COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP226-CR **Cir. Ct. No. 2003CF210**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYAN GARY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Bryan Gary appeals judgments of conviction for disorderly conduct and intimidation of a witness and an order denying his motion to withdraw his plea. Gary argues: (1) his plea was unknowing because he was

not informed of the maximum potential penalties; (2) the State breached the plea agreement; and (3) trial counsel was ineffective. We conclude the plea was unknowing. We therefore reverse the judgments and order and remand with directions to allow Gary to withdraw his plea.

Background

¶2 In November 2003, Gary was charged with misdemeanor battery as a domestic abuse incident, misdemeanor disorderly conduct as a domestic abuse incident, and felony intimidation of a witness. At the initial appearance, Gary was advised of the potential penalty terms of nine months, ninety days, and ten years, respectively.

¶3 A month later, an Information was issued but this time it included repeater allegations for each charge. The Information stated that the repeater allegations allowed the penalties for the misdemeanors to be raised to a maximum of two years for each count, and the felony penalty could be increased by four years.

¶4 A plea hearing was held in March 2004. The State relayed that in exchange for his no contest pleas to disorderly conduct and intimidating a witness, both with the repeater enhancer, the State would recommend the court withhold sentencing and give Gary probation.[1] Terms of probation would require Gary to attend a "batterers' group" and spend one year in the county jail.

[1] We note that neither judgment in this record reflects the repeater enhancer.

¶5 When the court asked Gary if this was his understanding of the agreement, counsel informed the court that he and Gary had not discussed the repeater enhancers. The court adjourned so they could talk about the repeater provisions and when the proceedings resumed, counsel indicated Gary would accept the agreement.

¶6 The plea questionnaire listed the maximum potential time in prison as eleven years. However, because of the repeater enhancers, the actual exposure on the two charges was sixteen years. The court did not inform Gary of the potential maximum. It accepted Gary's plea but, because of concerns of pending charges in another county, the court ordered a presentence investigation.

¶7 Gary was sentenced in April 2004.[2] The presentence investigation (PSI) recommended an eight-year sentence consisting of three years' initial confinement and five years' extended supervision. The prosecutor stated, "I take no issue with the recommendations made by the drafter of the presentence investigation, but I ask the court not to follow it." The prosecutor then repeated the agreed-upon recommendation, but departed from the agreement when he asked the court to impose and stay a sentence. Defense counsel did not object to any of the prosecutor's remarks. The court sentenced Gary to eight years as recommended by the PSI.

¶8 In October 2004, Gary moved to withdraw his plea, asserting it was neither knowing nor intelligent because he was not properly informed of the

[2] Gary attempted to withdraw his plea in March following the plea hearing and before sentencing on the basis of mental disease or defect. That motion was evidently denied, but was not appealed.

potential maximum penalty. He testified he did not recall his attorney pointing out even the lower eleven-year penalty. He claimed defense counsel told him the repeater allegations would make no difference to the sentence and did not advise him of any increased penalties. Defense counsel was unable to recall whether he had informed Gary of the extra five years.

¶9 The trial court denied the motion. It candidly noted, "I did not, at the plea hearing, ascertain that Mr. Gary understood the potential penalty if convicted. I think that's an error, as a matter of law." The court continued, however, to determine its error to be harmless because Gary was only sentenced to eight years' imprisonment, not eleven or sixteen. In addition, the court noted Gary's testimony that his motive in entering the plea was to avoid the five to six years defense counsel anticipated he would receive if he were found guilty following a trial. Thus, the court reasoned, Gary was not really concerned with the maximum sentence. He simply wanted to avoid prison. The court also specifically stated that Gary lacked credibility as a witness and it did not believe him when he claimed he would not have entered a plea had he known the potential maximum. Accordingly, the court denied Gary's motion.

¶10 Gary appeals. We address only the knowingness of the plea because it is dispositive. *See* ***Gross v. Hoffman***, 227 Wis. 296, 299-300, 277 N.W. 663 (1938).

Discussion

¶11 The decision whether to allow a plea withdrawal is committed to the trial court's discretion and as such, will not be overturned unless the court has erroneously exercised that discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). However, a decision based on an error of law

constitutes an erroneous exercise of discretion. ***Sullivan v. Waukesha County***, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998).

¶12 A defendant must understand the maximum penalty when he pleads no contest. *See* WIS. STAT. § 971.08(1)(a); ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986).[3] If the defendant establishes a prima facie case that the trial court did not comply with § 971.08, the burden shifts to the State. ***Id.*** at 274. The State must show by clear and convincing evidence that the plea was nonetheless knowing, voluntary, and intelligent—that is, that the defendant "in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him." ***Id.*** at 274-75. Whether the State has fulfilled its burden is a question of constitutional fact that we decide without deference to the trial court. ***Id.*** at 283.

¶13 Gary contends the plea colloquy was inadequate because the court failed to advise him of the potential maximum penalty or otherwise ascertain Gary knew the maximum. The court acknowledged its error.[4] The burden thus shifts to the State.

¶14 The State's sole argument on this matter on appeal is that there is no manifest injustice because Gary was sentenced to less than the maximum. It relies on the following paragraph from another of our decisions:

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

[4] While the court then proceeded with a harmless error analysis, that test does not apply here. *See* ***State v. Sturgeon***, 231 Wis. 2d 487, 496 n.3, 605 N.W.2d 589 (Ct. App. 1999) (harmless error applies in a WIS. STAT. § 971.31(10) plea withdrawal; otherwise, the manifest injustice standard applies); *see also, e.g.,* ***State v. Quiroz***, 2002 WI App 52, ¶20, 251 Wis. 2d 245, 641 N.W.2d 715.

> Furthermore, even if the maximum penalty had been overcalculated, which we have determined it was not, *Quiroz fails to establish that a plea withdrawal would correct a manifest injustice. Quiroz was sentenced to twelve years in prison, less than the fourteen-year maximum* correctly calculated by the court and less than the thirteen-year maximum incorrectly calculated by Quiroz. No matter which way the maximum sentence is calculated, Quiroz received less than the maximum. Furthermore, Quiroz willingly pled guilty to a crime with a fourteen-year maximum penalty; he cannot credibly argue that he would not have so pled had he been informed that the maximum was thirteen years.

State v. Quiroz, 2002 WI App 52, ¶16, 251 Wis. 2d 245, 641 N.W.2d 715 (emphasis added). We note first that this citation does not supplant the State's obligation to show that Gary possessed an adequate understanding of the maximum penalty. Moreover, ***Quiroz*** is distinguishable and the cited paragraph is dicta.

¶15 Quiroz was charged with two counts of attempted first-degree homicide, one count of discharging a firearm at a person, and one count of marijuana possession. The first three charges each had at least one penalty enhancer. ***Id.***, ¶2.

¶16 Quiroz reached a plea bargain with the State wherein he would plead guilty to one of the attempted murder charges, amended and reduced to a charge of first-degree reckless endangerment of safety as party to a crime, with two enhancers. Quiroz would also plead guilty to the firearm charge. The remaining attempted murder charge and the marijuana charge would be dismissed and read in at sentencing. The State agreed to recommend the maximum sentence on the reckless endangerment charge and consecutive probation for the firearm charge. ***Id.***, ¶3.

¶17 When the State made its recommendation to the court, it stated the maximum penalty it was seeking was fourteen years. The court confirmed that as the maximum sentence, but ultimately sentenced Quiroz to twelve years' imprisonment. ***Id.***, ¶¶4-5. Quiroz later sought to withdraw his plea, claiming in part that he had been misinformed of the maximum penalty. By his calculations, the penalty was only thirteen years. ***Id.***, ¶8.

¶18 The calculation dispute dealt with the application of penalty enhancers. Ultimately, we concluded the court and State had correctly determined that the maximum sentence for Quiroz's crime was fourteen years. ***Id.***, ¶12. Thus, Quiroz had never been misinformed of the maximum sentence.

¶19 We could have ended our analysis there. However, in the paragraph the State cites, we went on to opine that Quiroz was not prejudiced because he had agreed to allow the State to seek the maximum penalty. ***Id.***, ¶16. We determined it would be incredible for him to say that while he agreed to plead guilty and face fourteen years' imprisonment, he would not have agreed to face thirteen years' imprisonment.

¶20 Even if we were inclined to rely on it, ***Quiroz*** presents essentially the opposite of Gary's situation. Quiroz thought, albeit incorrectly, that he faced a greater penalty than he really did. Gary was advised that he faced a lesser penalty than he did. A defendant willing to enter a plea when he is advised the maximum penalty he faces is eleven years might not be willing to enter the same plea if he is advised that the maximum penalty is sixteen years.

¶21 "Courts are required to notify defendants of the direct consequences of their pleas." ***State v. Hampton***, 2004 WI 107, ¶22, 274 Wis. 2d 379, 683 N.W.2d 14; WIS. STAT. § 971.08(1). When the court does not do so, the State can

overcome the error by showing the defendant actually possessed the missing knowledge. Here, however, the State has failed to meet its burden. Thus, it was error for the trial court to deny relief, and we have no choice but to declare Gary's plea unknowing.[5] He is entitled to withdraw it.

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

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

[5] While we acknowledge—and share—the trial court's concern about the nature and frequency of offenses in Gary's criminal record and the possibility that he is somehow "playing" the court system, we are nonetheless bound to constitutional standards.