COURT OF APPEALS
DECISION
DATED AND RELEASED

December 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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Nos. 94-2832-CR
94-2833-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KURT A. LOEWEN,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Kurt A. Loewen appeals from judgments of conviction and an order denying his motion for postconviction relief. We affirm.

Loewen pleaded no contest to two felony counts and two misdemeanors. The plea agreement, as expressed by the prosecutor at the plea hearing without objection, was that "the State will not recommend prison if there ... are no further arrests based upon probable cause between now and the time of any sentencing." Later that day, Loewen was arrested for bail jumping, criminal damage to property and disorderly conduct. At sentencing on the earlier charges, the State adopted the recommendation of the presentence investigation for thirteen years in prison. The court imposed that sentence.

Loewen argues that his no contest pleas were not entered knowingly, voluntarily and intelligently because he did not understand that a mere arrest, as opposed to a conviction, would be a breach of the agreement.[1] Whether a plea was entered knowingly, voluntarily and intelligently is a question of "constitutional fact" which we review without deference to the trial court. ***State v. Bangert***, 131 Wis.2d 246, 283, 389 N.W.2d 12, 30 (1986). The trial court's findings of historical fact will not be upset unless they are clearly erroneous. ***Id.*** at 283-84, 389 N.W.2d at 30.

The trial court conceded that it should have better explained the plea agreement to Loewen. However, as the trial court noted, that is not the ultimate issue. The trial court went on to find, based on the testimony of Loewen and his trial counsel, that Loewen understood at the time of the plea hearing that he should not be arrested.

Loewen argues this finding was clearly erroneous. We reject the argument. Loewen's trial counsel testified he had no reason to believe Loewen's plea was not entered knowingly, voluntarily and intelligently. He testified he went over the terms of the agreement "again and again and again" with Loewen, Loewen expressed comprehension of the terms, and counsel did not doubt his actual comprehension of them.

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[1] Because Loewen did not make this argument before the trial court, we remanded for further findings. Following remand, Loewen asserts that the argument was indeed presented to the trial court in his original motion and memorandum. We disagree. While those materials show that Loewen sought to withdraw his pleas, he did not do so on the ground that they were not entered knowingly, voluntarily and intelligently.

Loewen's testimony on direct examination was somewhat confused and perhaps self-contradictory. He stated that he understood that he was not to commit any new offenses or the State could recommend prison. However, he also said that he did not understand that he was not supposed to do anything he could be arrested for. On cross-examination, however, the following exchange occurred:

> Q.[Trial counsel] has told us that he emphasized to you that if you took [the plea], you absolutely couldn't commit any more crimes, right?
>
> A.Yeah.
>
> Q.And that's true, isn't it?
>
> A.Yeah.
>
> Q.He told you, "Any arrests, Kurt, and you're done," right?
>
> A.Yeah, words to that effect.
>
> Q.And you understood him, didn't you?
>
> A.Yeah.

Loewen argues the record does not show his trial counsel or the trial court explained to him the meaning of the term "probable cause." The purpose of including the phrase "probable cause" was most likely to protect Loewen from being held in breach of the agreement on the basis of an arrest without probable cause, a circumstance which could be beyond his control. However, it is not apparent why it would be necessary for Loewen to understand this term. For Loewen to control his conduct, the key part of the plea agreement to understand was that he should not do anything to be arrested at all. Understanding the difference between arrests with probable cause and those without could not have assisted him in complying with the agreement.

For the above reasons, we affirm the trial court's finding that Loewen's pleas were entered knowingly, voluntarily and intelligently.

Loewen argues that his trial counsel was ineffective because he did not seek a hearing under ***State v. Rivest***, 106 Wis.2d 406, 316 N.W.2d 395 (1982), to determine whether Loewen breached his plea agreement. The ***Rivest*** court held that the State may not unilaterally determine that a plea agreement has been breached. ***Id.*** at 411-12, 316 N.W.2d at 398-99. An agreement may be vacated where a material and substantial breach has been proved. ***Id.*** at 414, 316 N.W.2d at 399. The burden of proof is on the party seeking to vacate the agreement. ***Id.***

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Strickland***, 466 U.S. at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

To show prejudice in this case, Loewen must demonstrate that if a ***Rivest*** hearing had been held the court would probably have determined that he did not commit a material and substantial breach of the plea agreement. But Loewen does not dispute that he committed the acts which are claimed to have been in breach of the agreement. In fact, it appears that he has been convicted, on pleas, of charges stemming from that episode. Rather, Loewen argues that he did not understand what the plea agreement meant. However, this argument goes only to whether Loewen's plea was entered knowingly, voluntarily and intelligently. Once it has been determined that Loewen understood the plea agreement, he is bound by it. His understanding of the agreement would not have been at issue in a ***Rivest*** hearing.

Loewen also argues that he might not have been mentally responsible for the conduct which led to his arrest following the plea

agreement, that is, he might have been found not guilty by reason of mental disease or defect. However, the plea agreement was that Loewen not be *arrested with probable cause*. It is irrelevant whether, following his arrest, he might have been found not guilty by reason of mental disease or defect.[2] Because Loewen has failed to demonstrate how he was prejudiced by the lack of a ***Rivest*** hearing, we reject the argument that his trial counsel was ineffective.

Loewen also argues that he should be allowed to withdraw his pleas because the State breached the agreement by recommending prison without the holding of a ***Rivest*** hearing. However, as Loewen concedes, the proper remedy for breach of a plea agreement by the State is not plea withdrawal, but resentencing with the State required to make the agreed upon recommendation. *See* ***State v. Poole***, 131 Wis.2d 359, 365, 389 N.W.2d 40, 43 (Ct. App. 1986). Furthermore, as discussed above, Loewen has shown no reason to doubt that he breached the agreement. A trial court may vacate a plea agreement without an evidentiary hearing when there was "an obvious material and substantial breach of the agreement." ***State v. Toliver***, 187 Wis.2d 346, 358, 523 N.W.2d 113, 117 (Ct. App. 1994).

By the Court.—Judgments and order affirmed.

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

[2] Perhaps it was not wise for Loewen to agree to such a condition if he had doubt about being able to behave consistently with it. However, unless he establishes that the plea was not entered knowingly, voluntarily and intelligently, he is bound by that agreement.