ***State v. Washington***, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct.App.1993).

In ***Bentley,*** 548 N.W.2d 53-548 N.W.2d 54, the court explained,

> . . . ***Nelson*** sets forth a two-part test which necessitates a mixed standard of appellate review. If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***Nelson***, 54 Wis.2d at 497, 195 N.W.2d 629. Whether a motion alleges facts

> which, if true, would entitle a defendant to relief is a question of law that we review de novo. See ***Nottelson v. DILHR***, 94 Wis.2d 106, 116, 287 N.W.2d 763 (1980) (whether facts fulfill a particular legal standard is a question of law).
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson***. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard. ***Brookfield v. Milwaukee Metropolitan Sewerage Dist.,*** 171 Wis.2d 400, 423, 491 N.W.2d 484 (1992).

Here, McDade's motion alleges exactly what is required by ***Bangert***- that he did not understand the nature of the offense to which is was pleading guilty. Plainly, the trial court abused its discretion in denying McDade's motion without a hearing.

This discussion is not complete without commenting upon the reason for not conducting an evidentiary given by the trial court in the memorandum decision. The court wrote that because McDade admitted to the court that he went over the elements of the offense with his lawyer he (McDade) must have had an understanding of the elements of the offense.

This only underscores the need for an evidentiary hearing. The record is devoid of evidence of *what* McDade's attorney told him the elements of the offense were. The court cannot simply conclude that McDade's lawyer knew the elements of the offense and properly explained them to McDade. This is the whole point of the so-called "Bangert" hearing.

For these reasons, the Court of Appeals should order that McDade's motion to withdraw his plea be granted; or, in the alternative, to remand the matter for a ***Bangert*** hearing into whether McDade did understand the nature of the charge to which he pleaded no contest.

## II. THE SENTENCE IMPOSED WAS UNDULY HARSH

Although the trial court is required to consider three main sentencing factors, the court has broad discretion in determining the weight to be given to each factor. ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct.App.1992). A trial court has abused its sentencing discretion and imposed an excessive sentence "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). The published case law is practically devoid of an example where a sentence imposed within the statutory maximums was found to be unduly harsh. There is, of course, a practical reason for this- where a trial court modifies a sentence on the grounds that it was unduly harsh in the first instance the State is highly unlikely to appeal. Nonethess, there is no denying the fact that Kasmarek faces a daunting task in this motion.

There is no doubt that any reasonably empathetic person who reads the criminal complaint in this action cannot held but feel nearly physically ill over the course of events leading up to Asanti's death. One's emphathy quickly turns to revulsion and hatred toward the person who caused her death. This is undoubtedly what happened to the court in this case.

Nonetheless, a court of law is required to mete out justice in a fair and dispassionate manner. This is not to say that the judge ceases to be a human being with the full range of human emotions; rather, the judge is required to be aware of these emotions, keep them in check, and fashion a sentenced based upon *reason* rather than upon emotion.

Here, the trial court imposed thirty-five years of initial confinement. The reasons expressed by the court for the length of the sentence dealt almost exclusively with the cruel nature of McDade's crime. At one point the court asked McDade, "Where was your compassion?" (referring to the manner in which McDade failed to obtain medical treatment for Asanti once she was injured). This demonstrates fairly conclusively that the court, like everyone else, was repulsed by the nature of McDade's crime.

Nonetheless, a thirty-five year period of initial confinement cannot be justified by reason. There are certain individuals who, by their behavior, have demonstrated that they are the sort of predatory fiend whose behavior will pose a danger to the community in general for, perhaps, the rest of the individual's life. There is a *reason* to keep such a dangerous person locked up for a lengthy period of time. The protection of the community demands it.

However, McDade's crime, though cruel and difficult to understand, does not demonstrate that he is the sort of person who preys upon the community in general. The crime was one which arose out of an unusual set of circumstances. McDade, inexperienced in child care duties, was thrust into the position of having to care for a small child during a period of time when he actually should have been sleeping. This is not offered as any sort of excuse for McDade's behavior but is offered only to emphasize that McDade did not go out into the community and select a stranger as his victim. There certainly are steps the government could take to assure that McDade never finds himself in a similar set of circumstances in the future. In its sentence court did so- the court ruled that McDade should not have any contact with children during the period of time he is under extended supervision. Thus, the protection of the community is not a *reason* justifying a thirty-five year period of confinement.

The next question, then, is whether such a lengthy sentence serves a legitimate purpose of deterrence or retribution (i.e. punishment of McDade). Undoubtedly, the sentence imposed by the court will have a tremendous deterrent effect on McDade and is sufficient for retribution. But sentences are like prunes- a certain amount is good and has the desired effect; but too much can cause a disaster.

Here, the length of McDade's sentence is far longer than is necessary to deter him; longer than is necessary to deter others; and is greater than the so-called "pound of flesh" which McDade owes society for his crime. As McDade's counsel emphasized in his sentencing remarks- this was an unintentional crime. Likewise, human nature reviles against physically abusing children. It is

highly unlikely that a shorter sentence for McDade would embolden some person who might otherwise not abuse a child. The facts of this case simply do not lend themselves to the principle of general deterrence.

This leaves, then, merely retribution. No sentence the court imposes could truly match the loss caused by the death of Asanti Flanagan. But our law does not require the retribution component of a sentence to actually match the loss. If this were the case then any crime which results in the death of another human being would require life in prison with no chance of release. We, as a community, have decided that this is not the sort of society we choose to build. Though the consequences of the act are catastrophic, the courts are instructed to look not only at the consequences but also at the intentions of the defendant while committing the crime. There is no doubt that McDade did not desire Asanti's death. He told the court at sentencing that he loved the child. This was nothing more than a situation where McDade was incompetent as a parent; selfish and cruel as a person while angry; and one who lacked the maturity to reign in his more base compulsions. Maturity will correct some of these major flaws in McDade. Thirty-five years is far longer than is necessary to punish McDade.

## CONCLUSION

For these reasons the trial court should order that McDade's motion to withdraw this guilty plea be granted; or, in the alternative, remand the matter for a Bangert hearing. Finally, if the court decides not to grant McDade's motion or remand for hearing, the court should remand the matter for resentencing on the grounds that the sentence imposed by the trial court is unduly harsh.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2005.

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4179 words including footnote, tables, and cover.

This brief was prepared using *Microsoft Word* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated at Milwaukee, Wisconsin, this May 29, 2007.

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
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STATE OF WISCONSIN,

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# DEFENDANT-APPELLANT'S APPENDIX

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A. Record on Appeal

B. Excerpt of trancript of plea hearing

C. Court's Memorandum Decision