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DISTRICT II

September 19, 2018

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Kenosha County Courthouse
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Kenosha, WI 53140

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

2017AP1626-CR State of Wisconsin v. Traval D. White (L.C. #2014CF18)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Traval D. White pled guilty to first-degree recklessly endangering safety with a dangerous weapon as a repeater. The circuit court went above the State's eight-year initial confinement (IC) recommendation and sentenced White to ten years' IC. Postsentencing, White moved to withdraw his plea, contending he did not understand the court could exceed the State's recommendation. White now appeals from the judgment and the order denying his motion.

Upon reviewing the briefs and the record, we conclude at conference the case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the judgment and order.

A defendant seeking to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a refusal to allow plea withdrawal would result in a "manifest injustice." ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way a defendant can meet this burden is to show that he or she did not knowingly, intelligently, and voluntarily enter the plea. ***Id.*** Due process requires that "a defendant's guilty plea must be affirmatively shown" to be knowing, intelligent, and voluntary. ***State v. Cross***, 2010 WI 70, ¶16, 326 Wis. 2d 492, 786 N.W.2d 64. Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. We accept the circuit court's historical and evidentiary factual findings unless they are clearly erroneous, but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. ***Id.***

The circuit court has numerous duties to ensure that a defendant's plea is knowing, intelligent, and voluntary. Among them is to establish personally that the defendant understands the court is not bound by the terms of any plea agreement, including the State's sentencing recommendation. ***State v. Brown***, 293 Wis. 2d 594, ¶35. It is undisputed that the court here failed to so inform White, such that White made a prima facie showing of a defective plea colloquy. *See* ***State v. Taylor***, 2013 WI 34, ¶32, 347 Wis. 2d 30, 829 N.W.2d 482.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

White then was granted an evidentiary hearing, at which the burden shifted to the State to prove by clear and convincing evidence that his plea was knowing, intelligent, and voluntary, despite the inadequacy of the plea colloquy. *See* ***id.*** The State may use "any evidence" to prove that the defendant's plea was knowing, intelligent, and voluntary, including any documents in the record and testimony of the defendant or defendant's counsel. ***Id.***

White claimed his attorneys never explained to him that the court could disregard the State's recommendation and impose the maximum penalty. The record does not bear that out. He signed the plea questionnaire which recited the maximum penalty and stated that he understood "that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty." Above his signature, it states, "I have reviewed and understand this entire document …. I have reviewed it with my attorney." Further, his two defense counsel and the district attorney testified that they told White either directly or by reviewing the plea questionnaire with him that the court was not bound by the plea offer. White asserted that he thought that "maximum" meant the State's recommendation, so if the court rejected the plea agreement it nonetheless was bound to sentence him to no more than eight years' IC. The circuit court found White's claim incredible and a "torture[d]" reading of "clear English."

The court also observed that this was not White's first go-round in criminal court but had "an ugly criminal history of lawlessness," several of which adjudications or convictions involved crimes of dishonesty. White claims that in each case, however, his lawyers neglected to tell him—or he does not recall his lawyers telling him—that the court could impose a sentence exceeding the State's recommendation. The court here found that White's self-serving testimony simply was not credible. It is for the circuit court, not this court, to determine witness credibility. ***State v. Arredondo***, 2004 WI App 7, ¶17, 269 Wis. 2d 369, 674 N.W.2d 647. The court's

findings that White knew and understood that the court was not bound by the plea agreement, specifically the State's recommended sentence, are not clearly erroneous. The record supports the court's conclusion that White's plea was knowing, intelligent, and voluntary.

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

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

Sheila T. Reiff
Clerk of Court of Appeals