

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3770-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY A. MAZE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Judgment vacated; order reversed and cause remanded.*

Before Eich, Roggensack and Deininger, JJ.

ROGGENSACK, J. Jerry Maze appeals from a judgment and an order of the circuit court denying his motion to withdraw his no contest pleas. Maze argues that his pleas were not knowingly and voluntarily entered because he entered them under the mistaken belief that he could appeal a prior ruling of the

circuit court. The circuit court concluded that Maze's subjective belief concerning appellate review did not result in a manifest injustice requiring plea withdrawal because the preservation of appellate review was not a condition of the plea, made at the plea hearing and accepted on the record by the court. We conclude that Maze relied on inaccurate information which was provided by his trial counsel, rendering his pleas uninformed and involuntary; and therefore, he may withdraw his pleas to avoid a manifest injustice. Accordingly, we vacate the judgment and reverse the order of the circuit court and remand for a trial on all the charges against Maze.

BACKGROUND

On June 3, 1993, the State issued a criminal summons and complaint alleging that Maze had failed to pay child support, a felony contrary to § 948.22(2), STATS. A copy of the summons and complaint was mailed to Maze at an address in Florida. When he failed to appear in court, the State issued a nationwide warrant for his arrest. In 1994, the State and Maze negotiated an agreement whereby Maze agreed to make child support payments, and the State agreed to have the warrant apply only in Wisconsin. In 1996, Maze failed to make payments as agreed; and thereafter, the State issued another warrant without the provision that the warrant would apply only in Wisconsin.

On June 24, 1996, Maze, who was in prison in Florida, filed a *pro se* "Motion for Resolution of Detainer" in Jefferson County Circuit Court. When Maze was released from prison in Florida, he was extradited to Jefferson County. Maze made his initial appearance before the circuit court on December 30, 1996.

On January 7, 1997, the date scheduled for Maze's preliminary hearing, the State filed an amended criminal complaint charging Maze with ten

counts of failure to pay child support contrary to § 948.22(2), STATS. That same day, Maze filed a motion to dismiss the criminal charges, alleging the State had failed to bring Maze to trial within 180 days as required by the Interstate Detainers Act, §§ 976.05 and 976.06, STATS.

During the course of the proceedings on January 7, 1997, Maze waived his right to a preliminary hearing, and after a brief recess to explore plea negotiations, Maze indicated that he would enter pleas to the first seven counts set forth in the amended criminal complaint. Thereafter, the court commenced a plea colloquy as mandated by § 971.08, STATS. Defense counsel interrupted the colloquy to emphasize that Maze was not withdrawing his motion to dismiss based on the detainer issue. The circuit court declined to make a ruling on the motion and instead adjourned the plea hearing and set a time to hear Maze's motion.

On January 10, 1997, the circuit court denied Maze's motion to dismiss, concluding that there had been "substantial compliance with the Interstate Detainers Act." Following this ruling, Maze entered no contest pleas to seven of the ten counts of failure to pay child support. Maze was sentenced to eight years in prison on four of the counts and consecutive terms of three years probation on the remaining counts.

Maze subsequently filed a motion to withdraw his no contest pleas, alleging that he entered the pleas in the mistaken belief that he had preserved his right to appeal the circuit court's ruling denying his motion to dismiss. At the hearing on Maze's plea withdrawal motion, he testified that he did not realize that his pleas waived the right to challenge the court's prior ruling, and that he would not have pled if he had known he was waiving the right to appeal the detainer issue. Defense counsel's testimony revealed that he, too, believed that a ruling on

the motion to dismiss prior to the entry of the pleas would preserve an appeal of the decision on the motion. Following the hearing, the circuit court denied Maze's request to withdraw his pleas because it had not acquiesced to Maze's mistaken view of the law. This appeal followed.

DISCUSSION

Standard of Review.

Permitting withdrawal of a guilty or no contest plea is a discretionary decision for the circuit court. *State ex rel. Warren v. Schwarz*, 219 Wis.2d 616, 636, 579 N.W.2d 698, 708 (1998). Therefore, its decision to deny Maze's motion to withdraw his plea will be overturned only if the circuit court erroneously exercised its discretion. *Id.* When we review a discretionary determination, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. *State v. Keith*, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997). An erroneous exercise of discretion occurs when the circuit court bases the exercise of its discretion on an error of law. *State v. Woods*, 173 Wis.2d 129, 137, 496 N.W.2d 144, 147 (Ct. App. 1992).

Guilty-Plea-Waiver Rule.

Generally, a guilty or no contest plea waives all non-jurisdictional defects and defenses.¹ *State v. Kazee*, 192 Wis.2d 213, 219, 531 N.W.2d 332, 334 (Ct. App. 1995). As the supreme court has instructed:

[T]he only public policy exception to the rule of [guilty-plea] waiver is the legislatively created one in respect to motions to suppress, and the intent or reservation of the defendant at the time of entering a plea is irrelevant in respect to preserving a right to appeal.

State v. Riekkoff, 112 Wis.2d 119, 126, 332 N.W.2d 744, 748 (1983). Both Maze and the State agree that Maze waived his right to appeal the detainer issue by pleading no contest; however, they disagree about whether Maze is entitled to withdraw his pleas based on his mistaken belief that he could appeal the motion to dismiss.

Plea Withdrawal.

In a motion to withdraw a plea after sentencing, the defendant has the burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *Woods*, 173 Wis.2d at 136, 496 N.W.2d at 147. A manifest injustice occurs when the defendant does not knowingly and voluntarily enter his plea. *Id.* at 140, 496 N.W.2d at 149. Therefore, a manifest injustice may at times result when the defendant enters a plea in the mistaken belief that he has preserved his right to appellate review of a circuit court ruling because such a mistake may negate the knowing and voluntary character of the plea. *Foster v.*

¹ An exception to this general rule is that a defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty or no contest plea. Section 971.31(10), STATS. Neither this exception nor a jurisdictional defect is at issue in this case.

State, 70 Wis.2d 12, 21, 233 N.W.2d 411, 415 (1975); *Riekkoff*, 112 Wis.2d at 128, 332 N.W.2d at 749; *State v. Nelson*, 108 Wis.2d 698, 702-03 n.1, 324 N.W.2d 292, 295 n.1 (Ct. App. 1982); *Woods*, 173 Wis.2d at 140, 496 N.W.2d at 149; *Kazee*, 192 Wis.2d at 220, 531 N.W.2d at 335.

The State argues that a defendant's subjective belief concerning appellate review does not result in a manifest injustice requiring plea withdrawal, unless the preservation of appellate review was a condition of the plea, made at the plea hearing and accepted on the record by the court. The State cites *Riekkoff*, *Woods*, and *Kazee*, in support of this contention. Although those cases involved conditional pleas which the court accepted, in each case, the merits of the plea withdrawal contention turned on the uninformed and involuntary nature of the plea, due to inaccurate information provided to the defendant by the lawyers and the court.

In *Riekkoff*, 112 Wis.2d at 121, 332 N.W.2d at 746, the circuit court ruled at a preliminary hearing that testimony offered by the defendant would be inadmissible at trial. The defendant subsequently entered a guilty plea with the condition that the issue of the admissibility of the testimony was preserved for appellate review. Both the prosecutor and the court acquiesced to the conditional plea, although the court was not explicit in its acquiescence. *Id.* at 121-122, 332 N.W.2d at 746. On review, the supreme court first discussed the guilty-plea-waiver rule, concluding that the waiver rule applies despite the intent or reservation of a defendant, or the acquiescence of a prosecutor and the court. *Id.* at 127-28, 332 N.W.2d at 748-49.

[The guilty-plea-waiver rule] is to be applied even though a defendant expressly states his intent not to waive certain issues on appeal and makes that intention a condition of his

plea and even though the prosecutor and the judge acquiesce in that intention.

Id. at 127-28, 332 N.W.2d at 749. The supreme court then discussed the effect of a defendant's mistaken belief on the knowing and voluntary nature of the plea, concluding that although the defendant had waived his appellate rights, he was entitled to withdraw his plea because it was grounded on misinformation that had been imparted to him by counsel and the court. *Id.* at 128, 332 N.W.2d at 749.

In subsequent cases, we concluded that a plea based on incorrect information from counsel or the court negated the knowing and voluntary nature of a defendant's plea. *Woods*, 173 Wis.2d at 140, 496 N.W.2d at 149; *Kazee*, 192 Wis.2d at 220, 531 N.W.2d at 335. In both *Woods* and *Kazee*, a conditional plea was made and accepted on the record by the circuit court. Agreement to the conditional nature of the plea may provide evidence of a defendant's reliance on erroneous information, as well as the source of that information, both of which are relevant inquiries in a motion to withdraw a plea based on the contention that the plea was not knowingly and voluntarily entered.

Here, Maze clearly waived his right to appeal the detainer issue by pleading no contest; and thereafter, he pursued the appropriate remedy of plea withdrawal. Because the issue in this case is plea withdrawal, not the guilty-plea-waiver rule, we are primarily concerned with Maze's knowledge and understanding at the time he entered his pleas, as well as the source of the information upon which he relied.

During the initial plea colloquy on January 7, 1997, defense counsel expressly stated that Maze was not withdrawing his motion to dismiss, despite his pleas. Rather than agreeing with the reservation, or conversely, explaining that the

right to appeal that issue would be waived if Maze entered pleas, the court appropriately adjourned the plea hearing and set a time to hear Maze's motion. When the court denied the motion and Maze entered no contest pleas, defense counsel did not restate Maze's intent to reserve appellate review, and the State and the court did not agree to a conditional plea.

However, at the postconviction plea withdrawal hearing, Maze testified that he did not realize his pleas waived his ability to challenge the circuit court's ruling on appeal, and that he would not have entered his pleas if he had known that they did. Maze's trial counsel confirmed that he understood that Maze believed that he could still appeal the circuit court's decision on the motion to dismiss if he pled. And that counsel, himself, believed so as well. Their statements are consistent with the circuit court's finding that trial counsel was the source of Maze's erroneous information. We rely on the circuit court's finding, which we conclude is not clearly erroneous. Section 805.17(2), STATS.

Therefore, even though the State and the circuit court did not expressly accept Maze's pleas as conditional, Maze nevertheless relied on inaccurate information from his trial counsel, as did the defendants in *Reikkoff* and *Woods*. While acknowledging this fact, the standard the circuit applied to Maze's motion to withdraw his pleas was whether the record supported a finding that the circuit court had "misadvised" or, in any other way, led Maze to conclude that he could plea and still retain the ability to appeal its decision on the motion to dismiss. The circuit court did not analyze whether Maze had entered pleas that were knowingly and voluntarily made, given the advice he had received from trial counsel. Therefore, the circuit court relied on an incorrect standard to determine whether manifest injustice had occurred.

Because we conclude Maze's plea was uninformed and involuntary due to incorrect information provided by counsel, and consistent with the principle that the lack of a knowingly and voluntarily entered plea requires withdrawal of the plea to prevent manifest injustice, we reverse the circuit court's order denying postconviction relief, vacate the judgment of conviction and remand for a trial of all the charges against Maze.²

CONCLUSION

Maze did not knowingly and voluntarily enter his no contest pleas because he entered the pleas based on inaccurate information provided by trial counsel, concerning his right to appeal the detainer issue. The circuit court applied an incorrect legal standard when it denied Maze's request to withdraw his pleas, because Maze's misperception of whether he was waiving appellate review was not a condition of the pleas, accepted by the court on the record. Because a knowingly and voluntarily entered plea is not made when a defendant bases his plea on erroneous information from trial counsel,³ the order and judgment of the circuit court must be reversed.

By the Court.—Judgment vacated; order reversed and cause remanded.

Not recommended for publication in the official reports.

² We conclude only that Maze's plea was invalid because it was unknowingly and involuntarily entered; therefore, we do not address whether ineffective assistance of counsel justified plea withdrawal, and we do not reach the merits of the detainer issue.

³ Necessary to our decision is the finding of the circuit court that Maze obtained the erroneous information upon which he relied from his trial counsel.

