COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3307-CR **Cir. Ct. No. 2002CF545**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS AGUIRRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Luis Aguirre appeals a judgment convicting him of battery by a prisoner and an order denying his motion to withdraw his no contest plea. Because we conclude Aguirre made a prima facie case that he was

misinformed about the maximum penalty, and the State did not establish that the plea was knowingly entered despite the misinformation, we reverse the judgment and order and remand the matter with directions to allow Aguirre to withdraw his plea.

¶2 The complaint charged Aguirre with battery by a prisoner and disorderly conduct, both as a repeater. Pursuant to a plea agreement, the State dropped the disorderly conduct charge and the repeat offender sentence enhancer on the battery charge. Removal of the sentence enhancer reduced the maximum sentence on the battery charge from eleven years to five years. The State agreed to recommend a one-year concurrent sentence. During the plea colloquy, the trial court stated and Aguirre said he understood the maximum sentence was eleven years. The court accepted the plea and sentenced Aguirre to eighteen months' initial confinement and forty-two months' extended supervision.

¶3 Aguirre moved to withdraw his plea based on the erroneous statement regarding the maximum sentence. The State opposed the motion on three grounds: (1) the plea questionnaire recited the correct maximum sentence and Aguirre acknowledged at the plea hearing that he read and understood the questionnaire; (2) the presentence report noted the correct maximum sentence and Aguirre said nothing before sentencing that would indicate confusion; and (3) citing dictum in ***State v. Quiroz***, 2002 WI App 52, ¶16, 251 Wis. 2d 245, 641 N.W.2d 715, overstating the maximum sentence did not prejudice Aguirre. Without objection from the State, the court ruled without Aguirre testifying, based on the argument of counsel and what the court surmised Aguirre would say. The court found it was possible that Aguirre was confused by the conflicting statements, but Aguirre's proceeding to sentencing without saying anything and

the lack of prejudice from overstating the maximum sentence justified denying his motion to withdraw the plea.

¶4 A defendant must understand the maximum penalty when he pleads no contest. *See* WIS. STAT. § 971.08(1)(a) (2003-04); ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). Once a defendant establishes a prima facie case that the trial court did not comply with § 971.08, the burden shifts to the State to show by clear and convincing evidence that the plea was nonetheless knowingly, voluntarily and intelligently entered. ***Id.*** at 274. Whether the State met the burden is a question of constitutional fact that we decide without deference to the trial court. ***Id.*** at 283.

¶5 Aguirre's showing of erroneous sentencing information in the plea colloquy and the trial court's finding of possible confusion make a prima facie case that shifted the burden to the State. Because the State presented no evidence, and its arguments do not establish that Aguirre entered a knowing plea, Aguirre is entitled to withdraw his plea.

¶6 The correct sentencing information in the plea questionnaire does not establish that Aguirre knew the true maximum sentence. It merely provides a basis for trial court's findings of possible confusion based on conflicting information provided by the court itself.

¶7 The correct information in the PSI is irrelevant. The question is Aguirre's knowledge at the time he entered the no contest plea. ***Id.*** at 269. His silence at the sentencing hearing does not constitute clear and convincing evidence of his correct understanding of the maximum sentence at the time he pled no contest. In light of the State's recommendation for a one-year concurrent sentence, there did not appear to be any need to mention the discrepancy.

¶8 The dictum in ***Quiroz*** does not establish nonprejudice in this case. While overstating the maximum sentence in some instances may conclusively show the defendant's willingness to enter a plea, that is not universally true. In ***Quiroz***, the prosecution agreed to recommend the maximum sentence. Obviously, if ***Quiroz*** was willing to plead guilty believing fourteen years was the maximum sentence, he would have accepted the same plea agreement if the maximum had been thirteen years. Here, the prosecutor agreed to recommend a one-year sentence. Misstating the maximum sentence as eleven years makes the prosecutor's agreement appear more generous than it was, providing a real possibility that it induced Aguirre's agreement. In this instance, we cannot conclude the misinformation had no effect on Aguirre's plea decision.

¶9 Finally, the State requests that if we conclude Aguirre made a prima facie case for confusion, we remand the matter for a hearing at which it will present evidence that his plea was knowingly, voluntarily and intelligently entered. The State had an opportunity to present that evidence at the postconviction hearing. It did not object when the court decided to forego Aguirre's testimony. It made no offer of proof. We conclude the State had its chance to rebut Aguirre's prima facie case and it should not get another "kick at the cat." ***State v. Nickelson***, 220 Wis. 2d 214, 226, 582 N.W.2d 460 (Ct. App. 1998).

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).