Appeal Nos. 2005AP1693-CR
2005AP1694-CR

Cir. Ct. Nos. 2002CF370
2004CF168

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WAYNE A. SUTTON,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether WIS. STAT. § 971.08(1)(a) (2003-04),[1] which directs a court to advise a defendant of "the potential punishment if convicted" prior to accepting a plea of guilty or no contest, requires a court to advise the defendant of the maximum term of initial confinement associated with a bifurcated sentence under Wisconsin's truth-in-sentencing law.

---

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

This appeal stems from consolidated cases against Wayne A. Sutton, the first charging him with felony battery and misdemeanor bail jumping, and the second charging him with his fifth offense of operating a motor vehicle with a prohibited alcohol concentration (PAC), felony bail jumping, and a second offense of operating a motor vehicle after revocation. The cases were resolved by plea agreement, whereby Sutton pled to a Class D felony, first-degree reckless endangerment under WIS. STAT. § 941.30(1), and a Class H felony, a fifth PAC offense under WIS. STAT. §§ 346.63(1)(b) and 346.65(2)(e).[2]

Both convictions are subject to bifurcated sentences under Wisconsin's truth-in-sentencing law (TIS).[3] The Class D felony under TIS-I is punishable by a fine and an overall sentence of not more than ten years' imprisonment, of which the term of initial confinement may not exceed five years. WIS. STAT. § 973.01(2)(b)4. (1999-2000). The Class H felony under TIS-II is punishable by a fine and an overall sentence of not less than six months' nor more than six years' imprisonment, of which the term of initial confinement may not exceed three years. Sec. 973.01(2)(b)8.

---

[2] Under the joint plea agreement, the State agreed to amend the felony battery charge to first-degree reckless endangerment and to dismiss and read in the misdemeanor bail jumping charge in exchange for Sutton's plea of guilty or no contest. The State also agreed to dismiss and read in the felony bail jumping and operating after revocation charges in exchange for a plea of guilty or no contest to the fifth offense of PAC.

[3] The reckless endangerment charge arose from an event that took place on April 10, 2002. TIS-I applies to offenses committed between December 31, 1999 and January 31, 2003. *See* ***State v. Cole***, 2003 WI 59, ¶4, 262 Wis. 2d 167, 663 N.W.2d 700. The PAC charge arose from an event on May 3, 2004. TIS-II applies to offenses committed on or after February 1, 2003. *See* ***id.***

During the plea colloquy regarding the reckless endangerment charge, the circuit court advised Sutton that the penalty for the Class D felony reckless endangerment included a "maximum penalty of $10,000 or ten years imprisonment or both." Regarding the PAC charge, the court stated, "If you are convicted of that offense, sir, which would be your 5th offense for an OWI-related incident, that would be a Class H felony, and … you would be looking at a fine of between 600 and $10,000 and imprisonment for between six months and six years." The court also advised Sutton of the maximum term of imprisonment for the charges that were dismissed but read in under the plea agreement. The court later advised Sutton that it would not have to follow the sentencing recommendations of either party and could impose the "maximum that the law allows," including "ten years in prison" for first-degree reckless endangerment and "six years in prison" for the PAC offense.

With regard to the conviction for recklessly endangering safety, the court imposed an eight-year sentence, with three years of initial confinement and five years of extended supervision. The circuit court imposed a four-year sentence in connection with the PAC conviction, ordering fourteen months of initial confinement in prison and thirty-four months of extended supervision. The court ordered the sentences to be served consecutively.

Sutton moved for postconviction relief, arguing that his pleas were not knowingly, intelligently, and voluntarily entered with respect to the potential punishment.[4] The circuit court denied Sutton's motion, holding that the plea

[4] Sutton also contends that there was no factual basis for the amended charge of first-degree reckless endangerment. We are satisfied that this issue can be addressed under existing law.

colloquy met the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

DISCUSSION

It is well established that a criminal defendant must enter a plea of guilty or no contest knowingly, voluntarily, and intelligently. ***State v. Bollig***, 2000 WI 6, ¶15, 232 Wis. 2d 561, 605 N.W.2d 199. Whether a plea is so entered presents a question of constitutional fact. ***Id.***, ¶13. The issue prompting certification is whether the circuit court complied with the mandate under WIS. STAT. § 971.08(1)(a), which requires that a defendant be informed of the potential punishment he or she faces if convicted. When a defendant is not aware of the potential punishment, the plea is not entered knowingly, voluntarily, and intelligently, and the result is a manifest injustice. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635-36, 579 N.W.2d 698 (1998).

Generally, this means that a defendant must be aware of the direct consequences of his or her plea. *See* ***State v. Hampton***, 2004 WI 107, ¶22, 274 Wis. 2d 379, 683 N.W.2d 14. A direct consequence of a plea has "a definite, immediate, and largely automatic effect on the range of a defendant's punishment." ***State v. Byrge***, 2000 WI 101, ¶¶60-61, 237 Wis. 2d 197, 614 N.W.2d 477. However, the circuit court need not inform a defendant of collateral consequences of a plea. ***Id.***, ¶61. "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea." ***Id.***

Sutton argues that the maximum term of initial confinement is a direct consequence of a plea and the circuit court had an obligation to include that

information in the colloquy. Sutton turns to ***Byrge*** for support. There, the circuit court sentenced Byrge to life imprisonment for first-degree intentional homicide and set a parole eligibility date of July 2, 2095, noting that Byrge would be 120 years old at that time. ***Id.***, ¶¶21, 56. The State maintained that the circuit court's power to set the parole eligibility date represents only a collateral consequence of the plea, and therefore WIS. STAT. § 971.08(1)(a) did not obligate the circuit court to notify Byrge that it would exercise its option to set parole eligibility. ***Byrge***, 237 Wis. 2d 197, ¶62. The ***Byrge*** court rejected the State's position, holding:

> [A] different set of considerations arises in the limited circumstances in which a sentencing court itself sets the parole eligibility date. If a circuit court elects to exercise the statutory option set forth in Wis. Stat. § 973.014(2), as it did in this case, the parole eligibility date links automatically to the period of incarceration, which in turn has a direct and automatic effect on the range of punishment. At Byrge's plea hearing, the circuit court expressly acknowledged this reality when it selected a parole eligibility date that exceeded Byrge's anticipated life span.

Byrge, 237 Wis. 2d 197, ¶67. Sutton concludes that the circumstances in ***Byrge*** are analogous to terms of initial confinement under TIS for purposes of accepting a plea because they represent "boundaries or conditions on the trial court's broad discretionary power to fix a term of imprisonment under the overall statutory ceiling."

The State argues that the initial term of confinement is not a direct result of a plea, but rather a collateral consequence that is contingent on future events. The State points out that periods of confinement are often reduced or extended depending on various circumstances and are "not nearly as fixed" as parole eligibility dates. For example, initial terms of confinement may be modified by a successful motion for modification under WIS. STAT. § 973.195(1r); participation in the challenge incarceration program under WIS. STAT. § 302.045(3m);

conditions of age or terminal illness under WIS. STAT. § 302.113(9g); or misconduct in prison under § 302.113(3)(a). The State directs us to ***State v. Yates***, 2000 WI App 224, ¶¶10-11, 239 Wis. 2d 17, 619 N.W.2d 132, for the proposition that since confinement periods may be controlled by a defendant's own behavior or a Department of Corrections decision, the consequence is collateral. Perhaps most persuasively, the State points out that Sutton's *range of punishment*, that is, the maximum term of imprisonment, does not change regardless of whether his conduct results in more confinement. The maximum term of imprisonment is the immediate and inflexible consequence of the plea and therefore, the State argues, the only direct consequence. *See, e.g.,* ***State v. Plank***, 2005 WI App 109, ¶16, 282 Wis. 2d 522, 699 N.W.2d 235, *review denied*, 2005 WI 136, ___ Wis. 2d ___, 703 N.W.2d 379 ("The lack of parole under truth-in-sentencing does not mean [a defendant] will serve more time than the maximum penalty of which the court informed him [or her]. Thus, truth-in-sentencing does not affect his [or her] range of punishment.").

Finally, the State argues that Sutton reads ***Byrge*** too broadly. ***Byrge***, by its own terms, has a very specific and limited application. Indeed, the supreme court held "that in the narrow circumstance in which a circuit court has statutory authority under WIS. STAT. § 973.014(2) to fix the parole eligibility date, the circuit court is obligated to provide the defendant with parole eligibility information before accepting a plea." ***Byrge***, 237 Wis. 2d 197, ¶68.

It is worth noting that the word "imprisonment" has been interpreted in "a common-sense fashion to mean incarcerated or confined in a jail or prison." ***State v. Cole***, 2003 WI 59, ¶26, 262 Wis. 2d 167, 663 N.W.2d 700. When the legislature enacted TIS-I, it gave the term a unique statutory meaning; specifically, "imprisonment" was defined as a bifurcated sentence comprising initial

confinement and extended supervision. ***Id.***, ¶27; WIS. STAT. § 973.01. Prior to the enactment of TIS-I, circuit courts advised defendants of a maximum term of imprisonment using the commonsense meaning of confinement. *See* ***Cole***, 262 Wis. 2d 167, ¶26. Even under TIS-I, the legislature occasionally used "imprisonment" to mean confinement alone. ***Id.***, ¶37.

Sutton asserts that when a defendant is advised of a maximum term of imprisonment, without being advised of the maximum term of initial confinement, the result is coercive because the term "imprisonment" connotes confinement. Sutton, for example, was advised that his maximum penalty included "ten years imprisonment" on the reckless endangerment charge and "imprisonment for between six months and six years" on the PAC charge. *See* WIS. STAT. § 973.01(2)(b)4. (1999-2000); WIS. STAT. § 973.01(2)(b)8. As he understood it, Sutton faced up to sixteen years of confinement on these two charges. The statutes, however, dictate a maximum of five years' initial confinement and three years' initial confinement, respectively. *See* ***id.*** Had he been advised of the maximum terms of initial confinement, Sutton implies, he may have weighed differently his decision to plead guilty or no contest.

Both parties draw reasonable inferences from existing case law to support their interpretation of a circuit court's duty under WIS. STAT. § 971.08(1)(a), which directs a court to advise a defendant of "the potential punishment if convicted" prior to accepting a plea of guilty or no contest.

CONCLUSION

This case presents a single but significant issue. It offers the opportunity for the supreme court to address and clarify the constitutionally sensitive question of when a TIS plea is knowingly, intelligently, and voluntarily made. The precise

issue presented here is one of first impression, and has far-reaching implications under Wisconsin's evolving truth-in-sentencing law. We respectfully request that the supreme court accept certification of this appeal.