COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 99-0311-CR and 99-0312-CR

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

CASE NO. 99-0311-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEAN A. MOLZNER,

DEFENDANT-APPELLANT.

CASE NO. 99-0312-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALDINE A. MOLZNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

ROGGENSACK, J.[1] Dean and Geraldine Molzner appeal from an order of the circuit court denying their motions for reconsideration of their plea withdrawal requests. The circuit court concluded that their motions were untimely and that even if the motions were timely, the Molzners were not entitled to withdraw their guilty pleas because the court did not inform them that: (1) they had the right to a twelve-person jury; and (2) as a consequence of their convictions, they may lose the right to possess a firearm due to 18 U.S.C. §§ 921 and 922. We conclude that the Molzners' pleas were knowingly, voluntarily and intelligently entered, and no manifest injustice occurred entitling the Molzners to withdraw their pleas. Therefore, we affirm.

BACKGROUND

Dean and Geraldine Molzner were charged with domestic disorderly conduct pursuant to §§ 947.01 and 968.075(1)(a), STATS. The Molzners appeared without counsel and pled guilty to the charges. The circuit court conducted a plea colloquy to ascertain the Molzners' knowledge of the nature of the charges and rights they would waive. The court recited the penalties under § 947.01, stating "[u]pon conviction of that, each of you may be sentenced to pay a fine up to $1,000, as well as to serve time in jail for as long as ninety days," and the court informed the Molzners of their right to a jury trial. The Molzners said they understood the potential penalties and the rights they were waiving. The circuit

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

court did not inform the Molzners that as a result of their convictions, they might lose the right to possess a firearm due to 18 U.S.C. §§ 921 and 922.[2]

Later, the Molzners, through counsel, filed motions to withdraw their pleas, alleging that they did not make them knowingly and voluntarily because the court did not inform them that as a result of their convictions, they would lose the right to possess a firearm. The circuit court denied the motions, concluding that the affect of 18 U.S.C. §§ 921 and 922 on those convicted of misdemeanor crimes of domestic violence was a collateral consequence of such a plea; and therefore, the court was not required to inform them of that potential consequence.

The Molzners then filed motions for reconsideration, alleging that they did not knowingly and voluntarily enter their guilty pleas because in waiving their right to a jury trial, they waived the right only to a six-person jury, and ***State v. Hansford***, 219 Wis.2d 226, 580 N.W.2d 171 (1998), established that a criminal defendant charged with a misdemeanor has a right to a twelve-person jury. The Molzners also contended that an amendment to the Wisconsin Constitution guaranteeing the right to bear arms made the effect of federal law a direct consequence of their pleas.

---

[2] 18 U.S.C. § 922(g)(9) states in relevant part:

> It shall be unlawful for any person … who has been convicted in any court of a misdemeanor crime of domestic violence, to … possess in or affecting commerce, any firearm or ammunition ….

Additionally, a misdemeanor subject to the proscription of § 922(g)(9) has been defined in 18 U.S.C. § 921(a)(33)(A)(ii) as:

> [having] as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse … of the victim ….

The circuit court denied the Molzners' motions for reconsideration because they were untimely. The court also concluded that even if the motions were timely, neither ***Hansford*** nor the amendment guaranteeing the right to bear arms rendered the Molzners' pleas invalid. This appeal followed.

DISCUSSION

Standard of Review.

Whether to permit withdrawal of a guilty or a no contest plea is a discretionary decision for the circuit court. ***State ex rel. Warren v. Schwarz***, 219 Wis.2d 615, 635, 579 N.W.2d 698, 708 (1998). Its decision denying the Molzners' motions to withdraw their pleas will be overturned only if the circuit court erroneously exercised its discretion. ***Id.*** When we review a discretionary determination, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. ***State v. Keith***, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

Plea Withdrawal.

After sentencing, a defendant has the burden to show by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***Birts v. State***, 68 Wis.2d 389, 392-93, 228 N.W.2d 351, 353 (1975). The following four factual situations, if proved by a defendant, justify post-sentencing plea withdrawal: (1) the defendant was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule; (2) the defendant did not enter or ratify the plea personally, or through a person authorized to so act on defendant's behalf; (3) the defendant did not enter a plea voluntarily, or it was

entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement. ***Id.*** at 393, 228 N.W.2d at 353-54. Circumstances which may cause manifest injustice are not necessarily limited to these four examples. ***Id.*** at 393, 228 N.W.2d at 354. However, the Molzners base their plea withdrawal motions on the third example and allege that they entered their pleas without the knowledge that they were waiving the right to a twelve-person jury and the right to possess a firearm.

1. Right to a Twelve-Person Jury.

The Molzners concede that during the plea colloquy, the circuit court informed them that they were entitled to a jury trial and that by pleading guilty they were waiving that right; however, the Molzners contend that they did not understand the nature of the constitutional right they were waiving because at the time they entered their guilty pleas, a criminal defendant charged with a misdemeanor was entitled to only a six-person jury panel under § 756.096(3)(am), STATS., 1995-96, while ***Hansford***, 219 Wis.2d at 241, 580 N.W.2d at 177, recently established that a criminal defendant charged with a misdemeanor has a right to a twelve-person jury panel.

The Molzners correctly assert that a plea is not knowingly, voluntarily and intelligently entered when the defendant does not understand the nature of the constitutional rights he or she is waiving. ***State v. Van Camp***, 213 Wis.2d 131, 139-40, 569 N.W.2d 577, 582 (1997). Instead of addressing this

alleged constitutional violation, however, the circuit court essentially employed a harmless error analysis.

A constitutional error is harmless if there is no reasonable possibility that it contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A "reasonable possibility" is one which is sufficient to undermine confidence in the outcome of the proceeding. ***Id.*** at 544-45, 370 N.W.2d at 232. The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial. ***Id.*** at 544 n.11, 370 N.W.2d at 232 n.11.

During the plea colloquy, when advising the Molzners that by their plea they were giving up the right to a trial by jury, the court never mentioned the number of persons who would make up such a jury. Additionally, the Molzners do not argue that they believed they had a right to a six-person jury at the time they made their pleas. Furthermore, there is nothing in the record to support the contention that the Molzners would not have waived the right to trial by jury had they known they had the right to a twelve-person jury. Accordingly, the circuit court properly exercised its discretion when it concluded that there is "no reasonable or rational basis on which the defendants would have done anything different in regard to the plea and sentencing had they been advised that they were entitled to a 12 person jury."

2. Right to Possess a Firearm.

The Molzners also contend that they did not knowingly, voluntarily and intelligently enter their guilty pleas because the circuit court did not inform them that as a result of their convictions, they would lose the right to possess a firearm because of 18 U.S.C. §§ 921 and 922. They further argue that an

amendment to the Wisconsin Constitution guaranteeing the right to bear arms made the effect of the federal law a direct consequence of their pleas.

When a defendant does not know what sentence could actually be imposed, a plea is not knowingly, voluntarily and intelligently entered, resulting in a manifest injustice. ***Warren***, 219 Wis.2d at 635-36, 579 N.W.2d at 708; ***Birts***, 68 Wis.2d at 393, 228 N.W.2d at 354. Before accepting a guilty or no contest plea, the court is required to, "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Section 971.08(1)(a), STATS. An understanding of potential punishments or sentences includes knowledge of the direct consequences of the plea, but it does not require that a defendant be informed of consequences that are merely collateral to the plea. ***Warren***, 219 Wis.2d at 636, 579 N.W.2d at 708. A defendant who was not apprised of the direct consequences of his plea does not knowingly, voluntarily and intelligently enter his plea and is entitled to withdraw it to correct a manifest injustice. However, no manifest injustice occurs when a defendant is not apprised of a collateral consequence. ***State v. Madison***, 120 Wis.2d 150, 159, 353 N.W.2d 835, 840 (Ct. App. 1984).[3]

Direct consequences of a plea have a "'definite, immediate, and largely automatic effect on the range of the defendant's punishment.'" ***Warren***, 219 Wis.2d at 636, 579 N.W.2d at 708 (quoting ***State v. James***, 176 Wis.2d 230, 238, 500 N.W.2d 345, 348 (Ct. App. 1993)). Collateral consequences, in contrast,

[3] Although not at issue in ***State v. Madison***, 120 Wis.2d 150, 160, 353 N.W.2d 835, 841 (Ct. App. 1984), this court cited with approval a federal case where the defendant was not permitted to withdraw his guilty plea to mail fraud because he had not been informed that, as a convicted felon, he would automatically forfeit his rights to vote and to travel abroad.

do not automatically flow from the plea, but rather will depend upon a future proceeding or may be contingent on a defendant's future behavior. ***State v. Myers***, 199 Wis.2d 391, 394, 544 N.W.2d 609, 610 (Ct. App. 1996); ***James***, 176 Wis.2d at 243-44, 500 N.W.2d at 350-51; ***State v. Santos***, 136 Wis.2d 528, 531, 401 N.W.2d 856, 858 (Ct. App. 1987).

For example, in ***Myers***, we concluded that the potential for Myers to be committed as a sexual predator following his sexual assault conviction was a collateral consequence because any commitment would be dependent upon Myers's condition as it would exist at a commitment hearing to be held sometime in the future. ***Myers***, 199 Wis.2d at 394, 544 N.W.2d at 610. Therefore, because the potential for commitment as a sexual predator had no definite, immediate or automatic effect on the range of punishment to which a defendant would be subjected, a defendant needed no knowledge of the potential for a future commitment, in order to make his plea knowing and voluntary. ***Id.*** at 394-95, 544 N.W.2d at 610-11.

Similarly, in ***James***, we held that resentencing upon revocation of probation was a collateral consequence to a no contest plea because the resentencing was contingent upon the defendant's behavior in electing not to abide by the conditions of his probation. ***James***, 176 Wis.2d at 243-44, 500 N.W.2d at 350-51. The consequence of resentencing on revocation of probation was well within the defendant's control; and therefore, it was not a definite, an immediate, or an automatic consequence of his plea, but only a collateral consequence, of which the circuit court was not bound to inform him. ***Id.***

To decide whether a manifest injustice occurred in this case, we must determine whether 18 U.S.C. § 922, which prohibits the possession, in or

affecting commerce, of any firearm by those convicted of domestic abuse, is a direct or collateral consequence of the Molzners' guilty pleas. The federal statute does not have a definite, immediate or automatic effect on the Molzners' range of punishment for domestic disorderly conduct because punishment for that offense is set by the State of Wisconsin. Additionally, the Molzners may never be subjected to the effects of the federal statute because they can choose not to possess a firearm in or affecting commerce. And if they do choose to possess a weapon, any consequence is only potential and subject to the government's ability to prove that the federal statute applies to them and that they have violated it. *See* ***Santos***, 136 Wis.2d at 531, 401 N.W.2d at 858.

Therefore, based on the foregoing review of relevant case law, we agree with the circuit court that the effect of 18 U.S.C. § 922 is a collateral consequence of the Molzners' pleas and subsequent convictions for domestic disorderly conduct. Indeed, to conclude otherwise could require circuit courts to know of and inform defendants of every possible consequence of every law in every possible jurisdiction, before they may accept a plea. That would be both unreasonable and impractical. ***Warren***, 219 Wis.2d at 638-39, 579 N.W.2d at 709. Because we conclude that the effect of 18 U.S.C. § 922 is collateral, it cannot form the basis for manifest injustice under the standards set in ***Birts***.

The Molzners also argue that the amendment to the Wisconsin Constitution guaranteeing the right to bear arms causes the effect of the federal law to become a direct consequence. They do not develop this argument; nor do they cite relevant legal precedent to support the contention that a right set forth in the Wisconsin Constitution causes a federal law to have an immediate and direct effect on one convicted of committing domestic disorderly conduct. We do not consider arguments which are undeveloped and unsupported with legal reasoning,

especially when their underpinnings involve the claimed infringement of a constitutional right. *See* ***Truttschel v. Martin***, 208 Wis.2d 361, 369, 560 N.W.2d 315, 318-19 (Ct. App. 1997). Therefore, we do not reach the merits, if any, of this argument, and we conclude that the circuit court properly exercised its discretion in denying the Molzners' motions to withdraw their pleas.

CONCLUSION

There is no reasonable possibility that the Molzners' pleas would have been different had the supreme court already ruled that an accused misdemeanant has the right to a twelve-person jury at the time they entered their pleas. In addition, the effect of 18 U.S.C. §§ 921 and 922 is a collateral consequence of the Molzners' guilty pleas to domestic disorderly conduct because the federal statute does not have a definite, immediate and automatic effect on the Molzners' range of punishment for domestic disorderly conduct. Therefore, we conclude that the Molzners knowingly, voluntarily and intelligently pled guilty to domestic disorderly conduct and vacation of their pleas was not necessary to correct a manifest injustice. The circuit court properly exercised its discretion and we affirm its decision denying the Molzners' motions for reconsideration.

By the Court.—Order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.