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DISTRICT II

March 4, 2015

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

2014AP1181-CR State of Wisconsin v. Edward Patterson (L.C. # 2012CF1166)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Edward Patterson appeals from a judgment of conviction entered upon his guilty plea to delivering less than three grams of heroin on or near a school as a second or subsequent offense, and from an order denying his postconviction motion for plea withdrawal. 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 (2013-14).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Patterson was charged with five drug-related counts arising from controlled buys conducted by a confidential informant, and a subsequent search of Patterson's home. The parties reached a plea agreement wherein Patterson would plead guilty to one count of heroin delivery and the State would move to dismiss and read in the remaining charges, and recommend a sentence of three to five years of initial confinement. The State reserved the right to argue the length and conditions of extended supervision. Patterson pled guilty pursuant to the agreement and the trial court imposed a bifurcated sentence totaling twelve and one-half years, with seven and one-half years of initial confinement.[2]

Patterson filed a postconviction motion alleging that prior to entering his plea, the trial court failed to inform him that it was not bound by the parties' recommendations and that he did not otherwise know this information. Following an evidentiary hearing, the trial court denied the motion, finding that Patterson "did understand that the court had no obligation to follow … the plea recommendation of the state." Patterson appeals.

A defendant seeking plea withdrawal due to a defective plea colloquy is entitled to a hearing if he or she demonstrates that the trial court failed to comply with WIS. STAT. § 971.08 or other mandatory procedures, and alleges that he or she did not know or understand the information that should have been provided. ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. Once the defendant has made this prima facie showing, the burden shifts to the State to demonstrate by clear and convincing evidence that despite the deficiency, the

[2] The court originally ordered a six-year term of extended supervision, but amended that number to five years after the Department of Corrections wrote a letter stating that five years was the maximum term allowable by statute.

defendant otherwise knew or understood the missing information. ***Id.***; ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986). To satisfy its burden, the State may refer to the totality of the record. ***Bangert***, 131 Wis. 2d at 275.[3]

We conclude that though the plea colloquy failed to ascertain Patterson's understanding that the court was not bound by the parties' plea agreement or recommendations,[4] the State met its burden to prove that Patterson's plea was knowing, intelligent and voluntary. As part of the plea hearing, trial counsel filed a completed plea questionnaire/waiver of rights form with the court. The form asserts:

> I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty is: ___.

On Patterson's form, the term "maximum penalty" is circled in blue pen and the correct maximum penalty is written on the blank line.[5] The form is signed by both Patterson and trial counsel. At the plea hearing, Patterson told the court that counsel had read the form to him, they had filled it out together, and that he understood its contents. Attached to the form is a statement of the parties' plea agreement which is signed by Patterson and provides: "The defendant

[3] In determining whether the State met its burden to show that the defendant's plea was knowingly, intelligently and voluntarily entered, a reviewing court accepts the trial court's findings of historical and evidentiary fact unless they are clearly erroneous. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We independently determine whether those facts satisfy the constitutional standard for a valid plea. ***Id.***

[4] The State concedes and we agree that Patterson established a prima facie showing under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

[5] As noted by the trial court in its decision denying Patterson's postconviction motion, the plea form contains a number of trial counsel's handwritten notations. In the portion warning Patterson that the court could impose the maximum sentence, not only is the correct maximum of "21 ½ year[s] WSP" written in, but trial counsel also wrote in the bifurcation structure as "IC 16 ½; ES 5."

understands that the Court is not a party to the agreement; and even if the Court approves this agreement, at the time of sentencing, the Court is not bound by the terms of this agreement."

At the postconviction hearing, trial counsel testified that though he did not specifically recall Patterson's plea, he had a practice of telling defendants that the court is not bound by the plea agreement. Counsel testified that he normally reads the plea questionnaire and waiver of rights form verbatim and could think of no reason why he would have deviated from this practice in Patterson's case. Based on the record, the trial court found that counsel reviewed the plea form and attachments with Patterson prior to the plea hearing, and that Patterson therefore knew that the court was not bound by the plea agreement and could exceed the State's recommendation. The court's findings are supported by the record and are not clearly erroneous.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals