COURT OF APPEALS
DECISION
DATED AND RELEASED

August 31, 1995

No. 94-1346-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS MAUG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for LaCrosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions*.

SUNDBY, J. In this case, the trial court was faced with a dilemma.[1] It was represented to the court at the plea hearing that defendant Douglas Maug would plead guilty to one count of theft of timber, contrary to §§ 26.05(2) and 943.20(1)(a), STATS. In fact, Maug pled "no contest" to the charge. Maug does not claim that the trial court abused its discretion when it received

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. "We" and "our" refer to the court.

his plea. However, before imposing sentence, the district attorney and Maug's counsel introduced testimony which presumably was intended to influence the court as to the sentence the court imposed. Much of that testimony was intended to show that Maug had intentionally stolen several trees. When the trial court asked Maug's counsel whether he had any other testimony to offer, Maug interrupted and stated: "Yes, Your Honor. It was just--it was a mistake."

Maug's counsel then put in evidence and argued that Maug did not intentionally steal the trees. "He is not the type of person that simply goes out and takes advantage of a few logs that are just over the line." After counsel put in this additional evidence and argument, the trial court asked Maug whether he wanted to say anything "about the situation or about sentencing." Maug then responded as follows:

> THE DEFENDANT: Yes. It was just a mistake. The line fence that was there, we never seen it. There's another netting fence going up the hill. We thought that was the line fence.... [I]f we'd have seen a fence, we'd have never cut them trees. We thought we were on Jerome Gundersen's 40. We cut six trees on his and one on Jerome's. The timber buyers come and told us we had to stop because they found out that 40 was a forest program and we quit.... [I]t do[esn't] make any sense. Why would I go way back into the boonies like that to steal some trees? I don't get nothing but $3 a tie to put them on the landing. And then I got to pay my help to do it.
>
> It was just a mistake. I didn't take it to trial because I can't afford another couple thousand dollars.
>
> THE COURT: Anything else?
>
> THE DEFENDANT: It was a dumb thing to do, I know that, but we sure didn't do it on purpose.

Acceptance of a plea is discretionary. *See* ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995). A defendant's motion to withdraw

his or her plea usually is the result of a sentence which was more than the defendant expected. However, in this case, Maug had not been sentenced. We conclude that when it becomes apparent to the trial court that the defendant refuses to admit an element of an offense necessary to a finding of guilt, the trial court should question the defendant as to whether he wishes to persist in his guilty or no contest plea in view of his claim of innocence. The record should reflect that the defendant wishes to adhere to his or her plea despite his or her protest of innocence.

Such an inquiry was especially necessary in this case because the complaint did not contain sufficient facts upon which to find Maug guilty. Further, the district attorney admitted that there were facts in this case which negated intent.

To sustain Maug's conviction, it was necessary that the State show that Maug knew that he was on Christopher Winther's land when he cut the trees. Maug's employer had a contract to log neighboring land owned by Jerome Gundersen. Maug thought he was on that land. A DNR warden inspected the site after the cutting and saw fallen treetops over the section corner marker. He observed that at least two treetops had fallen over the fence which marked the property line between Gundersen's and Winther's land. The complaint further states that Maug's employer informed the investigating officer that Gundersen had been paid for the logs and Winther should work out compensation with Gundersen. The complaint also alleged that when Maug and his helper went to log Gundersen's property, they did not see a line fence separating Gundersen's land from Winther's land. Maug's helper told the investigating officer that he was not aware that they had crossed the property line.

At the plea and sentencing hearing, the district attorney conceded that the line fence was not the "normal height" (three feet). She also conceded that the fence "was on the ground and was kind of curling around." The district attorney also informed the court that Maug did not have a criminal record. Maug's current employer, also a timber company, testified that Maug had worked for him for four or five years. He testified that once in a while they ran into this problem where the property lines were not clear. He further testified that he knew for a fact that Maug had never stolen anything. He testified that Maug's reputation in the community was that he was an honest person and a hard worker.

We conclude that it is probable that if Maug is allowed to withdraw his plea and is tried, the State will be unable to establish that Maug intentionally removed the trees from Winther's property. We therefore reverse the judgment and remand for further proceedings to allow Maug to withdraw his plea and be tried, should that be necessary.

By the Court.-- Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.