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

December 2, 2015

To:

Hon. Jennifer Dorow
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd
Waukesha, WI 53188

Hon. Lee S. Dreyfus Jr.
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Gregory Bates
Bates Law Offices
P.O. Box 70
Kenosha, WI 53141-0070

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Susan Lee Opper
District Attorney
515 W. Moreland Blvd. Rm. G-72
Waukesha, WI 53188-2486

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

2015AP22-CR State of Wisconsin v. Nathan A. Vieth (L.C. #2013CF77)

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

Nathan A. Vieth appeals from a judgment of conviction and an order denying his postconviction motion for plea withdrawal.[1] Based upon our review of the briefs and record, we

[1] The Honorable Jennifer R. Dorow presided over Vieth's plea and sentencing and entered the judgment of conviction. The Honorable Lee S. Dreyfus, Jr., heard and denied Vieth's postconviction motion.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[2] We reverse and remand to allow Vieth to withdraw his plea.

Vieth was charged with one count of identity theft, as a repeater. Because Vieth was serving unrelated prison sentences, arrangements were made for him to appear by video for plea and sentencing. A prison social worker facilitated the return to trial counsel of Vieth's completed plea paperwork. The plea form stated as the plea agreement: "For a plea to the charge, the State will strike the repeater and recommend unspecified initial confinement with 3 years extended supervision to follow. The State also will not take a position regarding concurrent v. consecutive." Thereafter, the State offered to recommend consecutive probation with an imposed and stayed prison sentence. Trial counsel immediately forwarded the new offer by email to the prison and asked that it be conveyed to Vieth, stating:

> This is actually a better recommendation than we originally had because probation must start the date of sentencing on our case which means he will actually be in custody for the significant majority of the probationary sentence.

Vieth was not informed of the modified offer until the next day when he appeared by video for plea and sentencing. The court went off the record to allow counsel to explain the offer to Vieth by phone. Vieth later testified that during that phone conversation, trial counsel described the new offer as a "win-win situation for him" because probation "had to start the day that [he] was sentenced because you can't run probation consecutive with another sentence." Counsel advised he should take the offer because the "State made a mistake in the offer they

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

gave" by not realizing probation would have to start immediately. Vieth pled no contest pursuant to the new offer.

Vieth filed a postconviction motion for plea withdrawal based on trial counsel's erroneous advice that the State's probationary recommendation would necessarily run concurrent with his previously imposed prison sentence.[3] Vieth testified he was advised the new deal "was better because [trial counsel] put it to me that it would start the day I was sentenced and it was better for me because it was not adding on extra time that I would be in longer." With trial counsel recommending concurrent prison, Vieth believed that both recommendations were favorable. Vieth stated he was not concerned about the State's reference to "consecutive" probation at the plea hearing because trial counsel had just told him the State made a mistake and, that by law, probation had to start immediately. Vieth testified that had he understood the true nature of consecutive probation, he would have "stopped the hearing" and sent trial counsel back to the bargaining table because he considered consecutive probation to be worse than unspecified prison time:

> Probation can be extended. It's a big difference. Everyone misconstrues that. Extended supervision, you know your maximum discharge date. They can't revoke you for all your time. They can only revoke you for a certain amount of time and when you get revoked, that time still counts towards the sentence, but with probation it doesn't.

The postconviction court denied the motion. Though the court accepted that Vieth "did not under any circumstances wish to have a consecutive probationary sentence," it determined he failed to establish prejudice. In particular, the postconviction court considered that after Vieth's

[3] Under WIS. STAT. § 973.09(1)(a), a "period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously."

telephone conversation with trial counsel, the plea-taking court informed him it could impose a consecutive sentence, and that Vieth was "an experienced defendant" who "either knew or should have known" the difference between concurrent and consecutive sentences. The postconviction court also stated that because the trial court did not actually order probation, Vieth had not shown "he was actually prejudiced from the standpoint of not receiving the benefit of the bargain that was reached."

To withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). One way for a defendant to meet this burden is to show that his or her plea was not entered knowingly, intelligently, and voluntarily. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. "A plea that was not entered knowingly, voluntarily, and intelligently violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right." ***State v. Dillard***, 2014 WI 123, ¶37, 358 Wis. 2d 543, 859 N.W.2d 44 (citation omitted). For a plea to be voluntary, the defendant must be "fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel." ***Id.***, ¶60 (citation omitted). Affirmative misinformation about the law provided by defense counsel can

compromise the informed and voluntary nature of a plea. *See* ***id.***, ¶39; *see also* ***State v. Woods***, 173 Wis. 2d 129, 141 n.2, 496 N.W.2d 144 (Ct. App. 1992).[4] To demonstrate a manifest injustice, a defendant is not required to show that the decision to enter a plea was based exclusively on the misinformation received. ***Dillard***, 358 Wis. 2d 543, ¶60. This court evaluates the totality of the circumstances in determining whether a plea predicated on misinformation constitutes a manifest injustice. ***Id.***, ¶40.

We conclude that trial counsel's affirmative misinformation and advice concerning the terms of the plea agreement rendered Vieth's plea unknowing, unintelligent, and involuntary. *See* ***id.***, ¶68 (If trial counsel was ineffective, "it follows that the defendant's plea was not knowing, intelligent, and voluntary."). Vieth's testimony that trial counsel told him any probationary term would necessarily commence immediately is undisputed and memorialized in counsel's email. Vieth testified he would not have pled pursuant to the stated plea agreement had counsel provided accurate information. A defendant is entitled to understand the terms of his plea agreement. ***Cf. State v. Wesley***, 2009 WI App 118, ¶¶20-24, 321 Wis. 2d 151, 772 N.W.2d 232 (defendant who claimed he misunderstood the term "dismissed outright" in his plea

[4] In ***State v. Woods***, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), the defendant's plea agreement included a recommendation that his adult sentence run consecutive to a juvenile court disposition. ***Id***. at 133. Unbeknownst to Woods, this was a legal impossibility. ***Id***. at 137. The court concluded that Woods was entitled to withdraw his plea:

> The record is clear that Woods, at least in part, made the decision to plead guilty based on inaccurate information provided to him by the lawyers and judge. The plea agreement to a legal impossibility necessarily rendered the plea an uninformed one. Furthermore, when, as here, inaccurate legal information renders a plea an uninformed one, it can also compromise the voluntariness of the plea.…

Id. at 140.

agreement was entitled to an evidentiary hearing on whether he knowingly and intelligently entered his plea). On the totality of the circumstances, Vieth's plea was not knowing, intelligent, and voluntary.

The State argues that Vieth was required to establish "that, but for counsel's error, he would not have entered the plea and instead, have insisted on going to trial." ***Dillard***, 358 Wis. 2d 543, ¶96 n.36 (citing ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)). This overlooks that a manifest injustice may occur where erroneous information provided to the defendant renders his plea unknowing, unintelligent, and involuntary. ***Id.***, ¶¶39-40;[5] *see also* ***Woods***, 173 Wis. 2d at 140. Here, counsel's affirmative misinformation undermined the fundamental integrity of Vieth's plea, and plea withdrawal is necessary to correct a manifest injustice.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily reversed and the cause is remanded with directions pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[5] In ***State v. Dillard***, 2014 WI 123, ¶¶9-10, 69, 81-82, 358 Wis. 2d 543, 859 N.W.2d 44, the court explicitly stated that a defendant is entitled to plea withdrawal upon a showing that his or her plea was not knowing, intelligent, and voluntary, or, separately, where the defendant establishes that the ineffective assistance of counsel led him or her to enter a plea. Acknowledging there is more than one way to demonstrate a manifest injustice, the court separately analyzed Dillard's plea under both tests, and determined that applying either standard, he was entitled to withdraw his plea.

We are cognizant that the parties' briefs applied the ineffective assistance of counsel test, with the State arguing that ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985), states the proper test for prejudice, and Vieth arguing the applicability of the test enunciated in ***Missouri v. Frye***, 132 S. Ct. 1399, 1409-10 (2012). Given the unique facts presented, we determine the resolution of this case does not require further analysis of this issue.