COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP1403
2008AP1404

Cir. Ct. Nos. 1998CF47
1998CF46

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH E. KOLL, JR.,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Reversed and cause remanded with directions.*

¶1 NEUBAUER, J.[1] Joseph E. Koll, Jr., appeals from circuit court judgments and orders denying his postconviction motion for plea withdrawal. Koll argues that the trial court erred in denying his motion to withdraw his no contest pleas because they were not knowingly and voluntarily entered. Because Koll was actively misinformed as to a collateral consequence of his plea agreement and because the misinformation went to the heart of the plea agreement, we agree that he is entitled to plea withdrawal. We reverse the judgments and orders and remand with directions.

BACKGROUND

¶2 On October 27, 1998, Koll pled no contest to two counts of "non-domestic disorderly conduct" contrary to WIS. STAT. § 947.01 and one count of intimidating (non-domestic) a witness contrary to § 940.42. The charges stemmed from an altercation with his then live-in girlfriend and were originally charged as disorderly conduct and battery. Due to Koll's concerns regarding his right to own firearms, Koll's plea was specifically tailored as "non-domestic" to avoid the application of the federal Gun Control Act which prohibits ownership of firearms by individuals convicted of misdemeanors involving a domestic partner.[2] After he was later prohibited from purchasing a handgun in December 2007, Koll filed a motion for relief from judgment requesting plea withdrawal.[3]

---

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] *See* 18 U.S.C. § 921(a)(33)(A) (2006). As observed by Judge Anderson in his concurrence to ***Koll v. DOJ***, No. 2008AP2027, slip op., ¶13 (WI App Apr. 1, 2009) (Anderson, P.J., concurring), Wisconsin does not recognize a crime of non-domestic disorderly conduct.

[3] Koll appealed the gun permit denial to the Department of Justice. The Department of Justice affirmed the "non-approval" of Koll's proposed handgun purchase, reasoning as follows:

(continued)

¶3 In support of his motion, Koll argued that the judgment should be vacated to avoid manifest injustice as his plea was attributed in part to ignorance, inadvertence or mistake. The State opposed Koll's motion on the grounds that the application of federal firearm prohibition is a collateral consequence to the plea.[4] Citing to ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, Koll argued that plea withdrawal may be permitted whether the "misunderstanding involved direct consequences or collateral consequences of [the plea]."

> The Gun Control Act, 18 U.S.C. 921(a)(33), defines the term "misdemeanor crime of domestic violence" as any state or federal misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon … by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian, of the victim." This definition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery, disorderly conduct) if separate inquiry reveals that in fact the offense was committed by a federally defined party. This is true whether or not the convicting statute specifically defines or classifies the offense as a domestic violence misdemeanor and whether or not the convicting statute has a relationship element.
>
> The records of the Green Lake County Circuit Court show that on October 19, 1998, Mr. Koll was convicted of 2 counts of Misdemeanor Disorderly Conduct/Non-Domestic as a result of an altercation with his girlfriend at that time. However, Mr. Koll was sentenced to probation, fined and ordered to undergo, participate and successfully complete domestic abuse counseling. As such and, according to the Gun Control Act (18 U.S.C. 921(a)(33)) he is prohibited from possessing a firearm.

Koll appealed the Department's decision to this court in ***Koll v. DOJ***. In keeping with the U.S. Supreme Court's recent decision in ***U.S. v. Hayes***, 555 U.S.___, 129 S. Ct. 1079 (2009), we upheld the Department's denial of Koll's gun permit. See ***Koll v. DOJ***, slip op., ¶1.

[4] The State also argued that Koll's request was barred by the doctrine of laches. The State concedes that the circuit court properly dismissed that argument and does not raise it on appeal.

¶4 Following a hearing on April 30, 2008, the circuit court denied Koll's motion.[5] The circuit court observed that "[i]n the early stages of the Federal Firearms Act, even prosecutors believed that they had the authority to control whether or not a crime came within the purview of that statute." While noting that Koll had not been "eligible for something that [he] left the courtroom thinking [he was] eligible for," namely protection from the application of the firearms statute, the circuit court nevertheless determined that to allow plea withdrawal would be too prejudicial to the State.

¶5 Koll appeals.

DISCUSSION

¶6 A defendant who seeks to withdraw a guilty or no contest plea after sentencing must carry the heavy burden of establishing by clear and convincing evidence that withdrawal is necessary to avoid manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A manifest injustice occurs when a plea fails to meet the constitutional requirement that it be knowingly, voluntarily and intelligently entered. ***Brown***, 276 Wis. 2d 559, ¶4.

¶7 A court's decision to allow withdrawal of a guilty plea is a matter of discretion, subject to the erroneous exercise of discretion standard on review. ***Thomas***, 232 Wis. 2d 714, ¶13. However, whether a plea was voluntarily and

[5] At the commencement of the hearing, Koll requested that the court approve amending the convictions in his judgment from disorderly conduct to vagrancy based on an agreement reached with the State. The circuit court denied the request as a manipulation and "extremely bad policy." Koll does not raise the issue of amendment on appeal.

knowingly entered is a question of constitutional fact that we review de novo. ***Brown***, 276 Wis. 2d 559, ¶5.

¶8 We begin our discussion by noting that Koll does not dispute that his plea was taken in conformity with the mandatory procedural requirements set forth in WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Nor does Koll dispute that the effect of the federal firearms statute is a collateral consequence. *See* ***State v. Kosina***, 226 Wis. 2d 482, 484, 595 N.W.2d 464 (Ct. App. 1999) (effect of federal firearms statutes is a collateral consequence of a guilty plea because the statute is enforced by a different jurisdiction). Rather, Koll's argument is narrowly presented as whether "[a] criminal defendant can withdraw his plea when he is misinformed as to the collateral consequences of the plea as part of the conviction process."

¶9 The difference between a direct consequence and a collateral consequence of a plea was discussed by the supreme court in ***State v. Byrge***, 2000 WI 101, ¶¶60-61, 237 Wis. 2d 197, 614 N.W.2d 477:

> Defendants have a due process right to be notified about the "direct consequences" of their pleas. A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment. If a defendant is not aware of the direct consequences of a plea, he or she is not [apprised] of "the potential punishment" under WIS. STAT. § 971.08(1)(a).
>
> Information about "collateral consequences" of a plea, by contrast, is not a prerequisite to entering a knowing and intelligent plea. Collateral consequences are indirect and do not flow from the conviction…. Sometimes a collateral consequence is one that rests not with the sentencing court, but instead with a different tribunal or government agency. The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea. (Citations omitted.)

Relying on our decision in ***Brown***, Koll argues that his plea was not knowingly entered because he had been misinformed of the collateral effects of his plea by his counsel, the prosecutor, and the presiding judge. Under ***Brown***, if the defendant is not responsible for the mistake of law, the defendant has the right to withdraw the plea, even if the mistake concerned a collateral rather than a direct consequence. *See* ***Brown***, 276 Wis. 2d 559, ¶¶13-14.[6]

¶10 The defendant in ***Brown*** pled no contest to six offenses, including child enticement and exposing genitals to a child. ***Id.***, ¶2. The defendant's attorney and the prosecutor had crafted a plea agreement intended to include only charges that would not require the defendant to register as a sex offender and were not sexual predator offenses under WIS. STAT. ch. 980. ***Brown***, 276 Wis. 2d 559, ¶2. Defense counsel explained the purpose of the agreement on the record at the plea hearing, and the prosecutor agreed with the explanation, stating that the charges pled to "are not strike offenses, are not a Chapter 980." ***Brown***, 276 Wis. 2d 559, ¶2. The circuit court then accepted Brown's pleas. ***Id.***

¶11 In considering the plea withdrawal in ***Brown***, we observed that "if the court does not disclose a collateral consequence of a plea, a defendant may not withdraw his plea on the basis of that lack of information." ***Id.***, ¶7. However, the defendant in ***Brown***, like Koll, was seeking to withdraw his pleas "not because he

[6] We reject the State's attempt to distinguish ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, on grounds that the "the court and the defendant's trial attorney all believed that the federal Gun Control Act would not be applicable, they really could not be certain because it was not Wisconsin law…. The federal Gun Control Act does not have a definite or specific outcome or immediate outcome." In so arguing, the State fails to point to any law identifying as an exception to ***Brown***'*s* holding the uncertainty on the part of those advising the defendant as to the law. It stands to reason that if the court and the trial attorney were uncertain as to the application of the law, they would refrain from advising the defendant as to its effect.

lacked information of the pleas' consequences, but rather because he was *mis*informed of those consequences by both his attorney and the prosecutor, with acquiescence by the judge." *See* ***id.***, ¶8. The ***Brown*** court observed that "Wisconsin courts have permitted defendants to withdraw pleas that were based on a misunderstanding of the consequences, even when those consequences were collateral." ***Id.*** Significant to that decision is whether the misunderstanding results from statements made by the prosecution or defense counsel and whether the judge acquiesces in the misunderstanding. *See* ***id.***, ¶10.

¶12 At the plea hearing in this case, the parties and the court discussed at length the rationale behind the plea agreement. The court observed: "In this case we're essentially going from what would appear to be a fairly typical domestic dispute down to even a non-domestic which wouldn't even carry with it any prohibition against possession of firearms." Koll's counsel stated that the three counts against Koll were "penalty enough, rather than taking away from him the firearm privilege, given the fact that there [are] no firearm related problems here, he's not had any violations in the past of any sort, and nothing in this matter regarding firearms, and would like to preserve that opportunity for him." The prosecutor additionally explained the rationale for the agreement, at no time correcting the understanding of Koll's counsel or the trial court. This lack of comment coupled with the amendments to the criminal complaints characterizing the disorderly conduct and intimidation of a witness as "non-domestic" indicate the prosecutor's acquiescence. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 322 N.W.2d 744 (1983).

¶13 Attached to Koll's motion for postconviction relief is a letter from his trial counsel confirming that Koll was concerned about gun ownership rights and that this was the rationale for amending the charge to a non-domestic charge.[7] This comports with Koll's uncontested affidavit filed in support of his motion for postconviction relief in which Koll states that when he pled no contest to the charges "he specifically told [his trial attorney] several times that the only way [he] was going to plead no-contest or guilty to anything is if [he] would not be giving up [his] gun ownership rights." Koll also states, "I pled to these charges because my attorney told me they were non-domestic charges that would not be impacted by the federal law." The State provided no evidence to the contrary. Koll's counsel's understanding of the application of the federal Gun Control Act was wrong, as was the trial court's.

[7] Trial counsel's letter further explained:

> At the time of Mr. Koll's plea the Federal Firearms Act, 18 USC 922(g) … was a relatively new law. Little case law or practical experience with the enforcement of the Act was present at that time.
>
> It was the practice of the criminal defense bar and prosecutors to amend disorderly conduct charges from the domestic enhancer to non-domestic in an effort to prevent the federal [firearms] act from prohibiting gun ownership. It was expected that the non-domestic conviction would not likely affect Mr. Koll's ability to possess firearms and that is the reason why the charges were amended to non-domestic.

CONCLUSION

¶14 As in ***Brown***, Koll's plea agreement was purposefully crafted so as to avoid a collateral consequence, and Koll entered his plea believing that he would not be subject to that collateral consequence. *See* ***Brown***, 276 Wis. 2d 559, ¶13. Koll's belief was based on affirmative, incorrect statements made on the record by his own counsel, with acquiescence by the prosecutor and the trial court. We conclude that Koll's plea was not knowingly and voluntarily made and, as such, he is entitled to withdraw it. The case is remanded for proceedings on the original charges in the information.

By the Court.—Judgments and orders reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.