COURT OF APPEALS
DECISION
DATED AND FILED

December 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2227-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ARDIE BYRD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Ardie Byrd appeals a judgment convicting him of three counts of delivering between five and fifteen grams of cocaine. Each charge carried a presumptive one-year minimum sentence. Section 161.41(1)(cm)2, STATS., 1993-94. He also appeals an order denying his motion for postconviction relief. He contends that his guilty plea was not knowing and voluntary because he

did not understand that he faced a presumptive one-year minimum jail sentence on each of the charges to which he pleaded guilty. We conclude that the trial court properly followed procedures required to ascertain a defendant's understanding of the potential penalties he or she faces if a guilty plea is accepted. Accordingly, we affirm.

On April 27, 1995, Byrd pleaded guilty to three charges of delivering between five and fifteen grams of cocaine. On July 7, 1995, the trial court imposed and stayed a seven-year prison sentence on one count, withheld sentence on the remaining counts and placed Byrd on probation for seven years, with one year of county jail confinement as a condition. On May 9, 1996, Byrd moved for a sentence modification in the trial court, alleging that he was improperly denied his statutory right of allocution at the 1995 sentencing. Byrd then filed a motion for plea withdrawal on May 24, 1996, four days before the trial court vacated the original judgment of conviction, reopened the case and set the matter for resentencing. The court subsequently denied the motion for plea withdrawal, withheld sentence on all three counts and placed Byrd on five-years probation, again with one year of jail confinement as a condition.

On this appeal, Byrd claims that because he successfully challenged his original sentence, he needs only to justify his plea withdrawal request under the standard applicable to requests made prior to sentencing—the "fair and just reason" standard. ***State v. Canedy,*** 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). However, we conclude that because Byrd's motion for plea withdrawal was filed before the trial court vacated his original sentence, the "manifest injustice" standard applies. "[T]he motion to withdraw the plea was filed after a sentencing decision had been made and that decision had not been reversed,

vacated or nullified by the court." ***State v. Nawrocke,*** 193 Wis.2d 373, 380, 534 N.W.2d 624, 627 (Ct. App. 1995).

A guilty plea may be withdrawn after sentencing when necessary to correct a "manifest injustice." ***Id***. at 378-79, 534 N.W.2d at 626. A "manifest injustice" is "a serious flaw in the fundamental integrity of the plea." ***Id***. at 379, 534 N.W.2d at 626 (citation omitted). Byrd claims he lacked the required knowledge about the presumptive minimum sentence when he entered the plea because he was led to believe that he could get probation, with no jail confinement, on the charges. *See* ***State v. Mohr,*** 201 Wis.2d 693, 700-01, 549 N.W.2d 497, 499-500 (Ct. App. 1996). He contends the trial court erred in refusing to allow him to withdraw his plea.

We employ a two-step process when reviewing the denial of a request to withdraw a guilty plea. *See* ***State v. Bangert,*** 131 Wis.2d 246, 389 N.W.2d 12 (1986). We first determine whether Byrd has made a prima facie showing that the trial court did not meet the procedures mandated by § 971.08, STATS., and whether Byrd has properly alleged he did not know or understand the information which should have been provided at the plea hearing. ***State v. Van Camp,*** 213 Wis.2d 131, 140-41, 569 N.W.2d 577, 582-83 (1997). If Byrd meets this initial burden, we then determine whether the State has nevertheless demonstrated by clear and convincing evidence that Byrd's plea was voluntarily, knowingly and intelligently entered. *See* ***id***.

Whether Byrd has made a prima facie showing that his plea hearing was defective is a question of law which we review de novo. ***State v. Issa,*** 186 Wis.2d 199, 205, 519 N.W.2d 741, 743 (Ct. App. 1994). At the plea hearing, the trial court addressed Byrd regarding the charges and the penalties:

> THE COURT: In case 94-CF-1710, I'm -- let me find the conditions here. Count III is delivery of a controlled substance, to wit: cocaine. Leaves Mr. Byrd exposed to a possible penalty of fine not more than $500,000 or imprisonment not longer than one year, no more than 15 years or both. Count IV alleges a violation of the same crime and punishable by up to 15 years -- from one year to 15 years and a fine up to $500,000. Count V is the same crime, fine not more than $500,000 and imprisonment not less than one year, no more than 15 years or both.
>
> Mr. Byrd, do you under stand the nature of those charges and the nature of the possible penalties?
>
> THE DEFENDANT: Yes

Byrd claims this statement by the trial court confused him and did not meet the requirements of § 971.08, STATS.

Although we concur that the foregoing statement by the trial court was not an entirely accurate or precise statement of the penalties, we conclude that the plea hearing as a whole, including the subsequent exchange between Byrd and the trial court, clarified that Byrd was subject to a mandatory minimum sentence:

> THE COURT: Do you understand I am not bound by any plea negotiations made between yourself, your attorney and the State of Wisconsin, which means if I thought it appropriate here, I could sentence you to pay a fine of not more than one million, five hundred thousand *and imprisonment anywhere from three years to 45 years?*
>
> THE DEFENDANT: *Yes.*

(emphasis added.) The trial court specifically noted this exchange at the postconviction motion hearing and relied upon it in reaching the conclusion that Byrd understood the range of punishment. We agree with the trial court and conclude that this exchange clarifies that Byrd entered his plea with knowledge that he faced a mandatory minimum period of incarceration.

Because we conclude that Byrd has not made a prima facie showing that the trial court failed to meet the procedures mandated by § 971.08, STATS., it is not necessary that we consider other evidence in the record that would illustrate he understood the applicability of the one-year mandatory minimum sentence to the charges.

By the Court.—Judgment and order affirmed.

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