COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0427-CR **Cir. Ct. No. 00-CF-572**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY H. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Randy H. Nelson appeals from a judgment convicting him of causing mental harm to a child contrary to WIS. STAT.

§ 948.04(1).[1] He also appeals from the order denying his postconviction motion to withdraw his negotiated plea. Nelson argues that the trial court erred by denying his motion for plea withdrawal. Specifically, Nelson contends that his claimed misunderstanding of what the plea agreement allowed the State to recommend at sentencing rendered his no contest plea unknowing and involuntary. We reject this argument and affirm the judgment and order.

BACKGROUND

¶2 In September 2000, the State charged Nelson with one count each of second-degree sexual assault of a person under the age of sixteen, indecent exposure and obstructing an officer. In exchange for Nelson's no contest plea to a single amended charge of causing mental harm to a child, the State agreed to dismiss the original charges. The circuit court sentenced Nelson to two and one-half years' imprisonment followed by seven and one-half years' extended supervision. The court denied Nelson's postconviction motion to withdraw his no contest plea and this appeal followed.

ANALYSIS

¶3 Nelson argues that the trial court erred by denying his motion for plea withdrawal. Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

795 (Ct. App. 1986). Nelson has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶4 At the outset of the plea hearing, defense counsel summarized the plea agreement, noting that:

> [Nelson] would be pleading no contest to the amended count in the information, that the remaining counts that were in the complaint would be dismissed and read in at least for the purpose of sentencing and … both parties will be free to argue, but the state would specifically not recommend prison. It would be recommending some other disposition besides prison.

The court engaged Nelson in a plea colloquy, confirming Nelson's understanding that the court was not bound by the plea agreement and could sentence Nelson to a maximum of fifteen years in prison. Nelson also executed a plea questionnaire and waiver of rights form in which Nelson agreed:

> I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows: "State to **Not** recommend prison, open sentence otherwise."

Ultimately, the State made the following recommendation:

> The presentence report, obviously, recommends a significant sentence. The State had made an agreement prior where we would be free to argue up to, obviously the maximum imposed and stayed, but we would recommend … the maximum probation and up to a year in jail.
>
> We are troubled by this defendant's [criminal] history. We believe a recommendation of an imposed-and-stayed sentence of … ten years with a ten-year probation and a year in the county jail would, basically, put the defendant on the edge of going off to prison if he were to violate his conditions.

¶5 Following his conviction, Nelson filed a motion for postconviction relief seeking to withdraw his plea. Nelson claimed that he did not understand that as part of the plea agreement, the State "could ask that the court impose the maximum prison sentence available ... and then ask the court to stay that sentence [and] … place him on probation." Thus, he argues that his misunderstanding of what the plea agreement allowed the State to recommend at sentencing rendered his no contest plea unknowing and involuntary.

¶6 A defendant has a due process right to the enforcement of a negotiated plea agreement. ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. As a predicate to such right, the defendant must understand the material and substantial terms of the plea agreement. *See* ***State v. Woods***, 173 Wis. 2d 129, 141 n.2, 496 N.W.2d 144 (Ct. App. 1992). Discerning the terms of a plea agreement involves questions of fact for the circuit court. Those findings must be upheld on review unless clearly erroneous. ***Williams***, 249 Wis. 2d at ¶5.

¶7 In denying Nelson's postconviction motion, the circuit court concluded that the substance of the plea agreement was that the State would not recommend prison. The court further concluded that the State did not recommend prison—but merely the possibility of prison should Nelson's probation be revoked. The court concluded that the State's suggestion of an imposed-and-stayed prison term was tantamount to a request for a "particular form or condition" to be placed on the probation term. Ultimately, the court determined that Nelson could not reasonably have understood the plea agreement as barring the State from recommending an imposed-and-stayed prison term on top of probation. The record supports this determination.

¶8 Nelson executed a plea questionnaire specifying that although the State would not recommend prison, its recommendation could involve an "open sentence otherwise." Notably, neither Nelson nor his counsel objected to the State's recommendation. Because Nelson could not reasonably have understood the plea agreement as barring the State from recommending an imposed-and-stayed prison term on top of probation, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.