COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0881

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RODOBALDO C. POZO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

EICH, C.J.[1] Rodobaldo Pozo appeals from an order denying his motion to withdraw his guilty plea to a charge of possessing marijuana within 1,000 feet of a school. He was convicted on his plea, sentence was withheld and he was placed on probation, which was revoked. He later filed a postconviction

[1] This case is decided by a single judge pursuant to § 752.31(2)(f), STATS.

motion under § 974.06, STATS., claiming that he should be allowed to withdraw his plea.

Pozo appealed his possession conviction, along with a second conviction for bail jumping. The bail-jumping charge arose from his violation of the conditions of his bond in the possession case—specifically the condition that he commit no further crimes while on bail. The bail-jumping charge was filed after his subsequent arrest on additional drug charges. Presumably, it was this charge that also formed the basis for revocation of his probation.

In his direct appeal, ***State v. Pozo,*** 198 Wis.2d 705, 544 N.W.2d 228 (Ct. App. 1995), he argued for reversal of his marijuana-possession conviction on grounds, among other things, that the trial court erred when it declined to suppress a statement he made to a police officer at the scene of his arrest. He claimed that the statement was obtained in violation of his ***Miranda*** rights. His challenge to the bail-jumping conviction was based on his assertion that his marijuana arrest was invalid due to lack of probable cause to seize evidence from his car. We rejected his search-and-seizure argument.

With respect to Pozo's argument that the challenged statement should have been suppressed, the police discovered a large quantity of cash in his pockets and one of the officers asked him whether he had a job after he had been arrested on the possession charge. He reasoned that his response that he was suffering from a back injury should be suppressed because he was not advised of his ***Miranda*** rights at the time of his statement. ***Pozo***, at 709, 544 N.W.2d at 230. Initially, Pozo was charged with two sales-related offenses—maintaining a dwelling and using a vehicle for the manufacture and delivery of controlled substances. ***Id***. at 709 n.1, 544 N.W.2d at 230. Because, however, the two sales-

related charges had been dismissed by the time Pozo entered his plea—leaving only the charge of "simple possession"—we concluded that his statement, which went only to sales-related drug offenses, could have played "no role" in his possession conviction. ***Id***. at 714-15, 544 N.W.2d at 232-33. As a result, we affirmed his marijuana-possession conviction without reaching the merits of his argument that the statement was obtained in violation of his ***Miranda*** rights.

A postconviction motion under § 974.06, STATS., may be used only to raise issues of "constitutional or jurisdictional dimension." ***State v. Carter***, 131 Wis.2d 69, 77, 389 N.W.2d 1, 4 (1986). Pozo begins by arguing that he "meets the criteria for relief" of the statute because a motion to withdraw a plea on grounds that it was "unintelligently, involuntarily, or unknowingly entered" presents a constitutional issue. ***State v. Carter***, 131 Wis.2d 69, 77, 389 N.W.2d 1, 3 (1986). He argues that because he entered his plea believing that he would retain the opportunity to appeal the trial court's denial of his motion to suppress his statement, we should conclude that the plea was not voluntarily or knowingly entered.

After sentencing, a defendant seeking to withdraw a plea of guilty "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct 'a manifest injustice.'" ***State v. Krieger***, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991) (citation omitted). And, as Pozo argues, a manifest injustice occurs when a defendant involuntarily makes a plea or without knowledge of its consequences. ***State v. Reppin***, 35 Wis.2d 377, 385-86, 151 N.W.2d 9, 13-14 (1967). A plea will be considered involuntary when it is "'attributable to force, fraud, fear, ignorance, inadvertence or mistake.'" ***State v. Booth***, 142 Wis.2d 232, 238, 418 N.W.2d 20, 22 (Ct. App. 1987) (quoted source omitted).

Both Pozo and his trial counsel testified at the postconviction hearing that he would not have entered a plea to the possession charge had he known that his plea would preclude appealing the statement-suppression issue; and the trial court specifically stated that it "d[id not] dispute … [Pozo's] statement." The trial court, however, citing our decision in Pozo's first appeal, reasoned that it was "basically a moot question" because the sales-related evidence had nothing to do with the simple possession charge of which he had been convicted.

Pozo grounds much of his appellate argument on ***State v. Reikkoff***, 112 Wis.2d 119, 128, 332 N.W.2d 744, 749 (1983), where the supreme court said that where a defendant enters a plea with the stipulation of his counsel and the prosecutor that an evidentiary ruling could still be appealed, and it turns out that it cannot, "it is clear that [the defendant] was under a misapprehension with respect to the effect of his plea," and that "[u]nder these circumstances, as a matter of law his plea was neither knowing nor voluntary."

In this case, however—as we said in our decision on his direct appeal—the statement Pozo seeks to suppress is immaterial to the charge of which he was convicted: "[T]he trial court's denial of Pozo's motion to suppress the statement could play no role in determining the result of a trial on the charge of simple possession of marijuana …." ***Pozo***, 198 Wis.2d at 715, 544 N.W.2d at 232.

> Evidence that Pozo, though unemployed, had a significant amount of cash on his person may well have been relevant to [the two originally charged offenses related to the sale of controlled substances], for it would imply that he was getting money somewhere, and if not from gainful employment then perhaps from selling drugs. As the State points out, however, "[T]he relevance of that evidence evaporated from the case along with the charges to which it was relevant." When the sales-related charges were dismissed, leaving only the charge of simple possession, it no longer mattered whether there was evidence suggesting that Pozo was selling drugs. All that

> was needed for conviction on the charge Pozo faced was evidence that he knowingly possessed some minimum quantity of marijuana. Evidence that he had money but no job would have no tendency to establish those facts.

Id. at 714, 544 N.W.2d at 232 (citation omitted).

In other words, we have already ruled in this case that the issue Pozo now claims he was unconstitutionally precluded from having decided by an appellate court is immaterial to the conviction from which he has taken his appeal. That is, in essence, the basis upon which the trial court denied his motion to withdraw his plea, and that is the basis upon which we now affirm that ruling.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.