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**DISTRICT III**

August 10, 2021

*To*:

Hon. Patrick F. O'Melia
Circuit Court Judge
Oneida County Courthouse
Electronic Notice

Penny Carter
Clerk of Circuit Court
Forest County Courthouse
Electronic Notice

Eric Michael Muellenbach
Assistant Attorney General
Electronic Notice

Timothy T. O'Connell
Electronic Notice

Charles J. Simono
District Attorney
Electronic Notice

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

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2020AP1469-CR State of Wisconsin v. Matthew J. Christenson
(L. C. No. 2017CF42)

Before Stark, P.J., Hruz and Nashold, 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).**

Matthew Christenson appeals from an amended judgment convicting him of three Class C felonies and one Class I felony, and from an order denying his 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 (2019-20).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence either that the plea colloquy was defective and the defendant did not understand information that should have been provided, or that some other manifest injustice occurred. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Manifest injustice can arise from coercion, a genuine misunderstanding on the defendant's part, an insufficient factual basis to support the charge, ineffective assistance of counsel, or a failure by the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

In evaluating a plea withdrawal motion, the circuit court may assess the credibility of the proffered explanation for the request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). Because the circuit court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the "ultimate arbiter" for credibility determinations when acting as a fact finder. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2). We will also accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous, but we will independently determine whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary or the result of a manifest injustice. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

In the circuit court, Christenson raised a claim of manifest injustice based upon the alleged ineffective assistance of his trial counsel and a genuine misunderstanding of the consequences of his pleas. Specifically, Christenson alleged that his trial counsel erroneously advised him that he would be released from custody after serving 75% of his initial confinement period, when in fact Christenson would not be eligible for sentence adjustment on three of the

four counts of conviction until after he had served 85% of those sentences, and then only if the prosecutor, victim and court all agreed to the request. *See* WIS. STAT. § 973.195(1g) (requiring minimum of 85% of sentence to have been served prior to sentence adjustment eligibility for Class C to E felonies). The circuit court held an evidentiary hearing on Christenson's motion.

On appeal, Christenson contends: (1) the circuit court erred as a matter of law by requiring Christenson to present "uncontroverted" evidence that his trial counsel misinformed him about the requirements for sentence adjustment and that the prosecutor and court acquiesced to such misinformation; and (2) the court failed to make a factual finding as to whether Christenson's counsel misinformed him with respect to the sentence adjustment statute. We disagree with Christenson's characterizations of the court's legal and factual determinations.

First, the circuit court correctly stated multiple times that it was Christenson's burden to demonstrate a manifest injustice by clear and convincing evidence. In evaluating whether Christenson had met his burden, the court observed that the only evidence supporting the allegation that counsel had misinformed Christenson as to the requirements for sentence adjustment was Christenson's own testimony to that effect. In contrast, counsel testified that he himself understood the sentence adjustment requirements of WIS. STAT. § 973.195 and believed (although he could not specifically recall) that he would have discussed the 85% figure with Christenson. Moreover, both the plea colloquy and plea questionnaire stated that there would be a joint recommendation to find Christenson eligible for sentence adjustment in accordance with § 973.195, without specifying the amount of initial incarceration time that Christenson would first need to serve. The court contrasted this evidence with that found in several cases in which manifest injustice was established when it was undisputed that misinformation had been provided to the defendant on the record without any correction.

In this context, the circuit court's reference to "uncontroverted" evidence did not signify that the court was requiring Christenson to meet some burden beyond clear and convincing evidence. Rather, the court's differentiation of other cases involving uncontroverted evidence was part of its explanation as to why Christenson's testimony alone—which was partially undermined by counsel's testimony and not corroborated by the record—failed to clearly and convincingly establish that counsel had misinformed Christenson about the requirements of the sentence adjustment statute.

Finally, the circuit court correctly cited ***State v. Brown***, 2004 WI App 179, ¶7, 276 Wis. 2d 559, 687 N.W.2d 543, for the proposition that a defendant's lack of information about the collateral consequences of a plea does not constitute a manifest injustice unless the defendant was actually misinformed about those consequences. We fully agree with the court's conclusion that eligibility for sentence adjustment is a collateral consequence of a plea. Here, the court acknowledged Christenson's testimony that his counsel told him he would get "25 percent off" his sentence, but the court did not credit Christenson's testimony on this point, especially given evidence to the contrary at the postconviction hearing. Thus, contrary to Christenson's assertion, the court implicitly found that Christenson had not been misinformed by counsel. Accordingly, pursuant to ***Brown***, Christenson was not entitled to plea withdrawal.

Upon the foregoing reasons,

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

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*