COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP966-CR
2007AP967-CR

Cir. Ct. Nos. 2005CF735
2006CF252

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON K. JONES,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Judgment reversed; judgment affirmed; order affirmed in part, reversed in part and cause remanded with directions*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Aaron Jones appeals from judgments convicting him of attempted armed robbery and misdemeanor disorderly conduct, and from an order denying his postconviction motion to withdraw his plea and for resentencing.[1] He argues that his plea was not knowingly entered and lacked a factual basis because of confusion regarding the date and place of the crime and that he is entitled to resentencing because dismissed counts were used as "read-ins" at sentencing. We affirm that portion of the order denying the motion for plea withdrawal and reverse the judgment of conviction and that part of the order denying resentencing. We remand for resentencing before a different judge.

¶2 Jones was charged with three counts of being a party to the crime of armed robbery. As reflected in the affidavit in support of the complaint, the police responded on November 14, 2004, to the Lang Oil gas station after an armed man robbed the clerk of $315. On November 21, 2004, an armed robbery occurred at a Copps Food Center. One of the two men stopped after the Copps robbery had also gone into Reagan's Liquor on November 21, 2004, but no robbery occurred. Both co-actors in the crimes indicated that Jones was driving the vehicle used in the crimes. One admitted committing the Lang Oil robbery and stated that Jones got the money obtained in that robbery.

¶3 The criminal complaint and information charged that the Lang Oil robbery occurred November 21, 2004, and that the Copps robbery occurred November 14, 2004. Based on a plea agreement, an amended information charged

[1] The two criminal prosecutions were handled together in the trial court and all filings include both lower court case numbers. Jones did not seek postconviction relief from the judgment of conviction of disorderly conduct and does not request relief on appeal from that judgment. We affirm the judgment of conviction of disorderly conduct, appeal 2007AP967-CR.

Jones with attempted armed robbery of Lang Oil on November 21, 2004. Jones entered a no contest plea to the amended charge.

¶4 In order to withdraw a no contest plea after sentencing, a defendant must show that a manifest injustice would result if the withdrawal were not permitted. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). The defendant bears the burden to establish manifest injustice by clear and convincing evidence. ***Id.*** at 237. A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. ***Id.***

¶5 Jones contends it is unclear what crime he pled to since the Lang Oil robbery did not occur on November 21, 2004, as charged in the amended complaint. The "failure of the trial court to establish a factual basis showing that the conduct which the defendant admits constitutes the offense charged and to which the defendant pleads, is evidence that a manifest injustice has occurred." ***White v. State***, 85 Wis. 2d 485, 488, 271 N.W.2d 97 (1978) (citation omitted). A showing that the plea was not knowingly, intelligently, and voluntarily entered also satisfies the manifest injustice standard. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

¶6 Jones's claim is a nonstarter because at the beginning of the plea hearing the trial court referred to count one of the complaint—the robbery at Lang Oil—as the charge to which Jones was entering his no contest plea. The amended information charged only the robbery at Lang Oil. Jones acknowledged his plea to the amended charge of attempted armed robbery, again the only charge in the

amended information. There was no confusion when Jones entered his plea.[2] Jones is simply wrong when he contends that without reference to the correct date it was not clear which robbery Jones was admitting his participation in. It was the Lang Oil robbery. Although the dates of commission were transposed,[3] the prosecution is not bound by the date alleged and may establish the commission of the offense charged on some other day within a reasonable limitation. ***Thomas v. State***, 92 Wis. 2d 372, 386, 284 N.W.2d 917 (1979). Further "the circuit court is not required to satisfy the defendant that he or she committed the crime charged." ***State v. Black***, 2001 WI 31, ¶12, 242 Wis. 2d 126, 624 N.W.2d 363. The charging documents provide a factual basis for Jones's no contest plea.

¶7 Jones contends that the court failed to comply with the requirement in ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986), that the trial court ascertain that the defendant possesses accurate information about the nature of the charge because it did not clarify which of the three robberies Jones was pleading to. We cannot fault the trial court for not clarifying which crime when no confusion existed. Although the plea colloquy was abbreviated, that does not alone establish a ***Bangert*** violation. In response to the State's motion for a remand on what information Jones received about the nature of the crime, Jones confirmed that he understood the elements of the offense. The trial court rejected Jones's testimony that he believed he was entering a no contest plea to the Copps

[2] Confusion was exhibited only at the postconviction motion hearing. Jones testified that he thought he was entering a plea to the Copps robbery. His trial counsel testified that he thought the plea was to the incomplete crime at Reagan's Liquor. The trial court found that at the plea hearing the plea was to the Lang Oil robbery.

[3] The prosecuting office acted unprofessionally in not observing and correcting the obvious transposition of dates or locations. Had the prosecution been more careful in its drafting of the charging documents, the issue would not be before this court.

robbery because it found Jones's recollection of what occurred at the plea hearing and what prompted his plea to be incredible. The trial court makes the necessary credibility determinations when a defendant seeks to withdraw a guilty plea. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291-92, 592 N.W.2d 220 (1999). Jones has not shown that he did not know or understand the information which allegedly should have been provided at the plea hearing, a prerequisite to a ***Bangert*** type claim. *See* ***State v. James***, 176 Wis. 2d 230, 237, 500 N.W.2d 345 (Ct. App. 1993); ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). No manifest injustice exists and the trial court properly exercised its discretion in denying the motion for plea withdrawal.

¶8 At the plea hearing, the parties indicated to the trial court that the remaining two counts of armed robbery charged in the complaint would be dismissed outright. The presentence investigation report (PSI) treated those two counts as read-ins and detailed Jones's alleged involvement in those crimes. The prosecutor and defense counsel also indicated at sentencing that those counts were read-ins. The sentencing court mentioned the two armed robbery charges as read-ins. Jones seeks resentencing on the ground that he was sentenced on inaccurate information.[4]

¶9 To establish a claim that he or she was sentenced on the basis of inaccurate information, the defendant must show both that the information was

[4] Jones argues in the alternative that his trial counsel was ineffective for not correcting the court's reliance on the charges as read-ins, and for contributing to that error. The State responds that the claim of ineffective assistance of trial counsel adds nothing to the appeal and does not argue that Jones waived the issue by not objecting at sentencing to the characterization of the dismissed charges as read-ins. We review directly the claim that may be made under a claim of ineffective assistance of counsel. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992).

inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶28, 291 Wis. 2d 179, 717 N.W.2d 1. The State concedes that Jones satisfied both requirements. The State argues that reliance on the inaccuracy was harmless. ***Id.***, ¶30.

¶10 The State points out that uncharged and unproven criminal offenses and facts may be considered by the sentencing court to determine the defendant's character or whether the conviction is part of a pattern of conduct. *See* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). The State argues that the fact that the two armed robbery counts were not read-ins did not preclude the sentencing court from considering them to exactly the same extent as the court did when characterizing them as dismissed and read-in offenses. Jones points out that unlike unproven offenses and acquittals, read-ins constitute admissions by the defendant to those charges. ***State v. Floyd***, 2000 WI 14, ¶¶25, 27, 232 Wis. 2d 767, 606 N.W.2d 155. Indeed, the implication is that more weight is placed on read-in charges than on unproven or acquitted charges. ***Id.***, ¶27.

¶11 We have previously questioned whether a charge designated in a plea agreement as "dismissed outright" can be considered by the sentencing court in light of the implication to a defendant that "dismissed outright" is something more beneficial than "dismissed and read in." *See* ***State v. Biesterveld***, 2005AP2138, unpublished certification at 5 (Wis. Ct. App. Aug. 23, 2006). The Wisconsin Supreme Court refused this court's certification of the issue.

¶12 We cannot ignore the difference between a plea agreement which calls for the dismissal of charges "outright" and one in which the defendant agrees

the charges may constitute read-ins at sentencing. WISCONSIN STAT. § 973.20(1g)(b) (2005-06),[5] defines a read-in charge as

> [a]ny crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.

From this definition we can infer that a dismissed-outright charge is one that a court cannot consider at the time of sentencing.

¶13 An error is harmless if there is no reasonable probability that it contributed to the outcome. ***State v. Anderson***, 222 Wis. 2d 403, 411, 588 N.W.2d 75 (Ct. App. 1998). Here the PSI, the prosecution, defense counsel, and sentencing court all looked at the dismissed armed robbery charges as read-in offenses and, by implication, assumed that Jones admitted guilt to those charges. We cannot conclude that the inaccuracy did not contribute the sentence.[6] Moreover, because charges dismissed outright should not be considered, the sentencing court relied on an improper factor. Consequently, the sentencing court improperly exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (when sentencing discretion is exercised on the basis of an improper factor, there is an erroneous exercise of discretion).

[5] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[6] The PSI's and prosecution's sentencing recommendation were also based on a higher maximum penalty than that which Jones actually faced for his attempt crime. Although the sentencing court corrected the representation of what the maximum penalty was, it did not inquire whether the PSI's and prosecution's recommendation would change in light of the lower maximum penalty.

¶14 Jones is entitled to resentencing. We reverse the judgment of conviction of attempted armed robbery and that part of the postconviction order denying Jones's postconviction motion for resentencing. We remand for resentencing before a different judge. We also direct that a new PSI be conducted to avoid any further taint in the case. *See* ***State v. Matson***, 2003 WI App 253, ¶34, 268 Wis. 2d 725, 674 N.W.2d 51.

By the Court.—Judgment reversed; judgment affirmed; order affirmed in part, reversed in part and cause remanded with directions.

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