COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP276-CR **Cir. Ct. No. 2002CF1942**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTWAN D. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Antwan D. Robinson appeals from the judgment convicting him of three counts of armed robbery with the threat of force, party to

the crime, contrary to WIS. STAT. §§ 943.32(1)(b) & (2) and 939.05 (2003-04)[1], and one count of false imprisonment with use of a dangerous weapon, party to the crime, contrary to WIS. STAT. §§ 940.30, 939.05 and 939.63. Robinson also appeals from the order denying his postconviction motion to withdraw his no contest plea. He contends that the trial court failed during the plea colloquy to personally advise him that it was not bound by the plea agreement, and that, as a result, his plea was not knowingly, intelligently and voluntarily entered. Because the trial court did advise Robinson that it was not bound by the plea agreement, Robinson has failed to show that he did not enter his plea knowingly, intelligently and voluntarily. Therefore, we affirm.

I. BACKGROUND.

¶2 According to the criminal complaint, on March 28, 2002, Robinson and his co-defendant Michael Malone entered the residence located at 1631 South 63rd Street. The complaint states that Robinson and Malone threatened the occupants at gunpoint and took property from the occupants without their consent. Robinson was charged with six counts of armed robbery with the threat of force, party to the crime, counts one, two, three, four, five and seven, and two counts of false imprisonment with use of a dangerous weapon, party to the crime, counts six and eight, all eight charges stemming from the March 28, 2002, incident.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Following plea negotiations, Robinson reached a plea agreement with the State, according to which Robinson would plead no contest[2] to three counts of armed robbery and one count of false imprisonment, counts one, two, six and seven, in exchange for the State moving to dismiss and read-in at sentencing the remaining armed robbery and false imprisonment counts, counts three, four, five and eight, and recommending twelve to seventeen years of initial confinement and fifteen to twenty years of extended supervision.

¶4 Robinson signed a Plea Questionnaire and Waiver of Rights form, which included the following language: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: Ct. 1 & 2 & 7 60 years [in the Wisconsin State Prison] Armed Robbery (PTAC) Ct. 6 False Imprisonment, 9 years and 10,000 fine." The questionnaire also reflected the terms of the plea agreement.

¶5 At the plea hearing on June 20, 2002, the court conducted a plea colloquy, during which Robinson stated that he was pleading no contest to counts one, two, six and seven, that he had reviewed the Plea Questionnaire and Waiver of Rights form with his attorney, and that he understood it. With respect to sentencing, the record contains the following colloquy:

> THE COURT: Knowing that and knowing – strike that. Do you understand that even though you're pleading today, when it comes time for sentencing I can give you the [] maximum sentence?

[2] At the plea hearing, Robinson's attorney explained that his client wished to plead no contest rather than guilty because he had been under the influence of drugs and alcohol at the time and does not recall the events, but does not dispute the fact that he committed the offenses. The judge allowed the no contest pleas.

> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: One hundred eighty-nine years in prison and a ten thousand dollar fine?
>
> THE DEFENDANT: Yes, ma'am.

The trial court accepted the no contest plea, and dismissed the remaining four charges.

¶6 Robinson was sentenced on August 1, 2002. The court declined to follow the State's recommendation, and instead, sentenced Robinson as follows: eleven years of initial confinement and four years of extended supervision on count one; six years of initial confinement and two years of extended supervision on count two; four years of initial confinement and three years of extended supervision on count six; and ten years of initial confinement and five years of extended supervision on count seven. The sentences were to run consecutive to one another, for a total of thirty-one years of initial confinement and fourteen years of extended supervision. Judgment of conviction was entered accordingly.

¶7 Robinson filed a postconviction motion seeking to withdraw his plea, arguing that the court had failed to inform him that the court was not bound by the plea agreement. An evidentiary hearing was held, at which the attorney who had represented Robinson during the plea negotiations testified that he went over the plea with Robinson and reviewed the fact that Robinson was facing a sentence of one hundred and eighty-nine years. He also recalled preparing the plea questionnaire, and although he was unable to recall exactly where, he recalled reviewing it with Robinson on June 18, 2002, at least once by reading it word for word, and that Robinson "appeared to understand it, and … did not give [him] the impression that he did not understand what [they] talked about." Robinson's former attorney also stated that Robinson is extremely intelligent, that he never

had problems communicating with Robinson, and that he had known Robinson for some time and knew that if Robinson was unclear about something, he asked questions. With respect to the section that read "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty," the attorney indicated that he read it to Robinson at least once and that Robinson did not ask any questions. He also stated that Robinson might have relied on the recommendation of twelve to seventeen years, but emphasized that he did not at any time tell Robinson that the recommendation by the State was in fact the sentence he would get.

¶8 Robinson recalled reviewing the questionnaire with his attorney on June 18, 2002, while he was in the holding pen and his attorney was on the other side of a screened door, and he recalled signing the questionnaire after his attorney slid it under the door. Robinson admitted having no questions regarding the section that explained that the judge may sentence him to the maximum penalty, but stated that he misunderstood it and believed the benefit of the plea agreement was that it dismissed four charges and made seventeen years the most to which the judge could sentence him. He explained that he believed the judge's reference to the maximum sentence meant that he could be sentenced to it only if he did not take the plea agreement and would not have entered a plea had he known that the judge could ignore the State's recommendation. When asked about previous pleas, Robinson admitted entering a plea of either guilty or no contest and filling out a plea questionnaire in 1999 on a marijuana charge, but could not recall being told that the judge was not confined to the State's recommendation. Robinson similarly admitted that two days prior to pleading no contest in this case, he had pled guilty and filled out a plea questionnaire on a weapons charge, but again did not remember the court stating that it could sentence him to whatever it felt was

appropriate. In both cases Robinson received sentences that were within or less than the State's recommendations.

¶9 The trial court agreed that an error had been committed in that Robinson had not been adequately informed that the court was not bound by the plea agreement. The trial court concluded, however, based on the record, that Robinson's claims that he did not know, at the time he entered his plea, that the trial court was not bound by the plea agreement, were not credible. The trial court specifically referenced Robinson's intellectual capacity, his defense attorney's statements, the fact that he had pled guilty or no contest on two previous occasions,[3] and the fact that one of his previous sentences had deviated from the recommended one. Because the trial court found that the plea was entered knowingly, it determined that the error was harmless, and therefore denied Robinson's plea withdrawal motion. Robinson now appeals.

II. ANALYSIS.

¶10 Robinson argues that his plea was not knowingly, voluntarily and intelligently entered because the trial court failed to advise him that the court was not bound by the plea agreement.

¶11 When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea

[3] The trial court took judicial notice of documents related to Robinson's previous pleas and read portions of the 1999 plea colloquy in which the court had asked Robinson whether he understood that the court is not a party to the plea negotiation, is not required to follow the State's recommendation and may sentence him to the maximum sentence, to which Robinson had responded that he did.

will be considered manifestly unjust if it was not entered knowingly, intelligently, and voluntarily. ***State v. Bangert***, 131 Wis. 2d 246, 274, 283, 389 N.W.2d 12 (1986). ***Bangert*** sets forth a two-part test to determine whether a defendant's plea was knowingly, intelligently and voluntarily entered. ***Id.*** at 274.

¶12 Under the first step, a defendant must make a prima facie showing that his or her plea was accepted without complying with WIS. STAT. § 971.08[4] or another court-mandated duty, and that he or she did not know or understand the information the court failed to provide. ***Bangert***, 131 Wis. 2d at 274. The court-mandated duty relevant for purposes of this case was recently set out in ***State v. Hampton***, 2004 WI 107, ¶¶20, 38, 274 Wis. 2d 379, 683 N.W.2d 14. In ***Hampton***, our supreme court held that a trial court must personally advise a defendant that the court is not bound by the terms of a plea agreement, including a

[4] WISCONSIN STAT. § 971.08 provides, in relevant part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address 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.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."
>
> (d) Inquire of the district attorney whether he or she has complied with s. 971.095(2).

prosecutor's recommendation, and the court must ascertain that the defendant understands this information:

> [W]hen the court becomes aware that the guilty or no contest plea is the result of a plea agreement, it must inquire as to the terms of the agreement. If the court discovers that "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, *the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court.*"

Id., ¶32 (quoting ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 24, 203 N.W.2d 638 (1973) (quoting American Bar Association, STANDARDS RELATING TO PLEAS OF GUILTY, Approved Draft, § 1.5 at 29 n. 6 (1968)) (emphasis in ***Hampton***). Under this first step, we accept the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. However, whether a defendant has established a prima facie case presents a question of law that we review independently. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992).

¶13 Under the second step, if a defendant makes the initial showing, the burden shifts to the State to show, by clear and convincing evidence, that the plea nonetheless was knowingly and voluntarily entered, even though the plea colloquy was inadequate. ***Bangert***, 131 Wis. 2d at 274-75. The State may use the entire record to demonstrate that the defendant's plea was in fact knowing and voluntary and may examine the defendant or his or her counsel to show the defendant's understanding and knowledge. ***Id.*** We defer to the circuit court's determination on this prong, reversing if the circuit court erroneously exercised its discretion. ***State v. Mohr***, 201 Wis. 2d 693, 701, 549 N.W.2d 497 (Ct. App. 1996).

¶14 Robinson claims his plea was not knowingly, voluntarily and intelligently made because the trial court never informed him that it was not bound by the terms of the plea agreement, and that he could be sentenced to more than the seventeen years mentioned in the plea agreement. Apparently relying on the trial court's initial conclusion that he was not adequately informed that the court was not bound by the plea agreement, *see* ***Hampton***, 274 Wis. 2d 379, ¶32, Robinson claims that the trial court incorrectly concluded that his plea was nonetheless made knowingly, *see* ***Bangert***, 131 Wis. 2d at 274-75. Robinson specifically asserts that the trial court's reliance on his intellectual capacity; the fact that he had pled guilty or no contest to criminal offenses on two prior occasions, including two days earlier; the fact that in one of the previous cases the judge had deviated from the sentencing recommendation; and his defense attorney's impressions, was incorrect because these facts do not show that he entered his plea knowingly. We disagree.

¶15 At the plea hearing, Robinson informed the court that he was pleading no contest to three counts of armed robbery and one count of false imprisonment. In so pleading, Robinson also stated that he understood the maximum penalties he was facing:

> THE COURT: How do you plead to count one, armed robbery …?
>
> THE DEFENDANT: No contest.
>
> THE COURT: How do you plead to count two, armed robbery …?
>
> THE DEFENDANT: No contest.
>
> THE COURT: How do you plead to count seven, armed robbery …?
>
> THE DEFENDANT: No contest.

> THE COURT: You understand that for each of those crimes you face a maximum sentence of 60 years in prison?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you understand that that means that together with Michael Malone and perhaps others on that same date … you intentionally confined [S.M.] without her consent and with knowledge that you had no lawful authority to do that?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you understand that the maximum sentence that you face upon conviction for count six is 9 years imprisonment and a ten thousand dollar fine?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: How do you plead to count six?
>
> THE DEFENDANT: No contest.

¶16 Robinson also told the court that he had reviewed the Plea Questionnaire and Waiver of Rights form with his attorney and that he understood it. With respect to sentencing, the form, as previously mentioned, included the language: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: Ct. 1 & 2 & 7 60 years [in the Wisconsin State Prison] Armed Robbery (PTAC) Ct. 6 False Imprisonment, 9 years and 10,000 fine." The following colloquy followed:

> THE COURT: Knowing that and knowing – strike that. Do you understand that even though you're pleading today, when it comes time for sentencing I can give you the [sic] maximum sentence?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: One hundred eighty-nine years in prison and a ten thousand dollar fine?
>
> THE DEFENDANT: Yes, ma'am.

The court then also asked Robinson separately, with respect to each of the four charges, whether, knowing that he may be sentenced to the maximum, he still wished to plead no contest. Robinson responded in each instance that he did. The court also asked Robinson whether he was confused about anything in terms of pleading no contest to the four charges, and Robinson responded that he was not.

¶17 In ruling on Robinson's plea withdrawal motion, the trial court did not find the plea colloquy to be sufficient under ***Hampton***, and believed that Robinson had not been adequately informed that the court was not bound by the plea agreement. The trial court instead found that Robinson had established a prima facie case, and shifted the burden to the State to show that the plea was nonetheless knowingly and voluntarily made. *See* ***Bangert***, 131 Wis. 2d at 274-75. The trial court, as mentioned, ultimately concluded that the State had satisfied that burden and in particular noted Robinson's attorney's indication that he reviewed the questionnaire with Robinson and felt confident that his client understood its contents, as well as Robinson's intelligence and previous experiences in pleading guilty and no contest.[5]

[5] The trial court's analysis is similar to the one we recently set forth in ***State v. Plank***, 2005 WI App 109, 282 Wis. 2d 522, 699 N.W.2d 235, where we applied the ***Hampton/Bangert*** plea withdrawal procedure. Plank had pled no contest pursuant to a plea agreement, however, during the plea colloquy, the trial court failed to advise him that it was not bound by the State's recommendation, so when the court declined to follow it, Plank sought to withdraw his no contest plea on grounds that it was not knowingly and voluntarily entered. *See* ***id.*** ¶¶3-5. On appeal, the State conceded that Plank had made a prima facie case under ***Hampton***. ***Id.***, ¶8. We noted that Plank had signed a Plea Questionnaire and Waiver of Rights form, which recited Plank's understanding that the judge is not bound by any plea agreement. ***Id.***, ¶¶8, 9. We also noted that the trial court had confirmed Plank's understanding of the maximum penalties at the plea hearing, and that Plank's trial counsel had testified that he had advised his client that the trial court was not bound by the plea agreement and that Plank's testimony disputing this was "just not believable." ***Id.***, ¶¶9-11.

¶18 We disagree with the trial court's conclusion that the plea colloquy was inadequate and are convinced that it sufficiently informed Robinson that the court was not bound by the plea agreement.[6] The trial court asked Robinson, "Do you understand that even though you're pleading today, when it comes time for sentencing I can give you the [] maximum sentence?," and Robinson responded that he did. This sentence, in our view, clearly qualifies as the court "advis[ing] the defendant personally that the recommendations of the prosecuting attorney are not binding on the court." *See* ***Hampton***, 274 Wis. 2d 379, ¶32. While we understand the trial court's concern that perhaps it could have been even more explicit and used language such as, "I'm not bound by the plea negotiation or I can throw out the plea negotiation or I can sentence you to whatever sentence I think is fair and just no matter what the attorneys argue or recommend to me," we are satisfied that the trial court's phrasing at the very least was adequate under ***Hampton***. Particularly given that ***Hampton*** explains that no "magic words or an inflexible script" are needed to satisfy the requirement, *see* ***id.***, ¶43, we are

[6] Interestingly, in spite of its initial determination that the plea colloquy was inadequate under ***Hampton***, the following statements by the trial court appear to indicate that it in essence believed the colloquy was adequate:

> I think that when a judge says that even though you're pleading, when it comes time for sentencing, I can give you the maximum sentence and knowing that you still want to plead no contest, I think that that is understandable to the average lay person who has achieved a level of a high school education or its equivalent.
>
> I don't think the defendant was under the misapprehension that he was assured a sentence within the range of 27 to 37 years or 12 to 17 years of initial confinement. I think that that – that what I said is as understandable, in some ways some could argue even more so than saying I'm not a party to the negotiations or that I'm not bound by the negotiation.

While it is unclear why the trial court appears to have changed its mind, it is clear that these comments are consistent with our conclusion.

persuaded that the trial court adequately advised Robinson that it was not bound by the plea agreement. Robinson has thus failed to make a prima facie showing that his no contest plea was accepted without complying with ***Hampton***, and has consequently failed to convince us that his plea was not knowingly, intelligently and voluntarily entered. *See* ***Bangert***, 131 Wis. 2d at 274. Because we conclude that the colloquy with Robinson at the time he entered his no contest plea was adequate under ***Hampton***, our inquiry ends here. *See* ***Bangert***, 131 Wis. 2d at 274.

¶19 Because Robinson has failed to show that the trial court did not inform him that it was not bound by the terms of the plea agreement, he has failed to show that his plea was not knowingly, intelligently and voluntarily entered. *See* ***id.*** Accordingly, the judgment of conviction is affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.