COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2387-CR **2007CF757**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELMER D. ALLEN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Elmer Allen pled guilty to armed robbery, party to a crime. The circuit court imposed a bifurcated sentence of thirty years, comprised of eighteen years of initial confinement and twelve years of extended supervision. Allen filed a postconviction motion to withdraw his plea. After an

evidentiary hearing at which only Allen testified, the circuit court denied the motion. Allen appeals. We affirm.

¶2 After sentencing, a defendant is entitled to withdraw a plea if he or she establishes that failure to allow the withdrawal would result in a manifest injustice. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. The "manifest injustice" test requires a showing of a serious flaw in the fundamental integrity of the plea. ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). The defendant bears the burden of showing, by clear and convincing evidence, that a manifest injustice exists, because "[o]nce the defendant waives his [or her] constitutional rights and enters a guilty plea, the state's interest in finality of convictions requires a high standard of proof to disturb that plea." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). A guilty 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).

¶3 A defendant may seek plea withdrawal by showing either the plea colloquy was defective and/or factors outside the plea colloquy fatally undermine the plea. *See* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. In his postconviction motion, Allen conceded that the plea colloquy complied with WIS. STAT. § 971.08 (2009-10) and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Allen's motion included allegations that his attorney had promised him that the court would impose only ten years of initial confinement and had told him that if he did not plead, Allen's girlfriend, a co-defendant, would receive prison time. At the postconviction hearing, Allen testified consistently with those allegations. He also testified that he understood the circuit court was not bound by the plea agreement, which he understood was "up to 15 initial

confinement and 10 extended supervision." Allen testified he had more than one juvenile adjudication and eleven criminal convictions, all involving guilty or no contest pleas. Allen testified he was not confused during the colloquy and he admitted telling the circuit court he had not been threatened or promised anything in exchange for his plea.

¶4 Allen's trial attorney did not testify. Allen argued his testimony about what his attorney told him was uncontroverted and compelled the circuit court to permit him to withdraw his plea.

¶5 In his postconviction testimony, Allen admitted his colloquy answers were true. During the colloquy, Allen told the circuit court he understood the plea agreement, including that the circuit court did not have to go along with any sentencing recommendation and could impose up to the maximum sentence. The circuit court asked Allen whether "anybody ma[d]e any threat or promise to you to get you to enter your plea here today," and Allen replied, "no." Allen admitted signing the plea questionnaire. When the circuit court asked Allen if his signature meant he had "read, understood, and agreed with everything on the questionnaire," Allen replied, "yes." Allen told the circuit court he understood the questionnaire and it was not confusing. Allen told the circuit court he "had a sufficient opportunity to thoroughly discuss the case, the plea agreement, and the plea … with [his] attorney." Allen told the circuit court he did not have any questions. The circuit court asked Allen whether "there [is] anything at all about your case or about what's gone on in the courtroom today that confuses you or that you don't understand," and Allen replied, "no."

¶6 The circuit court found Allen was "a very savvy character when it comes to the criminal justice system." The circuit court found that Allen was not

someone who "can be told what to do, who can be pressured what to do, or who can be told just to go along to make it look good." The circuit court stated that Allen's "intelligence and perception" would lead him to "understand that the girlfriend situation is a threat and the 10–year situation is a promise," but "when I asked him if anybody threatened him or promised him to get him to enter his plea, he told me back then no." The circuit court found Allen's postconviction testimony was "not … persuasive." The circuit court surmised Allen's "motive" for attempting to withdraw his plea was that "he was not enamoured [sic] with the sentence … imposed in the case." The circuit court concluded that Allen's responses during the plea colloquy "were truthful then, unlike … what [Allen] told [the court] today on those same issues."

¶7 On appeal, Allen contends, without citation to legal authority, that the absence of any testimony to counter his postconviction testimony compelled the circuit court to accept that testimony as true. We disagree. The circuit court expressly found Allen's postconviction testimony was not credible, and it expressly found Allen's statements during the plea colloquy were "truthful." The circuit court is the sole arbiter of the credibility of the witnesses and of the weight to be given to testimony. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). The circuit court was "free to discount" Allen's postconviction testimony because of "his self-interest in the outcome" of the postconviction motion. *See* ***State v. Fry***, 131 Wis. 2d 153, 182-83, 388 N.W.2d 565 (1986). Because the circuit court was not obligated to accept Allen's postconviction testimony as true, we reject Allen's contention that his testimony was uncontroverted and binding on the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).