COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0500-CR **Cir. Ct. No. 00-CF-233**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUSSELL L. ROSE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Russell L. Rose has appealed from judgments convicting him of battery to a police officer, two counts of resisting a police officer, and one count of escape. He has also appealed from an order denying his motion to withdraw his pleas of no contest and guilty to these offenses. We affirm the judgments and order.

¶2 Rose's convictions arise from events on March 8 and 9, 2000. The criminal complaint against Rose alleged that when Police Officer Mike Wilkinson attempted to arrest Rose on March 8, 2000, for obstructing an officer, Rose escaped, pushing Wilkinson, who was attempting to handcuff him. The complaint alleged that a second officer, Officer Clelland, chased Rose and tackled him. The complaint alleged that Rose then punched and kicked Clelland, and again fled. Rose was arrested the next day by a third officer.

¶3 Rose was initially charged with ten offenses arising from the events on March 8, 2000, and from his attempts to resist arrest by the third officer on March 9, 2000. After the preliminary hearing, the State filed an information charging Rose with nine counts. Subsequently, Rose entered a plea of no contest to Count 5, alleging battery to Clelland, and pleas of guilty to Counts 2, 3 and 7, alleging escape and two counts of resisting an officer. Rose entered his pleas to Counts 3, 5 and 7 as a repeat offender.

¶4 As part of the plea agreement, the State agreed to dismiss a second count of battery to Clelland, plus counts of obstructing a police officer, attempted battery of a police officer, attempt to disarm a police officer, and disorderly conduct. The plea agreement did not indicate that the dismissed charges would be read-in at sentencing.

¶5 After sentencing, Rose filed a motion to withdraw his pleas. He alleged in his motion that he accepted the plea agreement because of misinformation provided by this trial counsel, Attorney Jerold Breitenbach. Specifically, he alleged that Breitenbach told him that he could be found guilty of battery to a police officer even if the officer hurt himself accidentally. He also alleged that Breitenbach inaccurately told him that if he was sentenced to sixteen

years under the new truth-in-sentencing law, that meant he would be in prison for sixteen years. In addition, he alleged that Breitenbach told him that the dismissed charges would not be considered at sentencing.

¶6 Both Rose and Breitenbach testified at the postconviction hearing. At the conclusion of the hearing, the trial court denied the motion.

¶7 A court may accept a plea withdrawal following sentencing only if it is necessary to correct a manifest injustice. ***State v. Nawrocke***, 193 Wis. 2d 373, 378-79, 534 N.W.2d 624 (Ct. App. 1995). The manifest injustice test is rooted in constitutional concepts, requiring a showing of a serious flaw in the fundamental integrity of the plea. ***Id.*** at 379. The burden is on the defendant to show a manifest injustice by clear and convincing evidence. ***Id.***

¶8 A trial court's decision denying a motion to withdraw a no contest plea will not be disturbed by this court unless the trial court erroneously exercised its discretion. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). However, when a defendant establishes a denial of a relevant constitutional right, plea withdrawal is a matter of right. ***Id.***

¶9 A plea of no contest which is not knowingly, voluntarily and intelligently entered violates due process and provides a basis for withdrawal of the plea. ***Id.*** On appellate review, the issue of whether a plea was voluntary, knowing and intelligent is a question of constitutional fact which we review independently of the trial court. ***Id.*** at 140. However, we will not disturb the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. ***Id.***

¶10 Rose contends that the trial court erroneously exercised its discretion in denying his motion by applying an incorrect legal standard which evaluated Breitenbach's performance rather than considering Rose's understanding. We disagree.

¶11 It is true that the trial court considered what information was provided by Breitenbach to Rose prior to and at the time he entered his pleas. However, the information provided by Breitenbach to Rose was relevant to determining whether Rose's pleas were understandingly and voluntarily entered, and was properly considered by the trial court in evaluating whether Rose met his burden of proving that grounds existed to withdraw his pleas.

¶12 The trial court's understanding of the correct standards to be applied is manifest in its initial statements at the postconviction hearing. The trial court commenced the hearing by pointing out that Rose had filed a motion to withdraw his pleas, and inquiring whether it was in the nature of a ***Machner***[1] hearing. Rose's counsel explained that Rose's claim was that his plea was involuntary, and that Breitenbach was present to testify so that the trial court could decide the motion based on the testimony of both Rose and his trial counsel. The trial court clearly accepted and understood this explanation, stating: "Okay. So the position of the defense is that the plea was involuntary because of the reasons set forth in the motion and supporting papers and not that there was ineffective assistance of counsel pursuant to ***Machner***, correct?" Rose's counsel replied that this was correct, and the hearing proceeded.

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶13 The trial court's understanding and application of the proper standards is also clear from its decision at the conclusion of the hearing. The trial court again pointed out that the motion was a postjudgment motion for withdrawal of pleas "and not as a ***Machner*** hearing." It stated that "[u]nder the circumstances the defendant does have the burden by clear and convincing evidence to show that the facts are such that either the plea was involuntary because of his failure to understand the process, the consequences or the procedure, or for some reason there is a manifest injustice if the pleas are permitted to stand."

¶14 The trial court then considered the evidence, including the postconviction testimony of Rose and Breitenbach, and the transcript from the plea hearing. Noting that to some extent credibility issues were presented, the trial court found that Rose did not prove that Breitenbach told him that he would be guilty of battery even if the officer accidentally hurt himself, and that Breitenbach did not misinform Rose regarding the effect of the truth-in-sentencing law. After concluding that Rose also was not misinformed regarding consideration of the dismissed charges, the trial court reaffirmed the finding made by it at the plea hearing, indicating that Rose's pleas were entered knowingly and voluntarily. It further determined that Rose had failed to prove by clear and convincing evidence that he was entitled to withdraw his pleas.

¶15 It is clear from the trial court's discussion that it was aware of the correct legal standard to be applied in deciding Rose's motion and applied it. Moreover, based upon the record and the trial court's findings, we conclude that the trial court properly denied Rose's motion.

¶16 At the postconviction hearing, Rose testified that he told Breitenbach that he did not kick or punch Officer Clelland, who was the victim in Count 5, the

battery count to which Rose pled no contest. Rose testified that Breitenbach told him that he was guilty of battery if Clelland was hurt accidentally in the pursuit of Rose, and that as of January 1, 2000, there was a new law that removed the element of intent from the offense of battery to a police officer. Rose testified that he would not have considered the plea bargain if he knew that the State had to prove that he intentionally kicked or punched Clelland.

¶17 In contrast to Rose's testimony, Breitenbach testified that he explained the elements of the offense to Rose at least five times, and that he never used the word "accidentally." He also testified that on the day Rose entered his pleas, he went over the plea questionnaire form with him, line by line, including the attached jury instructions which explained that intent to commit bodily harm was an element of battery to a police officer. He testified that his earlier explanations of the elements of the battery charge also included the explanation that intent to commit bodily harm was an element of the battery charge, and that in conjunction with describing the elements, he explained what facts a jury could consider to find intent.

¶18 Breitenbach's testimony was consistent with Rose's response to the trial court at the plea hearing, indicating that he had reviewed the instructions attached to the plea questionnaire, setting forth the elements that the State would have to prove if he went to trial. The trial court gave Rose an opportunity to ask any additional questions regarding the elements at the hearing, after which Rose stated that he had no questions.

¶19 Based upon Breitenbach's testimony, the trial court's finding that Breitenbach did not misinform Rose as to the intent element of the battery charge is not clearly erroneous. Because Rose was accurately informed of the intent

element by Breitenbach and in the attachments to the plea questionnaire, the trial court reasonably disbelieved his claim that he did not understand the elements, and rejected his contention that his plea was unknowing and involuntary because he did not understand the nature of the battery charge.

¶20 Based upon Breitenbach's testimony, the trial court also reasonably disbelieved Rose's claim that he was misinformed as to the potential prison sentence. Rose testified that Breitenbach told him that if he was sentenced to sixteen years, it meant that he would serve sixteen years in prison with no possibility of parole. He testified that he did not understand that there was a distinction between incarceration and extended supervision and would not have entered guilty or no contest pleas if he had known. He also testified that Breitenbach led him to understand that all of his sentences were subject to the truth-in-sentencing law, including the two misdemeanors to which he was pleading guilty.

¶21 Breitenbach testified that the misdemeanor sentences faced by Rose were not subject to the truth-in-sentencing law, and that the other two felony charges were. He testified that he explained the difference between initial confinement and extended supervision to Rose, and that he went over the potential initial sentence with Rose two or three times. He testified that he explained to Rose that the maximum sentence imposed would be broken down into initial confinement time and extended supervision time, and that if Rose committed a violation while on extended supervision, he could serve the maximum amount of time. Breitenbach denied telling Rose that a sixteen-year sentence meant that he would do sixteen years in prison. He also testified that Rose appeared to understand the potential penalties at the time he entered his pleas, and that he did

not hesitate to enter the pleas after the potential penalties were explained by the trial court at the plea hearing.

¶22 Breitenbach's assertions are supported by the transcript of the plea hearing, which reveals that the trial court clearly informed Rose of the potential penalties faced by him if he entered the pleas. Specifically, the trial court informed Rose that the sentences for the felony convictions would be divided between confinement time and extended supervision. Rose stated that he understood. The trial court also expressly informed Rose that he faced potential penalties of five years of initial confinement and five years of extended supervision for the escape charge, plus eleven years of initial confinement and five years of extended supervision for the battery conviction.[2] The trial court also explained that Rose faced three years' imprisonment for each of the two misdemeanor convictions. Rose indicated that he understood all of the penalties.

¶23 Based upon Breitenbach's testimony and the understanding shown by Rose at the plea hearing, no basis exists to disturb the trial court's determination that Rose failed to prove that he entered his pleas without an understanding of the potential punishment that could be imposed.[3] Rose's claim

[2] Breitenbach's understanding of the potential initial confinement and extended supervision portions of the felony sentences was revealed at the plea hearing where he helped clarify the potential sentence for the trial court.

[3] To support his argument that the trial court considered only counsel's conduct, and not Rose's understanding, Rose notes that in addressing the truth-in-sentencing issue, the trial court stated that "if there was a misunderstanding on the part of Mr. Rose, it was not one that was visited upon him by instructions from [Breitenbach]." However, the trial court made this statement when responding to Rose's argument that Breitenbach told him that a sentence of sixteen years meant sixteen years in prison. The trial court found that Breitenbach did not misinform Rose. Based upon this finding and the understanding expressed by Rose at the plea hearing, the trial court also implicitly found that Rose understood the potential penalties faced by him, and therefore denied his claim that the plea was unknowing and involuntary.

that his plea was unknowing and involuntary because entered in reliance on misinformation from counsel as to the potential sentence was therefore also properly rejected.

¶24 In support of his motion, Rose also testified that Breitenbach informed him that the charges being dismissed pursuant to the plea bargain would not be read-in, and that the State would present facts at sentencing only on the charges for which he was being convicted. Rose testified that he therefore believed that the trial court would not consider any facts supporting the charges that were dismissed, and that this was important to him because he was entering the pleas in order to obtain leniency at sentencing.

¶25 Breitenbach confirmed that he told Rose that the dismissed charges would not be read-in at sentencing. He further testified that although he told Rose that the dismissed charges were not going to be considered in sentencing him, he also explained to him that the trial court would "have to take a version of what went on there, be it Mr. Rose's or someone else's."

¶26 Breitenbach accurately informed Rose that the plea agreement provided for outright dismissal of the remaining charges and did not provide that they were to be read-in at sentencing. To the extent Rose might have a claim that this agreement was not complied with by the State at sentencing, he has never raised that argument. To the extent he is claiming that his pleas to the specific charges were involuntary because entered in reliance on misinformation provided by his counsel, the trial court was entitled to conclude that the information provided by Breitenbach was accurate. Most importantly, Rose fails to establish that the reference at sentencing to some of the events underlying the dismissed charges, particularly Clelland's claim that Rose tried to take his gun during their

struggle, induced him to enter his pleas or rendered his pleas unknowing. The trial court therefore properly denied his motion.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).