**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 1, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP1740-CR** **Cir. Ct. No. 2013CF005266**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JASON D. HENDERSON,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Jason D. Henderson appeals from the circuit court's order denying his postconviction motion to withdraw his plea on the grounds of ineffective assistance of counsel. Henderson claims that both of his trial counsel were ineffective for failing to properly advise him as to the correct

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-2014). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

bifurcation initial confinement ("IC") maximum on each of his two charges. He claims he would not have pled guilty to battery if he had known the correct bifurcation IC maximum and that he is therefore entitled to withdraw his plea on manifest injustice grounds.

¶2 The State responds that neither of Henderson's trial counsel were ineffective because it is undisputed that they correctly advised him as to the maximum possible term of imprisonment. *See* ***State v. Sutton,*** 2006 WI App 118, ¶1, 294 Wis. 2d 330, 718 N.W.2d 146. As to incorrectly stating the bifurcation IC maximum, the State argues counsel were not deficient because the law at the time of his plea was unsettled. *See* ***State v. Lasanske***, 2014 WI App 26, ¶10, 353 Wis. 2d 280, 844 N.W.2d 417. Additionally, the State argues that any mistaken information did not prejudice Henderson because Henderson failed to credibly show that he would not have pled guilty to the State's offer of reduced charges if he had known the correct bifurcated IC maximum.

¶3 We agree with the State and affirm.

## BACKGROUND

¶4 In November 2013, Jason D. Henderson was charged with battery and disorderly conduct contrary to WIS. STAT. §§ 940.19(1), 939.51(3)(a), 968.075(1)(a), 947.01(1), and 939.51(3)(b). Each count was charged with two separate enhancers: the domestic abuse repeater, *see* WIS. STAT. § 939.621(1)(b) and (2), and the habitual criminality repeater, *see* WIS. STAT. § 939.62(1)(b). The domestic abuse repeater enhancer changed the status of each of these charges from a misdemeanor to a felony. The maximum penalty for the battery charge with both enhancers would be four years and nine months, and the maximum penalty

for the disorderly conduct charge with both enhancers would be four years and three months.

¶5 On the day trial was to begin, with the victim present in the courtroom ready to testify, the parties entered into plea negotiations. The State offered to dismiss the domestic abuse repeater enhancer from each count, reducing each to a misdemeanor, in exchange for pleas to both charges and the habitual criminality enhancer. Henderson agreed.

¶6 During the plea colloquy, it is undisputed that Henderson was correctly told that his maximum sentence on each count was two years incarceration. It is undisputed that he acknowledged that he understood the maximum possible incarceration.

¶7 But it is also undisputed that the plea questionnaire incorrectly stated that the two-year maximum incarceration consisted of a maximum of twelve months initial confinement ("IC") and twelve months extended supervision ("ES") on each count. The actual bifurcated sentence on each count is eighteen months IC and six months ES.

¶8 Shortly after the plea was entered, Henderson requested to withdraw his guilty pleas. The trial counsel who had represented him up to this point was allowed to withdraw as counsel, and new trial counsel was then appointed to represent Henderson. New counsel filed a motion to withdraw Henderson's plea prior to sentencing.

¶9 Henderson alleged in his motion that he was rushed into the plea; that he did not personally affirm the facts in the complaint and in fact was innocent; and that his plea was not knowingly, voluntarily, and intelligently made.

At the motion hearing, Henderson testified that he spent approximately three to four hours with his attorney on the morning of trial before entering his guilty pleas. He also testified he had prior experience in the criminal justice system with six prior convictions, none of which were felonies. He testified that he did not want to lose his job, and he had discussed with his attorney the pros and cons of "get[ting] it over with" rather than going to trial. He specifically mentioned that they discussed that if he went to trial and was convicted, his conviction would be a felony. He was concerned that becoming a felon would result in losing his job and that a felony was much worse than a misdemeanor. He wanted to make sure the felony was "wiped off."

¶10 The trial court denied Henderson's motion to withdraw his plea. The court found that Henderson's plea was knowingly, voluntarily, and intelligently made and that there were no defects in the plea colloquy. The court further found that Henderson had not presented any support for manifest injustice or a fair and just reason that would allow for plea withdrawal.

¶11 The court based its ruling on a number of factors including the time Henderson spent discussing his case with his attorney (three to four hours), that he weighed his options and was motivated by his desire to avoid a felony to protect his job, and that he told the court during the colloquy that he was not subject to undue pressure. Additionally, the court found there would be substantial prejudice to the State in allowing a plea withdrawal for the following two reasons: first, because the dynamics of domestic violence cases are such that maintaining cooperative victims is difficult, and second, because the plea was taken on a day when the victim was present and the State was ready to proceed, but the intervening passage of time put the State in a position such that it would be substantially prejudiced.

¶12 The trial court then imposed a sentence of nine months incarceration for the battery charge and three months for the disorderly conduct, but stayed that sentence and placed Henderson on two years of probation. Henderson filed a postconviction motion to withdraw his pleas. In this motion, he alleged ineffective assistance of counsel based upon the incorrect bifurcation information he received regarding the maximum IC time in his guilty pleas. The court denied his motion without an evidentiary hearing in a written decision, which Henderson appeals.

## DISCUSSION

¶13 Henderson argues that he should be permitted to withdraw his plea because of his two trial counsels' deficient performance in giving him incorrect information about the maximum initial confinement he faced in a bifurcated sentence. It is undisputed that trial counsel misadvised him of the maximum he faced on the initial confinement portion of his potential bifurcated sentence. Neither the State nor the trial court caught the error. He argues that because of the ineffective assistance of counsel, his plea was not knowing, voluntary, and intelligent. Additionally, he contends that he was prejudiced by the deficiency of counsel because he would not have accepted the State's plea offer and pled guilty if he had known the correct bifurcated maximum IC.

¶14 The State counters that while the IC maximum information was incorrect, our decision in ***Sutton*** held that misinformation about the IC maximum was not critical to a knowing and voluntary plea. ***Sutton***, 294 Wis. 2d 330, ¶15. The State points out that Henderson was correctly told the maximum possible incarceration he faced overall, which is required for a knowing and voluntary plea under ***Sutton***, 294 Wis. 2d 330, ¶1 and ***State v. Dillard***, 2014 WI 123, ¶9, 358 Wis. 2d 543, 859 N.W.2d 44. Additionally, the State contends that the law of

how to calculate the IC maximum when applying a prison enhancer to a misdemeanor was in a very unsettled state at the time of counsels' advice here so that neither of Henderson's two trial counsels were deficient for failing to know how the courts would ultimately resolve the issue.

¶15 Finally, the State argues that Henderson was not prejudiced because the record shows that the IC maximum discrepancy between twelve months (as he was incorrectly advised) and eighteen months (the correct IC maximum) would not have caused Henderson to turn down the State's plea offer of a misdemeanor in the face of Henderson's statements that he sought to avoid a felony to keep his job.

¶16 We agree with the State and address each issue in turn.

**1. Legal standards of review on motions to withdraw a plea**

¶17 Henderson filed both presentencing and postconviction motions to withdraw his plea. Each were denied, with the post-sentencing motion being denied without a hearing. We review each motion under a different standard.

¶18 We review a decision to grant or deny a presentencing motion to withdraw a plea for an erroneous exercise of discretion. ***State v. Lopez***, 2014 WI 11, ¶60, 353 Wis. 2d 1, 843 N.W.2d 390. To sustain a discretionary act, this court needs only to find that the trial court "'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id***. (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)). "In general, a circuit court should freely allow a defendant to withdraw his plea prior to sentencing for any

fair and just reason, unless the prosecution [would] be substantially prejudiced." ***Lopez,*** 353 Wis. 2d 1, ¶2 (citations and quotation marks omitted).

¶19 We review a postconviction motion to withdraw a plea independently of the trial court, but benefitting from the lower court's analysis. ***State v. Howell***, 2007 WI 75, ¶30, 301 Wis. 2d 350, 734 N.W.2d 48. To warrant a hearing on a postconviction motion to withdraw a plea, the defendant must first satisfy the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), showing that the plea colloquy is defective, or of ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972) and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), where the defendant's claim is that a factor extrinsic to the plea colloquy, like ineffective assistance, renders the plea infirm. *See* ***Howell***, 301 Wis. 2d 350, ¶¶2, 74.

¶20 If the defendant succeeds in the first showing, the next requirement is a showing that he or she did not know or understand information that should have been provided at the time of the plea. A defendant has the heavy burden of establishing by clear and convincing evidence that the court should permit the defendant to withdraw the plea to correct a manifest injustice. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836.

**2. Trial counsel was not ineffective despite the misinformation.**

¶21 We note at the outset that Henderson makes no argument about any defect in the plea proceeding other than whether the misinformation about the bifurcated initial confinement maximums rendered his plea infirm. Although he argued other grounds in his presentencing motion (that he should be allowed to withdraw his plea because he was innocent and only stipulated to the facts because he felt rushed), he has abandoned those arguments in his postconviction motion

and in this appeal. Consequently, we address only his claim that his plea was not knowing, voluntary, or intelligent because of the incorrect bifurcated IC maximum misinformation. He frames it as an ineffective assistance claim.

¶22 It is well-established law that to prove an ineffective-assistance claim, the defendant must satisfy the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984): (1) that counsel's performance was deficient; and (2) that the defendant was prejudiced thereby. *See* ***Strickland***, 466 U.S. at 687. Deficient performance requires errors so serious that counsel cannot objectively be seen to be functioning as the "counsel" guaranteed by the Sixth Amendment. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To succeed, "'the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" ***State v. Maloney***, 2005 WI 74, ¶43, 281 Wis. 2d 595, 698 N.W.2d 583 (quoting ***Strickland***, 466 U.S. at 689) (internal citations omitted). To prevail on establishing deficient performance, Henderson must show that acts or omissions of trial counsel were objectively unreasonable. *See* ***State v. Oswald***, 2000 WI App 2, ¶63, 232 Wis.2d 62, 606 N.W.2d 207. The defendant has the burden of affirmatively proving prejudice. ***Strickland***, 466 U.S. at 693. Here Henderson has failed to meet that burden.

### 3. Henderson's plea did not violate WIS. STAT. § 971.08 because he was properly advised of the maximum terms of incarceration.

¶23 We first turn to the circumstances of the plea—the guilty plea questionnaire and colloquy—to determine what Henderson was advised and what he told the court about the information. It is undisputed that the criminal complaint *correctly* stated that Henderson faced double-enhanced battery and disorderly conduct charges, making each charge a felony and exposing him to four

years, nine months on the battery and four years, three months on the disorderly conduct. It is undisputed that the plea negotiations were for Henderson to plead to battery and disorderly conduct without the domestic violence enhancer, but with the habitual criminality enhancer, which reduced the charges to misdemeanors and the exposure to two years for each count.

¶24 Henderson executed a guilty plea questionnaire with his lawyer which correctly showed the reduced charges, highlighted that the domestic violence repeater was being dismissed, and stated that the maximum penalty he faced was one year IC on each count and one year ES on each. Although the bifurcated IC maximum was wrong (it was actually eighteen months, not twelve), the overall sentence maximum reflected on the form was correct (two years on each count). Henderson signed the form.

¶25 During the plea colloquy, the trial court correctly stated the maximum possible incarceration. The court advised Henderson that he faced two years maximum sentence on each count and Henderson stated that he understood the maximum possible sentence he faced:

> THE COURT: "Do you understand that, sir, *two years on each one of the counts*?"
>
> THE DEFENDANT: "*Yes, I understand*."

(Emphasis added.)

¶26 Whether misinformation about the bifurcated IC maximum renders a plea infirm is an issue we faced in ***Sutton***. *See* ***Sutton***, 294 Wis. 2d 330, ¶1. There, we reasoned that the knowing, voluntary, and intelligent plea requirements in WIS. STAT. § 971.08(1)(a) and ***Bangert*** are met even without proper notification of the bifurcated sentence because the total possible imprisonment is

the *direct* consequence of the plea, and the potential bifurcation is analogous to a *collateral* consequence. ***Sutton***, 294 Wis. 2d 330, ¶11. We held that informing a defendant of the maximum term of imprisonment is all that is required in a proper plea colloquy. ***Id.***, ¶1. We note that Henderson does not address ***Sutton*** in his briefs, even after the State pointed out this case's holding in its response brief.

¶27 Rather, Henderson argues that ***Dillard*** supports his view because there the Wisconsin Supreme Court held that incorrect advising as to the repeater exposure constitutes ineffective assistance of counsel. In ***Dillard***, when the defendant was weighing a plea offer from the State, he believed that he faced a persistent repeater enhancer on an armed robbery charge, so he accepted the State's offer to plead no contest to the armed robbery in exchange for the State dropping the persistent repeater enhancer. He repeatedly asserted that his primary motivation for accepting the State's plea offer was eliminating the possibility of receiving a mandatory life sentence. ***Dillard***, 358 Wis. 2d 543, ¶62. After sentencing it became clear that Dillard had not actually faced the persistent repeater charge in the first instance. The court held in ***Dillard*** that his plea was not knowingly, voluntarily, and intelligently entered *because he was misadvised on his maximum sentence exposure* and as a result, the plea offer was actually less valuable than it appeared and granted him only an illusory benefit. *See* ***id.***, ¶¶34, 69. This is consistent with ***Sutton***. The direct and critical consequence of a plea is the total maximum imprisonment.

¶28 Both ***Sutton*** and ***Dillard*** support the State's position that because Henderson was correctly advised as to the total maximum sentence he faced, his plea was not infirm. When he evaluated the State's offer, he correctly knew that with the domestic violence enhancer dismissed he was spared even the possibility of a felony conviction and that his maximum imprisonment exposure was being

reduced from four years each count to two years each count. Unlike ***Dillard***, Henderson was correctly advised of the maximum imprisonment he faced. Accordingly, his plea was made knowingly, voluntarily, and intelligently, and accordingly trial counsel was not deficient.

**4. Trial counsel was not ineffective for incorrectly advising Henderson about the bifurcated IC maximum because the law was unsettled and obscure.**

¶29 Additionally at the time of Henderson's plea, the correct bifurcation of a misdemeanor enhanced with the habitual criminality statute was obscure and unsettled law. The case Henderson relies upon for determining the correct maximum bifurcation, ***Lasanske***, was decided on February 26, 2014. *See* ***Lasanske***, 353 Wis. 2d 280. Henderson was charged and had his initial appearance in November 2013, before the ***Lasanske*** opinion was decided, and he entered his guilty plea on March 3, 2014, only five days (three business days) after the ***Lasanske*** opinion was decided.

¶30 The ***Lasanske*** opinion begins:

> This appeal concerns the vexing problem of how our trial courts may structure bifurcated sentences when the base penalty for a misdemeanor does not require bifurcation but an applicable penalty enhancement does. Several unpublished one-judge opinions have tackled the issue. However, the analyses have been anything but uniform. We made this a three-judge decision in order to have some established law on the subject.

***Id.***, ¶1.

¶31 The ***Lasanske*** opinion itself clearly shows that this was an area of unsettled and obscure law. If the various courts of appeals could not uniformly compute the applicable bifurcated time, certainly trial defense counsel cannot be

found deficient for their respective failures to accurately compute it. ***Lasanske*** itself was not settled law until September 2014 because the respondent filed a Petition for Review to the supreme court on March 27, 2014, which was denied September 18, 2014.[2]

¶32 Comparing the ***Lasanske*** timeline with the dates both trial counsel misinformed Henderson here, we see that neither attorney can be faulted because both misadvised Henderson before ***Lasanske*** was settled law. The first trial counsel represented Henderson at the plea hearing five days after the court of appeals released the decision. Henderson's second trial counsel filed the presentencing motion to withdraw plea in March and argued the motion at a September 19, 2014 hearing, which was only the day after the supreme court denied ***Lasanske***'s Petition for Review.[3] Accordingly, Henderson fails to show that his trial counsel performed deficiently, and, as we have concluded in the preceding section, the misinformation itself was not critical to the knowing or voluntary nature of the plea.

**5. Henderson fails to show prejudice.**

¶33 Even if Henderson were able to show deficient performance, he cannot meet the second prong of the ***Strickland*** test showing actual prejudice. *See* ***Strickland***, 466 U.S. at 687. To prove prejudice, he must demonstrate that "under the totality of the circumstances there is a reasonable probability [he]

[2] According to the official court records available on CCAP.

[3] The unsettled nature of the law of bifurcation is further illustrated by the fact that appellate counsel acknowledges that even he erred in calculating the bifurcation IC maximum as late in the process as Henderson's postconviction motion, which was filed July 20, 2015. In the motion, appellate counsel stated that the "correct" bifurcation IC maximum was nineteen months. In his appellate brief he concedes that this was error and the correct amount is eighteen months.

would not have pled… and would have gone to trial" but for counsel's deficient performance. ***Dillard***, 358 Wis. 2d 543, ¶99. He "must make more than a bare allegation that he would have pleaded differently and gone to trial." ***Id.*** (citations omitted). He must establish that having the correct bifurcation at the time of his plea would have changed his decision to plead. *See* ***id.***

¶34 Henderson failed to show that he would not have pled to the State's offer if he had known the maximum IC exposure was eighteen months as opposed to twelve. His postconviction claim to the contrary is not credible, as the trial court found. Henderson himself testified that his main concern at the time he pled guilty was avoiding a felony conviction. He was concerned that he would lose his job if he became a felon. He emphasized that none of his prior convictions were felonies and that "a felony is a lot more worser than a misdemeanor case."

¶35 Nothing in his testimony indicates that he was concerned about the amount of time he was facing with his plea, but rather that he was concerned with avoiding a felony. The trial court relied on this testimony in making its determination that Henderson knowingly weighed his options and made an intelligent plea. It is simply not credible that Henderson would have taken two felony charges to trial rather than accept the plea to misdemeanors.

¶36 For all of the foregoing reasons, we affirm.

*By the Court*.—Judgment and Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.