COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP967 **Cir. Ct. No. 1997CF974862**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS A. RAMIREZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Luis A. Ramirez appeals *pro se* the order denying his postconviction motion seeking to withdraw his guilty plea to one count of armed robbery, as a party to the crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05

(1997-98).[1] Ramirez argues that he established a manifest injustice and he should have been allowed to withdraw his guilty plea because: (1) the trial court failed to follow the dictates of WIS. STAT. § 971.08 when it never personally addressed him at the guilty plea proceeding and ascertained that he understood the elements of the crime of armed robbery and the operation of the party to a crime statute; (2) the trial court failed to advise him that the court "was not bound by the plea agreement"; and (3) the State violated the plea agreement during its sentencing argument by mentioning uncharged offenses. We determine that although the guilty plea proceeding did not strictly comply with the dictates of § 971.08, Ramirez has not stated what elements of the charge of armed robbery he did not understand or what information about the operation of the party to a crime statute he did not know; thus, on this basis, he has not met his burden of establishing a manifest injustice. Further, while the court failed to advise him personally that the court was free to disregard the plea negotiations, the guilty plea questionnaire that Ramirez signed and claimed he understood did state that the trial court need not follow the plea negotiations and, more importantly, he has not claimed that he believed otherwise. Finally, our review of the record supports the State's contention that the prosecutor did not violate the terms of the plea negotiations by mentioning uncharged offenses in his sentencing argument. Consequently, we affirm.

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

I. BACKGROUND.

¶2 On October 26, 1997, Ramirez, then twenty-two years old, and two other males, one eighteen years old and the other fifteen years old, entered the Stop and Save food store located at 1400 South 6th Street in Milwaukee. All three were masked and carrying guns. Soon after entering the store, Ramirez put on gloves and removed the surveillance tape from the video camera. After threatening to shoot the store's manager, the three took money, lottery tickets, and a handgun. They also forced the manager to open the cash register, from which they took additional amounts of money, and took $200 and a gold necklace from another store employee. The manager's and the employee's hands and feet were then bound with duct tape. However, the robbers were unaware that the manager had activated the silent holdup alarm, so that when the three robbers were about to exit the store, they saw that the police were waiting for them. The three men frantically looked for another way to exit the store and began hiding items throughout the store. They also discussed using the manager and the store employee as hostages. After approximately thirty minutes, the three permitted the manager to call 911 and make arrangements for them to surrender. All three confessed to the crime.

¶3 After being charged with armed robbery, as a party to the crime, a question arose regarding Ramirez's competency to proceed because of his mental health, and he was examined by a psychiatrist. The doctor reported to the trial court that Ramirez was competent to proceed. Nevertheless, Ramirez entered a plea of not guilty by reason mental disease or defect, and a doctor was appointed to examine him. When the doctor's examination did not support Ramirez's special plea, Ramirez withdrew his plea and pled guilty.

¶4 The transcript of the actual guilty plea proceeding is very brief, consisting of only six pages. Following the completion of a presentence report, Ramirez was later sentenced to the maximum forty years' incarceration. No direct appeal was brought on Ramirez's behalf.

¶5 In March 2006, Ramirez, acting *pro se*, brought a motion seeking to withdraw his guilty plea, claiming a manifest injustice occurred because the trial court did not follow the procedures set forth in WIS. STAT. § 971.08, and because the trial court did not advise him that the court could disregard the plea negotiations. He also alleged that the State violated the plea agreement. The motion was denied without a hearing and this appeal followed.

II. ANALYSIS.

A. Validity of Guilty Plea

¶6 Ramirez claims he should be allowed to withdraw his guilty plea for three reasons, two of which deal with the guilty plea. He argues that because the trial court failed to address him personally and determine that he understood the elements of the crime of armed robbery and the operation of the party to a crime statute, and the trial court never told him that the court was free to disregard the plea negotiations, his plea was not knowingly entered, resulting in a manifest injustice.

¶7 The circuit court's denial of a motion to withdraw a plea is reviewed under an erroneous exercise of discretion standard. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. A defendant seeking to withdraw a guilty or no contest plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a

manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A "manifest injustice" occurs when a defendant makes a plea involuntarily or without knowledge of the charge or potential punishment if convicted. *See* ***State v. James***, 176 Wis. 2d 230, 237, 500 N.W.2d 345 (Ct. App. 1993). "A plea which is not knowingly, voluntarily or intelligently entered is a manifest injustice." ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). We accept the trial court's findings of historical and evidentiary facts unless they are clearly erroneous, but we determine *de novo* whether those facts demonstrate a knowing, intelligent and voluntary plea. ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891.

¶8 WISCONSIN STAT. § 971.08, directs, in relevant part, that:

> **(1)** 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.

¶9 In addition, in ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14, the supreme court instituted a rule that when a trial court discovers that "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, *the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court*." ***Id.***, ¶32 (emphasis in original; citation omitted).

¶10 Thus, we must first determine: (1) whether the defendant has made a prima facie showing that his plea was accepted without the trial court's

conformance with WIS. STAT. § 971.08 and other mandatory duties imposed by this court (such as the one set forth in ***Hampton***); *and* (2) whether he has properly alleged that he in fact did not know or understand the information which should have been provided at the plea hearing. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¶11 At the guilty plea hearing, the following colloquy took place between Ramirez and the court:

> [PROSECUTING ATTORNEY]: Your Honor, if the Court does accept this plea to the one charged count in the Information – and I understand that, um, earlier this morning that the Defendant formally withdrew his N.G.I. plea, after reviewing Dr. Palermo's report – if the Court does accept that plea, the State has agreed to read-in, rather than charge, two additional counts of armed robbery and concealing identity – ah – individuals were masked at the time. There's also two counts of false imprisonment, while armed, and potentially there is a Class A, um, taking a hostage type of a count, which would have needed further investigation, but the State will not pursue that upon this plea being accepted.
>
> When the Presentence Report comes back, both sides will be free to argue what they feel is an appropriate sentence.
>
> THE COURT: Is that a correct, ah, statement of the negotiations?
>
> [DEFENSE ATTORNEY]: Yes, Judge.
>
> THE COURT: You agree with that, sir?
>
> THE DEFENDANT: (Nods head.) Yes.
>
> THE COURT: And you understand what you're charged with?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: Do you understand the concept of party to a crime?

THE DEFENDANT: Yes, I do.

THE COURT: And you understand the penalty the Court could impose?

THE DEFENDANT: Yes, I do.

THE COURT: And by pleading guilty to the armed robbery, you're going to be waiving your rights to a – to a trial by jury, and all 12 jurors must agree unanimously as to a verdict.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: The State would have to prove you guilty beyond a reasonable doubt as to each and every single element of the offense.

Do you understand that, also?

THE DEFENDANT: Yes, I do.

THE COURT: You'll – you've gone over those elements with your lawyer; is that right?

THE DEFENDANT: Yes.

THE COURT: You will be waiving any possible defenses that you may have to the offense charged in the Criminal Complaint, and you will be waiving your right to cross-examine the State's witnesses and call witnesses on your own behalf.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: You've, ah, signed this Guilty Plea Questionnaire and Waiver of Rights Form; is that right?

THE DEFENDANT: Yes, I have.

THE COURT: Nobody made any promises or threats to you to plead guilty to this offense?

THE DEFENDANT: No.

….

THE COURT: So is it a correct statement for the Court to make that you're voluntarily, knowingly, intelligently waiving those constitutional rights?

THE DEFENDANT: Yes, I am.

THE COURT: And, counsel, you believe that he is?

[DEFENSE ATTORNEY]: Yes, Judge.

THE COURT: And it's also my understanding that you're withdrawing – or you did, in fact, withdraw your special plea; is that right?

THE DEFENDANT: Yes, I did.

THE COURT: What's your plea then, sir, to the charge in the Criminal Complaint, the armed robbery, party to a crime?

THE DEFENDANT: Guilty

THE COURT: On that plea then, the Court will make a finding of guilt.

The Court will use the Criminal Complaint as a factual basis for the Defendant's plea, and waive any testimony, if there[are] no objections.

[PROSECUTING ATTORNEY]: None by the State, Your Honor.

[DEFENSE ATTORNEY]: Ah, Judge, only thing pointed out to me by my client was the statement that is near the end of the – of the Complaint – um – he doesn't have a clear recollection of those statements. He said it's possible he said them; he doesn't know for sure if he did. I just want to point that out on behalf of my client.

THE COURT: All right.

But he stipulates to the Complaint; is that correct[?]

[DEFENSE ATTORNEY]: Correct.

THE COURT: All right.

¶12 The guilty plea questionnaire and waiver of rights form referenced by the trial court contains the following language:

> I have read (or have had read to me) the criminal complaint and the information in this case, and I understand what I am charged with, what the penalties are and why I have been charged. I also understand the elements of the offense and their relationship to the facts in this case and how the evidence establishes my guilt.

Additionally, the guilty plea questionnaire and waiver of rights form addressed the trial court's ability to disregard sentence recommendations:

> I understand that the Judge is not bound to follow any plea agreement or any recommendation made by the District Attorney, my attorney, or any presentence report. I understand that the Judge is free to sentence me to the following minimum (if applicable) and maximum possible penalties in this case.

Following this clause is handwritten the words "Armed Robbery—Threat of Force—PTAC" (party to a crime). Then, printed on the form is the word "Years," followed by the handwritten number "40." Ramirez admitted that he signed the form and understood its contents. His attorney also signed the form.

¶13 As is evident from the transcript and the guilty plea questionnaire and waiver of rights form, although not in conformity with WIS. STAT. § 971.08 or ***Hampton***, Ramirez admitted that he was advised of the elements of the offense and "their relationship to the facts in this case and how the evidence establishes [his] guilt." Similarly, while Ramirez has established that the trial court failed to personally advise him as ***Hampton*** directs, that the trial court is not bound by the sentence recommendation, the guilty plea questionnaire and waiver of rights form contained the required advisals.

¶14 While admittedly the plea proceeding "did not strictly conform to the statutory dictates," as the State concedes, what is critical to our determination is that Ramirez has not alleged what it was that he failed to understand concerning the elements of armed robbery or the party to a crime statute, nor has he said that he never knew the trial court was free to disregard all sentence recommendations. Consequently, because Ramirez has not shown that his plea was "unknowing," he has failed to establish a manifest injustice on this basis.[2]

¶15 Thus, as a result, Ramirez has established only that the trial court strayed from the statutory directives and also failed to personally explain that it need not follow the plea negotiations. These errors do not rise to the level of a constitutional error because Ramirez has not claimed that he did not know the omitted information. Therefore, the guilty plea questionnaire and waiver of rights form remedied the trial court's omissions, and, moreover, Ramirez has not asserted that he did not know what he claims the trial court should have told him.

B. The prosecutor's remarks were proper.

¶16 Ramirez next contends that he is entitled to withdraw his guilty plea because the prosecutor violated the spirit of the negotiations in his sentencing remarks.

[2] In his brief to this court, Ramirez claims that he "asserted on the trial level that he didn't understand or know at the time of the plea hearing the elements of armed robbery or the specific theory of criminal liability under s. 939.05 Stats." However, the record belies that claim, as nowhere is there any substantiation that Ramirez presented to the trial court allegations that he did not understand the elements of armed robbery, the workings of the party to a crime statute, or that he did not know the trial court was free to disregard the plea negotiations.

¶17 The Wisconsin Supreme Court set forth the standards for reviewing an alleged breach of a plea agreement in ***State v. Williams***, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733:

> [A]n accused has a constitutional right to the enforcement of a negotiated plea agreement.
>
> …. A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement. An actionable breach must not be merely a technical breach; it must be a material and substantial breach. When the breach is material and substantial, a plea agreement may be vacated or an accused may be entitled to resentencing.

Id., ¶¶37-38 (footnotes omitted). "Whether the State breached a plea agreement is a mixed question of fact and law." ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. "The precise terms of a plea agreement between the State and a defendant and the historical facts surrounding the State's alleged breach of that agreement are questions of fact," and "the circuit court's determinations as to these facts are reviewed under the clearly erroneous standard." ***Id.*** However, "[w]hether the State's conduct constitutes a material and substantial breach of the plea agreement is a question of law that this court reviews de novo." ***Id.*** A breach is material and substantial if it "'defeats the benefit for which the accused bargained.'" ***Id.*** (citing ***Williams***, 249 Wis. 2d 492, ¶38).

¶18 Ramirez maintains that the prosecutor's mentioning at sentencing that no charges were being considered concerning the hostage-taking was, if not an actual breach of the agreement, a violation of the spirit of the agreement. We disagree. Ramirez misinterprets the unambiguous recitation of the plea negotiations, claims that things were said that were not, and merges the holdings of inapposite case law to legitimize his claim.

¶19 As noted, the prosecutor explained the negotiation as follows:

> [PROSECUTING ATTORNEY]: Your Honor, if the Court does accept this plea to the one charged count in the Information – and I understand that, um, earlier this morning that the Defendant formally withdrew his N.G.I. plea, after reviewing Dr. Palermo's report – if the Court does accept that plea, the State has agreed to read-in, rather than charge, two additional counts of armed robbery and concealing identity – ah – individuals were masked at the time. There's also two counts of false imprisonment, while armed, and potentially there is a Class A, um, taking a hostage type of a count, which would have needed further investigation, but the State will not pursue that upon this plea being accepted.
>
> When the Presentence Report comes back, both sides will be free to argue what they feel is an appropriate sentence.

At sentencing, the prosecutor explained the sentence recommendation by saying:

> [PROSECUTING ATTORNEY]: Let me start with the bottom line here. It turns out that the State is going to be recommending forty years in prison on this case. I didn't anticipate that I was going to be recommending what would be the statutory maximum, although it's only a fraction of the exposure that Mr. Ramirez would have faced if he had gone to trial.
>
> I thought I'd be able to find some mitigation in the presentence. I guess I've been unable to do so. If this case had proceeded to trial, there would have been a separate count obviously for each of the two victims who were not only robbed at gunpoint, taped up and terrorized, but then held hostage briefly, it would definitely have been penalty enhancers for concealing identity, two counts of false imprisonment while armed, and very possibly a Class A hostage-taking type situation, although that probably would have ended up as a Class B, another forty-year felony for taking hostages, and then voluntarily releasing them.
>
> So he got substantial consideration by pleading to only forty out of close to two hundred years of exposure for what he [w]as involved with, and I think he deserved that because he ple[]d guilty.

> When I read the presentence it was like I wasn't – it was like I wasn't reading the same case. I thought it was a guilty plea. I had asked your deputy clerk to confirm and check the guilty plea questionnaire and sure enough, it was a guilty plea just like I thought I sat in on several weeks ago, but, boy, how it has changed.
>
> From reading this you'd think that somebody had kidnapped Mr. Ramirez, drugged him up and put him inside here with some kind of a memory-killing type of drug so that he can't remember anything, and I feel like I need to comment on a little bit about what I find in the presentence that I think makes it necessary to impose a forty-year sentence in this case.

¶20 Ramirez's first complaint is that "there was a provision precluding reference to an uncharged class A felony hostage situation." He argues that when the prosecutor stated that "potentially there is a Class A … taking a hostage type of a count, which would have needed further investigation, but the State will not pursue that upon this plea being accepted," that the prosecutor was actually promising not to mention the hostage situation at sentencing. Ramirez is incorrect. The prosecutor was merely advising the court that no further investigation would be done into that matter because Ramirez was pleading guilty. The prosecutor never agreed not to mention it at sentencing, and his remarks concerning it were clearly appropriate. Moreover, the prosecutor did not violate the spirit of the negotiations by relating to the trial court why no charges were issued as a result of Ramirez's hostage-taking actions.

¶21 Next, Ramirez cites ***State v. Grindemann***, 2002 WI App 106, 255 Wis. 2d 632, 648 N.W.2d 507, and claims that since the spirit of the plea negotiations was violated, resentencing is required. However, the holding in ***Grindemann*** was that the trial court cannot resentence an offender without first obtaining a response from the State. ***Id.***, ¶18-19. ***Grindemann*** is of no help to Ramirez. Here, there was no violation of the spirit of the plea negotiations.

¶22 Ramirez also misinterprets the prosecutor's sentencing comments and claims that the State's comments "did not render a nuetral [sic] recitation of [the] plea agreement," which entitles him to withdraw his guilty plea. He then cites several cases where the court found that the prosecutor's comments undercut the plea agreement for a specific sentence recommendation and mandated a withdrawal of the guilty plea. However, here, the prosecutor never agreed to recommend a particular sentence in exchange for Ramirez's guilty plea. The prosecutor informed the court that he would not make any sentence recommendation until he had the opportunity to read the presentence investigation report.[3] Consequently, the prosecutor could not possibly have undercut the negotiated sentence recommendation because there was no such recommendation.

¶23 After reading the presentence report, the prosecutor recommended the maximum sentence. The negotiated plea permitted this as the plea agreement contemplated the State's not making any recommendation until after the presentence report was completed. The prosecutor went on to explain his reasoning. This, too, is allowed. A prosecutor may offer relevant, negative information at sentencing to support a sentence recommendation, even if such evidence is harsh. ***State v. Liukonen***, 2004 WI App 157, ¶¶10-11, 276 Wis. 2d 64, 686 N.W.2d 689. The fact that the prosecutor remarked that he did not initially think he would be arguing for the maximum sentence does not transform his recommendation into a violation of the spirit of the negotiation. The prosecutor's observation about what he originally thought he might recommend and his later recommendation does not compromise the plea negotiations.

[3] Apparently the presentence investigation report was highly critical of Ramirez. The presentence investigation report is not contained in the record.

Ramirez has failed in his attempt to construe the prosecutor's sentencing remarks into something other than what they were. We note that his situation illustrates the adage that: "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest." ***Coleman v. Commissioner of Internal Revenue***, 791 F.2d 68, 69 (7th Cir. 1986).

¶24 For the reasons stated, the order denying his motion to with his guilty plea is affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.