

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-0248
STATE OF WISCONSIN**

Cir. Ct. No. 96-CF-66

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK WOLFE,

DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Patrick Wolfe appeals from a judgment convicting him of solicitation to commit first-degree intentional homicide, contrary to WIS.

STAT. §§ 939.30 and 940.01(1).¹ He also appeals from the order denying his postconviction motion for sentence modification. Wolfe argues that the circuit court erred by denying his postconviction motions to: (1) withdraw his guilty plea based upon a claim of ineffective assistance of trial counsel; and (2) modify his sentence. Wolfe additionally argues that the State breached the plea agreement by opposing his motion for sentence modification. We reject Wolfe's arguments and affirm the judgment and order.

BACKGROUND

¶2 In April 1996, Wolfe was charged with solicitation to commit first-degree intentional homicide arising from his attempt to hire a hitman to kill his wife. In exchange for the State recommending no more than five years in prison, Wolfe pled no contest to the charge. Wolfe was ultimately convicted and sentenced to the maximum ten years in prison. Wolfe did not pursue a direct appeal from his conviction.

¶3 In June 2000, Wolfe filed a motion to withdraw his guilty plea based upon a claim of ineffective assistance of trial counsel. In September 2000, Wolfe filed an alternative motion for sentence modification. After a hearing, the circuit court denied Wolfe's motions and this appeal followed.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

ANALYSIS

I. MOTION TO WITHDRAW PLEA

¶4 Wolfe argues that the circuit court erred by denying his postconviction motion to withdraw his guilty plea based upon a claim of ineffective assistance of trial counsel. Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Wolfe has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See State v. Schill*, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶5 Ineffective assistance of trial counsel can constitute a manifest injustice. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Wolfe must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697.

¶6 To prove prejudice, Wolfe must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This claim presents a mixed question of fact and law. *Strickland*, 466 U.S. at 698. The circuit court's factual findings will not be disturbed unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711

(1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law that we review independently. *Id.*

¶7 Here, Wolfe argues that trial counsel was ineffective for failing to fully inform Wolfe of the potential ramifications of a plea of not guilty by reason of mental disease or defect. Citing *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983) and *State v. Ludwig*, 124 Wis. 2d 600, 369 N.W.2d 722 (1985), Wolfe thus contends that he was denied information necessary to make an intelligent decision regarding his plea. Because *Felton* and *Ludwig* are factually distinguishable from the present case, we are not persuaded.

¶8 In *Felton*, a defendant's conviction for second-degree intentional homicide was reversed due to ineffective assistance of counsel. There, trial counsel admitted ignorance of statutes authorizing two viable defenses, *Felton*, 110 Wis. 2d at 504, and also withdrew the defendant's NGI plea without consulting his client. *Id.* at 514. Our supreme court concluded that the defendant was deprived of the effective assistance of counsel because counsel's conduct did not rise to the standard expected of a prudent lawyer reasonably skilled and versed in the criminal law and counsel's conduct prejudiced the defendant by depriving her of important defenses. *Id.* at 519. In *Ludwig*, a defendant was denied her right to effective assistance of counsel by her attorney's failure to inform her of a plea offer in a manner that made clear that she, and not the attorney, had the right to accept or reject the offer. *Ludwig*, 124 Wis. 2d at 611.

¶9 Here, trial counsel had an understanding of the relevant defenses and, in an effort to explore the possibility of an NGI defense, counsel commissioned a psychologist to evaluate Wolfe. The psychologist's report stated that Wolfe lacked the ability to appreciate the wrongfulness of his acts or conform

his conduct to the requirements of law. At the hearing on Wolfe's postconviction motion to withdraw his plea, trial counsel testified that he presented the psychologist's conclusions to Wolfe and discussed the possibility of Wolfe's pleading not guilty by reason of mental disease or defect. Counsel further testified that Wolfe stated that he understood what his actions were when he committed the offense and, therefore, he did not want to pursue an NGI defense. Unlike counsel in *Felton* and *Ludwig*, Wolfe's trial counsel explored an NGI plea as a possible defense and discussed the option with his client. Despite the psychologist's report, Wolfe opted not to pursue an NGI defense.² Because Wolfe has failed to show that his counsel's conduct was deficient, we conclude that the circuit court properly denied Wolfe's motion to withdraw his plea based on the ineffective assistance of counsel.

II. MOTION FOR SENTENCE MODIFICATION

¶10 Wolfe argues that the circuit court erred by denying his motion for sentence modification. Specifically, Wolfe claims that the termination of his parental rights subsequent to his conviction was a new factor warranting modification of his sentence. We are not persuaded.

¶11 The purpose of a sentence modification is to correct an unjust sentence. *State v. Koeppen*, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. "Before a sentence will be modified, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying

² Although Wolfe testified that much of what counsel testified to concerning their discussions on the NGI defense did not occur, the circuit court made a credibility determination in favor of counsel. This credibility determination is more appropriately left to the circuit court. *State v. Owens*, 148 Wis. 2d 922, 930-31, 436 N.W.2d 869 (1989). We will not disturb it.

the court’s reconsideration.” *Id.* A new factor is a fact “relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing ... or which frustrates the sentencing court’s intent.” *Id.* (citations omitted). This court reviews without deference the question of law of whether the facts constitute a new factor. *Id.* If a new factor is established, the question of sentence modification is addressed to the circuit court’s discretion. *State v. Michels*, 150 Wis. 2d 94, 96-97, 441 N.W.2d 278 (Ct. App. 1989).

¶12 At the hearing on Wolfe’s motion for sentence modification, the circuit court stated that it intended a very tough sentence and that even if the termination of parental rights had been a factor, it would not have been one that would have changed the court’s mind. At sentencing, the court noted a variety of factors relevant to the imposition of the maximum sentence—none of which included Wolfe’s parental relationship with his son. Rather, the court emphasized that “the protection of the community and the protection of [Wolfe’s wife] are probably the paramount interest of the court today.” The court also emphasized deterrence, rehabilitation and punishment as supporting the sentence imposed. Because Wolfe’s parental rights were not highly relevant to the imposition of sentence, the subsequent termination of those rights did not frustrate the purpose of the original sentence. *See Koeppen*, 2000 WI App 121 at ¶33. We therefore conclude that the circuit court properly denied Wolfe’s motion for sentence modification.

III. PLEA AGREEMENT

¶13 Finally, Wolfe argues that the State breached the plea agreement. Plea bargaining has been recognized as an “essential component of the administration of justice.” *Santobello v. New York*, 404 U.S. 257, 260 (1971);

State ex rel. White v. Gray, 57 Wis. 2d 17, 21, 203 N.W.2d 638 (1973). As an important phase in the process of criminal justice, plea bargaining must be attended by procedural safeguards to ensure that a defendant is not treated unfairly. *Santobello*, 404 U.S. at 262. Thus, when a defendant pleads guilty to a crime pursuant to a plea agreement and the prosecutor fails to perform his part of the bargain, the defendant is entitled to relief. *Id.*

¶14 A plea agreement is analogous to a contract and we therefore draw upon contract law principles for its interpretation. *State v. Jorgensen*, 137 Wis. 2d 163, 167, 404 N.W.2d 66 (Ct. App. 1987). The law in Wisconsin is that unambiguous contractual language must be enforced as it is written. *Dykstra v. Arthur G. McKee & Co.*, 92 Wis. 2d 17, 38, 284 N.W.2d 692 (Ct. App. 1979) (citation omitted), *aff'd*, 100 Wis. 2d 120, 301 N.W.2d 201 (1981). Contractual language is ambiguous only when it is “reasonably or fairly susceptible of more than one construction.” *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Construction of a contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide independently. *Id.*

¶15 Here, Wolfe contends that the State breached its plea agreement to recommend five years’ incarceration by objecting to Wolfe’s postconviction motion to modify his sentence to seven years. “Whether a breach of contract exists involves a question of fact,” and “[f]indings of fact will not be overturned unless clearly erroneous.” *Jorgensen*, 137 Wis. 2d at 169 (citations omitted). The party asserting a breach of a plea agreement must “show, by clear and convincing evidence, not only that a breach occurred, but also that it was material and substantial.” *Id.* at 168.

¶16 We determine that the scope of the plea agreement was limited to the original sentence. As this court intimated in *State v. Windom*, 169 Wis. 2d 341, 350, 485 N.W.2d 832 (Ct. App. 1992), where there is no evidence to indicate the parties intended the plea agreement to extend beyond the original sentence, we cannot bind the State to the plea agreement *ad infinitum* in all subsequent sentence hearings arising out of the original crime. We therefore conclude that the State did not breach the plea agreement by objecting to Wolfe's postconviction motion to modify his sentence to seven years.

By the Court.—Judgment and order affirmed.

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

