State of Wisconsin: Circuit Court: Racine County

State of Wisconsin,

Plaintiff,

v. Case No. 2013CF000503

Robert Philopulous,

Defendant.

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§ 809.30, Stats., motion to withdraw guilty pleas

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and pursuant to § 809.30, Stats., hereby moves to withdraw the guilty pleas entered in this matter on December 17, 2013, for the reason that the guilty plea to count eight was wholly invalid; and both pleas were not knowingly and intelligently entered because there was not a sufficient factual basis to find that Philopulous was a repeat offender.

As grounds, the undersigned alleges and shows to the court as follows:

1. The defendant, Robert Philopulous ("Philopulous") was charged in an information with nineteen felony counts. He reached a plea agreement with the state by which he would enter guilty pleas to count one and count eight of the information. The remaining counts would be dismissed and read-in.

2. At the guilty plea hearing, both parties told the court that counts one and eight were "identical" counts of regular burglary as a repeater (Class F felony).

3. Count eight of the information actually charges Philopulous with burglary while armed with a dangerous weapon, contrary to § 943.10(2)(b), Stats., (a class E felony) with the repeater penalty enhancer[1].

[1] Count eight of the criminal complaint charged regular burglary; however, after Philopulous waived the preliminary hearing, the state filed an information alleging in count eight that the defendant committed burglary while armed with a dangerous weapon. The prosecutor pointed this out at the arraignment. (Trans. 5-9-2013 p. 4).

4. Philopulous' guilty plea to count eight is wholly invalid because, under Wisconsin law, the court lacks competence to accept a guilty plea from a defendant to a felony charge that is not alleged in an information.

5. Moreover, as to both guilty pleas, during the guilty plea colloquy was defective in that the court did not establish a factual basis for the repeater allegation. The judge asked Philopulous whether the prior criminal convictions alleged in the complaint and the information "apply to him" (Tran. 12-17-2013 pp. 7-8), but the judge did not specifically ask Philopulous to admit that he was convicted of a felony, and that the date of conviction was within five years of the commission of the present offense. There were no certified judgments of conviction attached to the criminal complaint, nor was there any other proof presented concerning these convictions. Both the criminal complaint and the information allege that Philopulous was convicted of felony injury by intoxicated use of a vehicle in Racine County case number 2008CF000508. That case number is assigned to *State v. Mac-Elmonzeo Benton*, who was convicted of cocaine with intent to deliver.[2]

6. Philopulous, when he entered his guilty pleas did not know that the 2008 felony conviction alleged in the information did not apply to him...

Wherefore, it is respectfully requested that the court permit the defendant to withdraw his guilty pleas.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this ________ day of _______________, 2014

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:______________________________
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[2] Racine County case number 2008CF000506 lists to *State v. Robert Philopulous,* who was convicted of felony causing injury by intoxicated use of a vehicle on September 15, 2008.

414.671.9484

State of Wisconsin: Circuit Court: Racine County

State of Wisconsin,

Plaintiff,

v. Case No. 2013CF000503

Robert Philopulous,

Defendant.

Memorandum of Law in Support of § 809.30, Stats., Motion to Withdraw Guilty Pleas

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I. Philopulous's guilty plea to count eight was invalid because in count eight he was not charged with ordinary burglary.

At the plea hearing, all parties involved were under the misapprehension that Philopulous was charged with ordinary burglary as a repeater in count eight of the information. This was not the case. In count eight Philopulous was charged with burglary while armed with a dangerous weapon as a repeater. Thus, Philopulous' guilty plea to that count is wholly invalid because the court has no legal authority to accept a guilty plea to a felony offense not alleged in an information.

A defendant may only enter a guilty plea in a felony case to an offense with which he has been properly charged in an information. *See*, § 971.06, Stats., which provides that, "(1) A defendant *charged with a criminal offense* may plead as follows . . . (b) guilty." There is no legal basis for the court to accept a guilty plea from a defendant to an offense with which the defendant is not charged, even if it is to the defendant's benefit.

Thus, even though it is a less serious offense, the court's acceptance of Philopulous' guilty plea to count eight is invalid.

Moreover, there is no legal authority for the court to permit the state to amend the information after the defendant has already pleaded guilty. § 971.29, Stats. governs the amendment of the information. Under that section, the last opportunity for the state to amendment information is after the return of the jury's verdict, and then only when there is no objection by the defendant. There is no legal authority for the state to amend the information to conform with what the parties intended at a guilty plea hearing.

Thus, Philopulous' guilty plea to count eight is invalid. It must be set aside.

II. The guilty pleas to both count one and count eight were not knowingly and intelligently made because there was an insufficient factual basis for the repeater allegation.

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

A. The plea colloquy was defective

The requirements for acceptance of a guilty plea are prescribed by statute. §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; (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged." The requirement in subsection (b) is typically referred to as the "factual basis" requirement.

A defendant seeking to withdraw his plea must show the following: (1) that the record of the plea hearing was inadequate; and, (2) sffirmatively 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. *See, e.g., State v. Howell,* 2007 WI 75, P27 (Wis. 2007)

Here, the record of the plea hearing was inadequate because there was not an adequate factual basis for the allegation that Philopulous was a repeat offender. The judge asked Philopulous whether the prior convictions alleged in the information "applied to him", and Philopulous said that they did; however, there was no further questioning by the court. The judge did not ask Philopulous whether, in fact, he was convicted of a felony within the five years preceding the commission of the present offense. Much less did the judge explain to Philopulous the consequences of the repeater allegation.

Concerning the repeater allegation, § 973.12, Stats. requires that:

> (1) Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. . . . . If the prior convictions are admitted by the defendant or proved by the state, he or she shall be subject to sentence under s. 939.62 . .

Here, Philopulous' "admission" that the offenses alleged in the complaint "applied" to him is insufficient to establish a factual basis that he is a repeater. As the court of appeals explained, concerning an admission to prior offenses:

> Despite the State's suggestion, *Rachwal* does not stand for the proposition that a guilty plea constitutes an admission per se. In fact, the court expressly recognized that a guilty plea may not constitute an admission if the judge fails to conduct the proper questioning so as to ascertain the meaning and potential consequences of such a plea. *Id.* at 512, 465 N.W.2d at 497. It is well established that the admission may not by statute be inferred or made by the defendant's attorney, but rather must be a direct and specific admission by the defendant.

State v. Zimmerman, 185 Wis. 2d 549, 555-56, 518 N.W.2d 303, 305 (Wis. Ct. App. 1994). The judge's colloquy with the defendant in *Zimmerman* was very similar to the colloquy in this case. Here is what the court of appeals wrote about the colloquy:

> It is true that Zimmerman did admit to being convicted of aggravated battery in Texas in 1983 and did admit to the facts as stated in the criminal information. However, at no time did Zimmerman admit that the prior conviction was less than five years from the date of the present conviction. Further, he was never asked about his confinement, and there was

> no admission by Zimmerman to a period of incarceration that would bring his 1983 conviction within the five-year statutory period. Therefore, we cannot conclude that Zimmerman gave a direct and specific admission to facts necessary to establish the repeater penalty enhancer.

Zimmerman, 185 Wis. 2d at 557.

Similarly, in this case, Philopulous admitted that the convictions alleged in the information “applied to him”, but he was not asked to specifically admit that the conviction was for a felony and that it was within five years of the date of offense in the present case. Thus, this was not the sort of specific admission required under the statute.

Even more disturbing, Philopulous’ admission that the 2008 felony conviction “applied” to him was not accurate. The case number listed in the criminal complaint and the information actually involved some other defendant.

For these reasons, it is respectfully requested that the court permit Philopulous to withdraw his guilty pleas.

Dated at Milwaukee, Wisconsin, this ________ day of _______________, 2014

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

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