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

September 17, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-0471-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**v.**

**JAMES W. BRESEMAN,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Reversed and cause remanded.*

ROGGENSACK, J.[1] The State of Wisconsin appeals from an order of the circuit court allowing James Breseman to withdraw his no contest plea because he was not aware of the effect of a domestic disorderly conduct conviction on the right to possess a firearm, due to 18 U.S.C. §§ 921 and 922. The

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

court concluded that although 18 U.S.C. § 922 is not a direct consequence of a domestic disorderly conduct conviction, it would be a manifest injustice to deny Breseman's request to withdraw his plea because he was unaware of the effect of his plea under the federal statute. We conclude that Breseman's plea was knowingly and voluntarily entered, and no manifest injustice occurred entitling Breseman to withdraw his plea. Therefore, we reverse and remand for reinstatement of Breseman's conviction and sentence.

## BACKGROUND

Breseman was charged with domestic disorderly conduct in violation of §§ 947.01 and 968.075(1)(a), STATS., based on an incident during which he allegedly placed his child's mother in a headlock, threatened to kill her, and struck her in the head. On April 23, 1997, a pretrial conference was held at which Breseman was represented by an attorney. However, shortly before the plea and disposition, Breseman's attorney withdrew. On November 26, 1997, the court conducted two further hearings. First, the court advised Breseman of his right to counsel and the consequences of proceeding without a lawyer. Second, Breseman entered a no contest plea, was convicted and sentenced.

On December 17, 1997, Breseman's attorney reappeared in the case and filed a motion to withdraw Breseman's no contest plea, alleging that Breseman did not enter his plea with knowledge of the effect that 18 U.S.C. §§ 921 and 922 would have on his right to possess a firearm. On February 12, 1998, the circuit court granted Breseman's motion to withdraw his no contest plea. This appeal followed.

## DISCUSSION

**Standard of Review.**

Permitting withdrawal of a guilty or no contest plea is a discretionary decision for circuit court. ***State ex rel. Warren v. Schwarz***, 219 Wis.2d 616, ___, 579 N.W.2d 698, 708 (1998). Therefore, its decision to permit Breseman to withdraw his plea 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.**

In a motion to withdraw a plea after sentencing, the defendant has the burden to show by clear and convincing evidence that 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 which, if proved by the defendant, justify withdrawal of the plea to avoid manifest injustice: (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.

Every misunderstanding a defendant may have about the effects of the entry of a plea does not rise to the level of manifest injustice; however, only those which do rise to the level of a manifest injustice are sufficient to permit the circuit court to vacate a defendant's plea. Circumstances which may cause manifest injustice are not necessarily limited to the four examples cited in ***Birts***. ***Id.*** at 393, 228 N.W.2d at 354. However, here it appears that Breseman bases his motion to withdraw his plea on the third example.

A plea is not knowingly, voluntarily and intelligently entered and a manifest injustice results when a defendant does not know what sentence could actually be imposed. ***Warren***, 219 Wis.2d at ___, 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 ___, 579 N.W.2d at 708. A defendant who was not apprised of the direct consequences of his plea did 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 the 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).[2]

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 Breseman's no contest plea. 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 ___, 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, 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.

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 of a future

[2] 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.

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 neither a definite, immediate, nor an automatic consequence of his plea but only a collateral consequence, of which the circuit court was not bound to inform him. ***Id.***

Although 18 U.S.C. § 922 applied to Breseman as soon as he was convicted of domestic disorderly conduct, the federal statute does not have a definite, immediate or automatic effect on his range of punishment for domestic disorderly conduct. Punishment for that crime is set by the State of Wisconsin. Additionally, Breseman may never be subjected to the effects of the federal statute because he can choose not to possess a firearm in or affecting commerce.

The circuit court did not identify any special circumstances which it believed warranted its decision, except to note that Breseman was not represented by counsel at the time of his plea. However, the record reflects that the circuit court explained the risks of proceeding in a criminal matter unrepresented. It conducted a full waiver colloquy to satisfy itself that Breseman's decision to waive his right to counsel was knowingly and intelligently made. ***State v. Klessig***, 211 Wis.2d 194, 206, 564 N.W.2d 716, 721 (1997). We do not apply a different level of review to a motion to withdraw a plea when the movant has been fully informed of his right to counsel and elects to proceed without representation.

Therefore, in order to set aside his plea, Breseman must prove his right to do so to correct a manifest injustice.

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 Breseman's plea and subsequent conviction for domestic disorderly conduct. Indeed, to conclude otherwise could require circuit courts to know of and inform defendants of every possible consequence of pleas they accept, in every possible jurisdiction. That would be both unreasonable and impractical. ***Warren***, 219 Wis.2d at ___, 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 a manifest injustice under the standards set in ***Birts***. Therefore, the circuit court did not apply the correct legal standard to the facts of this case, and we conclude that it erroneously exercised its discretion in granting Breseman's motion to withdraw his plea. We reverse that decision and remand for reinstatement of his conviction and sentence.

## CONCLUSION

The effect of 18 U.S.C. § 922 is a collateral consequence of Breseman's no contest plea to domestic disorderly conduct because the federal statute does not have definite, immediate and automatic effects on Breseman's range of punishment for domestic disorderly conduct. Therefore, vacation of his plea was not necessary to correct a manifest injustice. We conclude the circuit court erroneously exercised its discretion and we reverse its decision permitting Breseman to withdraw his plea.

*By the Court.*—Order reversed and cause remanded.

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