COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1167-CR **Cir. Ct. No. 2014CF4082**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY GERMAINE GRIFFIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Anthony Germaine Griffis appeals from a judgment of conviction, entered upon his guilty pleas, on one count of robbery with the use of force and one count of taking and driving a vehicle without the owner's consent, both as a party to a crime. Griffis also appeals from the circuit court order denying his motion to withdraw his pleas. Griffis argues the circuit court introduced a "condition subsequent" to the terms of his plea bargain, and the condition went unfulfilled. We reject Griffis's argument and affirm the judgment and order.

BACKGROUND

¶2 On September 9 and 10, 2014, then-seventeen-year-old Griffis and others engaged in a series of carjackings and armed robberies in Milwaukee County. Griffis was initially charged with one count of robbery with the use of force and one count of taking and driving a vehicle without the owner's consent, both as a party to a crime. The State later amended the information to add two counts of conspiracy to commit armed robbery and two counts of conspiracy to take and drive a vehicle without the owner's consent, all as a party to a crime. The State also believed it had enough evidence to charge sixteen additional counts.

¶3 Griffis eventually reached a plea deal with the State. In exchange for his guilty pleas to the two original counts, the State would dismiss and read in the four conspiracy counts and recommend ten years of initial confinement plus eight years of extended supervision. The State also agreed not to charge any of the sixteen additional potential counts, though they would be read in at sentencing.

¶4 During the plea hearing, the circuit court inquired whether the additional sixteen counts were reflected in the original complaint; defense counsel was uncertain. The circuit court advised the substitute assistant district attorney

that the State should provide the details of the additional counts for sentencing, then told Griffis it would not "go over the details of all of those crimes, yet, because I want to see those from the District Attorney's Office before I go over the details, okay? So I will do that next time, do you understand that?" Later, the circuit court told Griffis, "[W]hen we go to sentencing I will go over all of the other charges that you are facing so that you would understand what they would have to prove if you were charged and didn't take this deal[.]"

¶5 At sentencing, the State called Detective Eric Draeger from the Milwaukee Police Department. Draeger had been part of the Intelligence Fusion Center, focusing on juvenile gangs and juvenile gang crimes. He prepared a "risk assessment" report on Griffis, which reviewed Griffis's criminal history and "the basis for which we believe he's a continuing danger to the City of Milwaukee."[1] The circuit court stopped Draeger from reading the report aloud, noting it could read the report. Ultimately, the circuit court sentenced Griffis to eight years' initial confinement and six years' extended supervision—a total of four years less than the State had recommended.

¶6 Griffis subsequently moved to withdraw his plea. He claimed that at the time he entered his guilty pleas and the circuit court accepted them, the pleas were based "upon the condition subsequent that the state provide the court with sufficient information concerning these read-in counts to permit the court to go over each of the offenses with Griffis." The circuit court denied the motion,

[1] The circuit court noted that "risk assessment" was a term of art and, given that Draeger had not made any mathematical prediction of Griffis's risk, it commented that the report was more "a statement of everything the Intelligence Fusion Center of Milwaukee Police Department has on Mr. Griffis[.]" The State acquiesced in that description.

stating that Griffis's pleas were never conditioned on the State's ability to provide a factual basis for the uncharged offenses. Griffis appeals.

DISCUSSION

¶7 When a defendant seeks to withdraw a guilty plea, one of two standards applies depending on whether the defendant seeks plea withdrawal before or after sentencing. *See* ***State v. Thomas***, 2000 WI 13, ¶15, 232 Wis. 2d 174, 605 N.W.2d 836. In his postconviction motion and again on appeal, Griffis asserts the pre-sentencing standard should apply because he could not have known whether the "condition subsequent" would be fulfilled until after sentencing was complete. This argument presumes that the supposed condition subsequent was a term of the plea agreement, so we address that question first.

¶8 "Plea agreements are 'an essential component of the administration of justice.'" ***State v. Deilke***, 2004 WI 104, ¶11, 274 Wis. 2d 595, 682 N.W.2d 945 (quoting ***Santobello v. New York***, 404 U.S. 257, 260 (1971)). "'Once a plea agreement has been reached and a plea made, a defendant's due process rights require the bargain be fulfilled.'" *See* ***State v. Bokenyi***, 2014 WI 61, ¶39, 355 Wis. 2d 28, 848 N.W.2d 759 (citation omitted). But only a "material and substantial breach" warrants a remedy. *See* ***Deilke***, 274 Wis. 2d 595, ¶13. "A material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the non-breaching party." ***Id.***, ¶14.

¶9 We reject Griffis's claim that the circuit court's desire to review the facts underlying the sixteen never-charged read-ins was a condition subsequent

incorporated as a term of the plea agreement.[2] The parties to a plea agreement are the State and the defendant. *See, e.g.*, ***State v. McQuay***, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990). "[C]ircuit courts may not participate in plea bargaining." ***State v. Frey***, 2012 WI 99, ¶49, 343 Wis. 2d 358, 817 N.W.2d 436.

¶10 The circuit court determined, in denying the postconviction motion, that Griffis's pleas were not conditioned on the State's ability to provide a factual basis for the additional sixteen counts but, rather, "on the agreement he made with the State for only two felony convictions and significantly reduced prison exposure." The conclusion is supported by the record: the condition subsequent was not memorialized in the plea questionnaire, nor was it mentioned when the State recited the terms of the plea agreement at the start of the plea hearing. These "omissions" are consistent with the premise that Griffis, prior to the hearing, negotiated an agreement with the State only. Indeed, had Griffis not reached an agreement with the State prior to the hearing date, the parties would have been convening for a trial, not a plea hearing.

¶11 Griffis takes issue with the circuit court's conclusion that his plea was not premised on the State's ability to provide a factual basis for the additional read-ins. He contends that the circuit court's ruling implicitly concluded "there was a real possibility that the State could convict Griffis of the additional sixteen counts." He asserts it was "not rational for the circuit judge to simply assume, without being given any factual basis, that the State could prove the additional sixteen counts," and "[i]f the State could not prove the additional counts, then

[2] Griffis does not explain, if in fact the circuit court was adding a term to the plea agreement, what the "benefit of the bargain" was for the State.

Griffis pleaded guilty, and gave up his right to trial, for nothing. He folded based on the State's bluff, and the State was never made to show its cards."

¶12 The original criminal complaint detailed the carjacking spree, the circuit court reviewed an amended but never filed information with the additional counts listed, and the circuit court reviewed Detective Draeger's intelligence report on Griffis.[3] It is therefore incorrect to say the circuit court was not "given any factual basis" for the sixteen read-ins.[4]

¶13 Regardless, the circuit court did not necessarily need the State to provide a factual basis for the uncharged read-ins, nor did it need Griffis to agree to them: "a sentencing court may consider uncharged and unproven offenses regardless of whether or not the defendant consents to having the charge[s] read in." ***State v. Sulla***, 2016 WI 46, ¶32, 369 Wis. 2d 225, 880 N.W.2d 659 (internal quotation marks and citations omitted).

¶14 Further, Griffis did not give up his right to trial "for nothing." The State notes that by the terms of the plea, which dismissed the four conspiracy counts, Griffis reduced his potential prison exposure from 113 years to twenty-one years. Additionally, we note that the lowest level of felony with which Griffis was actually charged was a Class H felony. *See* WIS. STAT. § 943.23(2) (2013-14). If

[3] The report itself, while accepted as an exhibit, was not transmitted as part of the appellate record, so it is not available for our review. It is the appellant's obligation to ensure the record on appeal is complete. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). When portions of the record are omitted, we presume the missing portions support the circuit court's decision. *See* ***id.***

[4] It also appears that Griffis should have been on notice about the potential additional charges—not only did the complaint detail many more crimes than Griffis was originally charged with, but the State at an earlier hearing had commented, "This is a robbery crime spree. He was there for the whole thing."

all sixteen of the uncharged read-ins were that offense—though undoubtedly some would have been a higher class of felony—then Griffis's deal with the State spared him from facing, at a minimum, an additional possible ninety-six years' imprisonment. *See* WIS. STAT. § 939.50(3)(h) (2013-14) (maximum penalty for Class H felony is six years' imprisonment). If Griffis believed the State was bluffing with respect to the additional counts, he had the option of calling the bluff.

¶15 Having rejected the notion that the circuit court interjected any sort of condition subsequent as a term of Griffis's plea, we also reject his argument that the pre-sentence plea withdrawal standard should apply. Instead, we apply the standard for plea withdrawal after sentencing.

¶16 "A defendant who seeks to withdraw a plea after sentencing has the burden of showing by 'clear and convincing evidence' that a 'manifest injustice' would result if withdrawal were not permitted." ***State v. Dawson***, 2004 WI App 173, ¶6, 276 Wis. 2d 418, 688 N.W.2d 12 (citation omitted). A plea that is not entered knowingly, intelligently, and voluntarily constitutes a manifest injustice. *See* ***Sulla***, 369 Wis. 2d 225, ¶24. A "material and substantial breach" of the plea agreement would also constitute a manifest injustice. *See* ***State v. Bangert***, 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986). The decision whether to grant a plea withdrawal motion is generally committed to the circuit court's discretion. *See* ***State v. Lopez***, 2014 WI 11, ¶60, 353 Wis. 2d 1, 843 N.W.2d 390.

¶17 Aside from his erroneous belief that the "condition subsequent" was an unfulfilled plea term, Griffis suggests no breach of the plea by the State. Aside from his erroneous belief that the circuit court was required to review the factual

basis for the read-ins with him, Griffis suggests no failure of the circuit court to comply with its mandatory plea colloquy duties for ensuring a valid plea.[5]

¶18 Finally, we observe the circuit court imposed less time than the State recommended under the plea agreement. Accordingly, the effect of the sixteen read-in offenses on the sentence appears inconsequential or non-existent. We therefore conclude Griffis has failed to establish a manifest injustice, and the circuit court properly exercised its discretion in denying his motion for plea withdrawal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

[5] While our supreme court has emphasized that circuit courts *should* provide certain warnings regarding read-in offenses, *see* ***State v. Straszkowski***, 2008 WI 65, ¶¶93, 97, 310 Wis. 2d 259, 750 N.W.2d 835, those warnings have not been made a mandatory part of a plea colloquy, *see* ***State v. Sulla***, 2016 WI 46, ¶35, 369 Wis. 2d 225, 880 N.W.2d 659 (stating counsel and courts "should" provide advisements).