OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

October 2, 2024

To:

Hon. Laura J. Lavey
Circuit Court Judge
Electronic Notice

Michelle Weber
Clerk of Circuit Court
Fond du Lac County Courthouse
Electronic Notice

Susan E. Alesia
Electronic Notice

Kara Lynn Janson
Electronic Notice

Kelsey Jarecki Morin Loshaw
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP1173-CR State of Wisconsin v. Chad W. Voeller (L.C. #2009CF48)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Chad W. Voeller appeals from a judgment of the circuit court convicting him of attempted burglary, as a repeater, and an order denying his postconviction motion. Voeller argues that he is entitled to plea withdrawal because his plea was not entered knowingly, voluntarily, and intelligently, and he suffered a manifest injustice. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm.

The background facts relevant to this appeal are undisputed. In 2009, the State charged Voeller with ten counts related to reports of him stalking, burglarizing, and attempting to burglarize various victims. Voeller, who had several previous misdemeanor convictions, was charged as a repeater as to each of the ten counts in the Criminal Complaint. Pursuant to a plea agreement, Voeller entered an ***Alford*** plea[2] to three of the counts charged, and the remaining charges were dismissed and read in. As to counts one and nine, stalking and burglary, respectively, Voeller was sentenced to five years of probation with conditional jail time. As to count ten, attempted burglary, Voeller entered into a ten-year deferred prosecution agreement (DPA). The agreement as to count ten provided that if Voeller committed any new crimes within the ten-year period, he would be in breach of the agreement and would be convicted of and sentenced on the attempted burglary charge.

Voeller successfully completed probation on counts one and nine, but was charged with new crimes just a few months shy of the ten-year term of the DPA on count ten. The circuit court granted the State's motion to revoke the DPA. The court later sentenced Voeller to seven years of initial confinement and two and one-half years of extended supervision for attempted burglary with the misdemeanor-repeater enhancer.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] ***North Carolina v. Alford***, 400 U.S. 25 (1970) (establishing type of plea entered when the defendant maintains his or her innocence with respect to the charge to which he or she offers to plead on the recognition that there is sufficient evidence to prove guilt beyond a reasonable doubt).

After he was sentenced on count ten, Voeller filed a postconviction motion seeking to withdraw his plea to this charge. Voeller argued that he was entitled to plea withdrawal because he did not know the maximum penalty he faced when he entered his plea over ten years earlier.

The circuit court held a hearing at which only Voeller testified, and denied the postconviction motion. A transcript of Voeller's plea hearing was not available due to the passage of time between the entry of the pleas and Voeller's sentencing following the DPA's revocation. Because the plea hearing transcript was unavailable, Voeller acknowledged that he had to provide other evidence to prove by clear and convincing evidence that he did not know the maximum penalties and plea withdrawal was warranted.

The postconviction court concluded that Voeller failed to prove his claim by clear and convincing evidence. It deemed his testimony "somewhat forced and odd." Given Voeller's general memory issues regarding the events that transpired, the court found it "very convenient" that Voeller recalled which maximum penalties were covered at the 2011 plea hearing, determining that the testimony was not "very credible." The court also found it noteworthy that both the Criminal Complaint and Information (collectively, the charging documents) provide the maximum penalty for count ten, including the repeater enhancer, and Voeller testified to having reviewed those documents with his trial attorney. Voeller appeals.

The sole issue Voeller raises on appeal is whether he is entitled to withdraw his plea as a manifest injustice because he claims that he was not informed and did not know the maximum penalty he faced for the attempted burglary when he entered his plea. A defendant wishing to withdraw his or her plea after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v.***

McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A plea which is not made knowingly, intelligently, or voluntarily is a manifest injustice. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We accept the circuit court's findings of fact unless they are clearly erroneous, and we independently determine whether those facts show that Voeller entered a knowing, intelligent, and voluntary plea. *See* ***id.***

"Two legal paths are available to a defendant who seeks to withdraw his plea after sentencing. The first is via a motion made pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)," which a defendant may invoke when the plea colloquy is deficient. ***State v. Sulla***, 2016 WI 46, ¶25, 369 Wis. 2d 225, 880 N.W.2d 659. "The second is through a ***Nelson/Bentley*** motion for plea withdrawal," which a defendant invokes "when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." ***Id.***

Voeller claimed at his postconviction hearing that he never was informed of any potential maximum penalty on count ten. As explained above, without a plea hearing transcript, we must look to other record evidence to surmise what happened. Here, the record belies Voeller's claim.

First of all, the charging documents both correctly stated the penalty for attempted burglary at a maximum of seven and one-half years imprisonment, plus additional initial confinement time based on the repeater enhancer. The complaint also listed Voeller's priors, and all were misdemeanors. Voeller testified that his trial counsel had reviewed both of the charging documents with him.

Further, at Voeller's first sentencing hearing just eight days after his plea entry, the circuit court informed Voeller that the aggregate maximum he faced on count ten (if the deferred prosecution agreement was revoked before completion of the term) was eleven and one-half years, mistakenly applying the felony-repeater provision. *See* WIS. STAT. § 939.62(1)(b) (permitting four years of additional initial confinement for felony priors, rather than two years for misdemeanor priors). Neither Voeller nor his counsel objected or indicated any surprise at this maximum sentence, nor did Voeller indicate that this was the first time he was learning this information. However, as accurately stated in the charging documents, the maximum penalty for attempted burglary is five years of initial confinement and two and one-half years of extended supervision, WIS. STAT. §§ 943.10(2)(e); 939.32(1m), and the penalty enhancer for prior misdemeanors potentially adds up to two years of initial confinement, § 939.62(1)(b). Thus, the aggregate maximum Voeller faced for this count was actually nine and one-half years.

Finally, we apply "a deferential, clearly erroneous standard to the [circuit] court's" credibility determinations. ***State v. Jenkins***, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24. As to Voeller's testimony at the postconviction hearing, the court stated: "I don't believe that any specific testimony that he ... claims he did remember or didn't was particularly credible." Significantly, the court rejected Voeller's testimony that the 2011 plea hearing did not cover the maximum penalty for count ten, finding it "very convenient" given that he "seem[ed] to struggle with respect to remembering anything else of concrete nature from that hearing." And while the court did not specifically address Voeller's testimony that he was unaware of the maximum penalty at the plea hearing, it implicitly rejected that testimony as incredible as well: "I can't find the information testified to today by Mr. Voeller to be particularly credible such that it would go to the level of showing by clear and convincing evidence a manifest injustice."

Voeller has failed to develop any viable argument as to why we should not defer to the circuit court's finding that Voeller's testimony was not "very credible." He has also failed to explain how this, or any of the court's findings, were clearly erroneous. *See* ***Brown***, 293 Wis. 2d 594, ¶19. Deferring to these findings, and the evidence set forth above, we conclude that Voeller was informed at the plea hearing and knew of the maximum penalty for count ten, although the evidence further indicates that he was misinformed about the maximum penalties at the sentencing hearing. Although there is no evidence that Voeller was misinformed about the maximum penalties at the plea hearing, we will address that scenario for the sake of completeness.

Our supreme court has addressed in detail a situation in which a defendant enters a plea with misinformation regarding the potential maximum penalties. *See* ***State v. Cross***, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64. In ***Cross***, the defendant was mistakenly told at the time of his initial plea and sentencing that the maximum penalty he faced if he pled to a reduced charge was forty years' imprisonment, broken into twenty-five years of initial confinement and fifteen years of extended supervision. ***Id.***, ¶1. The circuit court sentenced the defendant to this maximum term. ***Id.*** The defendant subsequently realized that the maximum penalty was only thirty years, consisting of twenty years of initial confinement and ten years of extended supervision. ***Id.*** As a result of being told he was subject to a greater maximum penalty than, in reality, he faced, the defendant filed a postconviction motion to withdraw his plea. ***Id.***, ¶2. Rather than allow plea withdrawal, the court resentenced the defendant, this time imposing the lesser maximum penalty that it should have applied initially. ***Id.***

On appeal, our supreme court addressed whether it was a ***Bangert*** violation when a defendant enters a plea to an offense with a mistaken understanding that the maximum sentence

he or she faces is greater than the actual maximum faced. The court concluded that it is not, holding as follows:

> We hold that where a defendant is told that he faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law, the circuit court has not violated the plea colloquy requirements outlined in WIS. STAT. § 971.08 and our ***Bangert*** line of cases. In other words, where a defendant pleads guilty with the understanding that he faces a higher, but not substantially higher, sentence than the law allows, the circuit court has still fulfilled its duty to inform the defendant of the range of punishments. Therefore, the defendant is not entitled to an evidentiary hearing, and plea withdrawal remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice.

Cross, 326 Wis. 2d 492, ¶4. Applying this holding, we conclude that Voeller has failed to establish a ***Bangert*** violation in this case where Voeller may have been informed of a maximum penalty that was higher, but not significantly higher, than that which he faced. Thus, he is only entitled to withdraw his plea if he can establish that doing so "is necessary to correct a manifest injustice." *See* ***Cross***, 326 Wis. 2d 492, ¶4; *see also* ***State v. Gomolla***, 2024 WI App 13, ¶37, 411 Wis. 2d 239, 4 N.W.3d 610 (finding where "only flaw in [defendant]'s plea is that it was made with a misunderstanding of the precise maximum statutory penalty," but defendant understood the potential punishment, plea withdrawal not necessary to correct a manifest injustice).

As we now explain, we are not persuaded, based on the evidence before us, that Voeller has established a manifest injustice warranting plea withdrawal. "A manifest injustice occurs when there has been 'a serious flaw in the fundamental integrity of the plea.'" ***Cross***, 326 Wis. 2d 492, ¶42 (citations omitted). "Wisconsin courts have uniformly held that when applying the manifest injustice test, 'a reviewing court may look beyond the plea hearing transcript' to the totality of the circumstances." ***State v. Cain***, 2012 WI 68, ¶31, 342 Wis. 2d 1, 816 N.W.2d 177

(citations omitted). "The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well the defense counsel's statements ... among other portions of the record." ***Id.*** (omission in original; citation omitted).

Voeller does not argue, nor would the record support, that he received ineffective assistance of counsel or that his plea was coerced. *See* ***Sulla***, 369 Wis. 2d 225, ¶25. Rather, as with the defendant in ***Cross***, "[t]he only flaw [Voeller] points to is that the plea was made with a misunderstanding of the precise maximum sentence." *See* ***Cross***, 326 Wis. 2d 492, ¶42.

Even if Voeller received misinformation, there is no evidence that it created a manifest injustice warranting plea withdrawal. To the contrary, Voeller received a tremendous benefit from the plea agreement that allowed seven charges to be dismissed and read in, along with what the circuit court later described as a "very generous" DPA that allowed him to potentially avoid a lengthy confinement term for attempted burglary if he complied with its terms. Voeller entered his plea believing that he was, in fact, subject to nine years of initial confinement and two and one-half years of extended supervision. He later benefitted, when the DPA was revoked, from the fact that the actual maximum penalty provided for two years less initial confinement than he anticipated facing, particularly considering that the sentencing court determined that the situation called for the maximum sentence. Thus we conclude that Voeller's "plea agreement provided him with benefits that were only enhanced by the reduced maximum sentence." *See* ***id.***, ¶43.

In sum, Voeller bears the burden of establishing by clear and convincing evidence a manifest injustice that necessitates plea withdrawal. He has not done so. We therefore affirm the judgment of conviction and the order denying Voeller's postconviction motion for plea withdrawal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals