COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3316

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD C. BRANDAU,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

Before Cane, P.J., Hoover, P.J., and Gordon Myse, Reserve Judge

PER CURIAM. Edward Brandau appeals an order denying his motion to withdraw his no contest pleas. He argues that due to ineffective assistance of counsel, he misunderstood his plea agreement and, therefore, his pleas were not intelligently, knowingly and voluntarily entered. Because the trial court disbelieved Brandau's claim that his misunderstanding concerned a

substantial inducement to enter his pleas, it properly concluded that Brandau has not shown manifest injustice. Therefore, we affirm the order.

This appeal arises out of six criminal cases in Outagamie County that were eventually consolidated for plea and sentencing purposes. Three different attorneys handled two cases each on behalf of Brandau. In one of the cases, a jury returned a verdict of guilty of committing armed robbery with a dangerous weapon. While Brandau was awaiting sentencing on that case, he and his attorneys reached a plea bargain on the remaining charges. Their agreement resulted in Brandau pleading no contest to several counts, while having others reduced or dismissed. The numerous other uncharged offenses were "read in" at sentencing.

At the plea hearing, Brandau, his attorneys and the district attorney made no reference to two burglaries giving rise to this appeal; one in Rhinelander, Oneida County, and the other in Fitchburg, Dane County. Similarly, there was no mention of these two burglaries at sentencing. Brandau was sentenced to prison terms totaling seventy-five years.

After sentencing, Brandau brought postconviction proceedings to withdraw his no contest pleas. He alleged that contrary to his understanding, the burglaries in Rhinelander and Fitchburg had not been read in at sentencing, and as a result, he was subsequently prosecuted on the Fitchburg burglary.[1] At the postconviction hearing, one of Brandau's attorneys testified that the Outagamie County district attorney proposed in a letter a plea agreement that included

[1] Brandau received a 10-year sentence to be served consecutively to his other sentences for the Fitchburg burglary. The record is not clear what became of the Rhinelander offense.

"reading in" various uncharged crimes under investigation by the Appleton Police Department "as encompassed in the document provided to the defense counsel by Detective Woodkey." The Woodkey document includes a list of over twenty-five incidents of theft, burglary, robbery and arson that were under investigation.[2] One of the burglaries listed was in Rhinelander, Oneida County, and another was in Fitchburg, Dane County. It is undisputed that the Outagamie County district attorney did not have the authority, nor did he profess to have the authority, to negotiate on behalf of Oneida County or Dane County prosecutors.

Brandau and his three attorneys met at the jail and went through the Outagamie County district attorney's proposal as set out in his letter. They also went over the list prepared by Woodkey. Brandau testified that he asked one of his attorneys whether the Fitchburg and Rhinelander offenses would be read in and that his attorney advised that they would.

The trial court found that Brandau had misunderstood the plea negotiations. It found that both Brandau and one of his defense attorneys were under the mistaken belief that the Rhinelander and Fitchburg burglaries would be read in and that Brandau would not be subject to prosecution for them. Nonetheless, the trial court concluded that this misunderstanding did not affect Brandau's decision to enter his plea. It explained:

> Despite this erroneous belief on the part of Mr. Brandau and his attorney, I do not find on this Record that it was a substantial inducement to the rendering of Mr. Brandau's pleas. Indeed, there [were] considerable other inducements offered to Mr. Brandau, including the dismissal of numerous additional charges, reducing some felonies to

[2] The list is marked as an appendix and attached.

> misdemeanors, and striking the potential for enhanced penalties through the repeater statutes ….

The court did not permit Brandau to withdraw his plea, but reduced his sentence to sixty-five years.

When a defendant wishes to withdraw a plea after sentencing, he or she must show manifest injustice by clear and convincing evidence. ***State v. ex rel. Warren v. Schwarz***, 219 Wis.2d 616, 635, 579 N.W.2d 698, 708 (1998). It is well settled that a guilty plea must be knowing, voluntary and intelligent. ***Id***. "The 'manifest injustice' test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea." ***State v. Nawrocke***, 193 Wis.2d 373, 379, 534 N.W.2d 624, 626 (Ct. App. 1995). A defendant may withdraw his plea if he shows by clear and convincing evidence that there was a genuine misunderstanding about a plea agreement. ***State v. Kivioja***, 225 Wis.2d 271, 291, 592 N.W.2d 220, 230 (1999). "However, it does not follow that any time that a defendant asserts that he or she misunderstood the plea, he or she is entitled to withdrawal." ***Id***. "Our case law establishes that not all defendants who *state* that they did not earlier understand their plea are *entitled* to withdraw their pleas." ***Id***. (Emphasis in original.)

Our supreme court has also recognized that a plea may be vacated where a "material and substantial breach of the agreement" is proven. ***State v. Bangert***, 131 Wis.2d 246, 289, 389 N.W.2d 12, 32 (1986). The breach must deprive the defendant of a material and substantial benefit for which he or she bargained. ***Id***. at 290, 389 N.W.2d at 33. A material and substantial breach amounts to "manifest injustice." ***Id***. at 289, 389 N.W.2d at 33. The government is not, however, required to fulfill every agreement or offer it makes. "Rather, as we have consistently recognized, the [United States Supreme] Court was

concerned with enforcing governmental promises that had induced the defendant to plead guilty." ***United States v. Rourke***, 74 F.3d 802, 806 (7th Cir. 1996) (quoted source omitted).

Whether to permit withdrawal of a guilty plea is committed to the trial court's discretion. ***Nawrocke***, 193 Wis.2d at 381, 534 N.W.2d at 627. "We will affirm the trial court's exercise of discretion if the record shows that the court correctly applied the legal standards to the facts and reached a reasoned conclusion." ***Id***. We do not overturn a trial court's findings of fact unless they are clearly erroneous. ***State v. Owens***, 148 Wis.2d 922, 929-30, 436 N.W.2d 869, 872 (1989). Whether the plea was voluntarily, knowingly and intelligently entered is an issue of constitutional fact we review de novo. ***Bangert***, 131 Wis.2d at 283, 389 N.W.2d at 30.

A rational basis supports the trial court's denial of Brandau's motion to withdraw his plea. The trial court did not find that the prosecutor had breached the agreement, but that Brandau and his counsel misunderstood it. We agree with the trial court's analysis that to show manifest injustice, a misunderstanding of the plea agreement, like a breach, must concern a material and substantial inducement to enter the plea. *See* ***Rourke***, 74 F.3d at 805-06. Although the court found that Brandau and his attorney misunderstood the number of offenses that were to be read in, it determined that in light of the numerous other charges that the plea negotiations had disposed of, the anticipated resolution of the Rhinelander and Fitchburg burglaries was not a substantial inducement for entering the plea. The court disbelieved Brandau's testimony that the two burglaries were critical to the plea negotiation process. The court noted that other inducements, including the reduction and dismissal of several charges, were substantial, and concluded that

despite Brandau's protestations, the two out-of-county burglaries were not critical to the plea negotiations.

The trial court's determination that Brandau failed to show manifest injustice rested on its factual finding that the disposition of the Rhinelander and Fitchburg burglaries did not induce Brandau to forego trial on all the other charges. This determination is a credibility assessment. The circuit court, not the appellate court, must determine whether the defendant's proffered reason for withdrawal "is credible or plausible or believable." ***Kivioja***, 225 Wis.2d at 291-92, 592 N.W.2d at 230. The trier of fact has the opportunity to hear and observe testimony. Thus, when a finding of fact is premised on the trial court's assessment of credibility, we must give due regard to the court's opportunity to make this assessment. *See* ***Jacquart v. Jacquart***, 183 Wis.2d 372, 386, 515 N.W.2d 539, 544 (Ct. App. 1994). The record supports the trial court's assessment that many other inducements, including the reduction, dismissal and non-prosecution of the numerous other charges on the Woodkey list, induced Brandau to enter the plea agreement. Based on the record before us, we cannot conclude that the trial court erred in ruling, on the basis of its implicit credibility assessment, that it disbelieved Brandau's claims that he would not have accepted a plea negotiation resolving over thirty alleged offenses solely because two offenses would not be read in.

Next, we reject Brandau's claim that he should be allowed to withdraw his pleas due to ineffective assistance of counsel. The test for ineffective assistance of counsel requires a demonstration that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Whether counsel's actions were deficient or prejudicial is a mixed question of law

and fact. ***Id***. at 633-34, 369 N.W.2d at 714. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS. However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination that this court decides de novo. ***Id***. at 634, 369 N.W.2d at 715.

One factor guiding the court's exercise of discretion in deciding whether to permit withdrawal of a plea is whether defense counsel gave incorrect information to the defendant, on which the defendant relied, resulting in ineffective assistance of counsel. *See* ***State v. Rodriguez***, 221 Wis.2d 487, 498-99, 585 N.W.2d 701, 706 (Ct. App. 1998). Not all misunderstandings based upon incorrect advice necessarily require a court to grant a request to withdraw a plea. *See* ***Hill v. Lockhart***, 894 F.2d 1009, 1010 (8th Cir. 1990) (The "misadvice" must be "of a solid nature, directly affecting [the defendant's] decision to plead guilty.").

Here, the trial court found in effect that the misunderstanding was not regarding a substantial inducement to accept the plea negotiation. The misadvice must be "directly affecting [the defendant's] decision to plead guilty." ***Id***. Because the trial court found contrary to Brandau's assertions that the misadvice did not concern a substantial inducement to accept the plea proposal, Brandau fails to satisfy the prejudice component of his claim. As a result, we conclude that Brandau has not shown a reasonable probability that, but for counsel's error, the result would have been different. *See* ***State v. Eckert***, 203 Wis.2d 497, 507, 553 N.W.2d 539, 543 (Ct. App. 1996).

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

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