COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2013

Diane M. Fremgen
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. 2012AP1356-CR **Cir. Ct. No. 2011CF73**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL F. GRAF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Mitchell Graf appeals a judgment of conviction for two counts of misdemeanor battery, two counts of disorderly conduct, and one count of obstructing an officer. He also appeals an order denying his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

postconviction motion for plea withdrawal. Graf argues the circuit court erred by denying his motion to withdraw his no contest pleas. We affirm.

BACKGROUND

¶2 Following a physical altercation, the State charged Graf with substantial battery and disorderly conduct. Substantial battery is a felony, and Graf, who is a ship captain, entered into a plea agreement with the State, at least in part, to avoid the felony conviction.[2] The agreement required Graf to plead no contest as charged and also plead to four additional misdemeanor offenses. In exchange for Graf's no contest pleas, the State agreed to ask the court to approve a three-year deferred acceptance of a plea agreement for the felony offense. As for the misdemeanors, the State would ask the court to withhold sentence and place Graf on probation for three years with various conditions. The parties agreed on all proposed conditions of probation, except the amount of conditional jail time.

¶3 Graf submitted a signed plea questionnaire/waiver of rights form and pled no contest pursuant to the plea agreement. The court found that Graf's pleas were knowing, voluntary, and intelligent, and that a factual basis supported the charges. The court withheld its acceptance of Graf's plea to the felony charge and approved the three-year deferred acceptance of a plea agreement. It accepted Graf's pleas to the five misdemeanor offenses and then proceeded to sentencing on those charges.

[2] At the postconviction hearing, Graf's counsel advised the court that the "main factor" in the plea agreement was the felony conviction.

¶4 Consistent with the plea agreement, the State recommended that Graf be placed on probation for three years with the agreed conditions. On the contested issue of conditional jail time, the State argued Graf should serve six months' jail. The State noted that Graf had knocked the victim unconscious and that the victim had received stitches to his upper lip. It also advised the court that Graf had previously received the benefit of a deferred plea agreement that ultimately reduced a felony charge to a misdemeanor so that he could save his captain's license. The State argued that because Graf was being given a second chance to save his captain's license, the court should impose six months' jail to impress upon Graf the seriousness of his behavior and serve as a deterrent.

¶5 Graf's counsel argued that the negotiated outcome was driven by the hope that Graf could keep his current captain's job. Counsel conceded, however, that even with the captain's license, Graf's continued employment was not guaranteed because there were concerns involving the boat's insurance carrier. Counsel argued that, irrespective of the insurance issues, if the court imposed six months' jail as a condition, it would cost Graf his current captain's job. Counsel asked the court to "see fit not to impose the jail sentence that's going to cause" Graf to lose his employment. It asked the court to put Graf on probation and impose ten days' condition time. Counsel also advised the court:

> I spoke personally with Jessica over at probation and parole. He's going to have to leave the state to go to work. I said is that okay with you guys. She said that's perfectly fine. We can do travel permits. All of that is all right.
>
> I said there may be a time or two when he strays into international waters. It's not like he's going to China or Fiji, but sometimes on the east coast that happens; would probation and parole be okay with that? And she says, sure, especially if the Court is.

> So I'm asking if the Court might put something in the record that says that that's okay, as long as probation and parole know about it ahead of time.

¶6 The court withheld sentence in favor of three years' probation with seventy-five days' jail as a condition. It determined Graf's job was the best thing for his rehabilitation and therefore gave Graf flexibility as to when he wanted to serve the condition time, noting that it must be "served consecutively and … in the first year." As for travel permits, the court observed, "I've allowed those in the past and you've been successful on them. I've taken a chance before that you would be able to do that and you've proven yourself, so I don't know any reason that I wouldn't grant those if asked by the Department of Corrections in the future."

¶7 Five days later, Graf moved to withdraw his pleas. Graf advised the court that the Department of Corrections determined "the circumstances of Defendant's employment render him 'unavailable for supervision.'" Graf argued that he should be permitted to withdraw his pleas because a probation disposition was unavailable.

¶8 The court held a nonevidentiary hearing on Graf's motion. At the hearing, Graf argued that the "motivation … behind the plea agreement had everything to do with manufacturing a situation where Mr. Graf could keep his job." Graf argued he should be permitted to withdraw his pleas because everyone believed he would be able to keep his job if placed on probation.

¶9 The State responded that, although it acquiesced to Graf's desire to keep his job, "Mr. Graf keeping his job was not a consideration of the State in this case," and "probation is not impossible." The State speculated that the term "unavailable for supervision" meant that Graf was not in Wisconsin enough to be

supervised, and therefore, if Graf wanted to be supervised on probation he needed to be in the State more often. The State argued the fact that the Department of Corrections would not accept Graf for supervision under his terms did not amount to a manifest injustice requiring plea withdrawal.

¶10 The court denied Graf's plea withdrawal motion, finding Graf's objection to probation did not amount to a manifest injustice. It observed that, although Graf may have entered into the plea agreement for the possibility of keeping his job, it "can't say that the State was necessarily motivated to keep Mr. Graf's job." Graf appeals.

DISCUSSION

¶11 "When a defendant moves to withdraw a plea after sentencing, the defendant 'carries the heavy burden of establishing by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a manifest injustice.'" ***State v. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177 (quoting ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836). The defendant's postsentencing burden "reflects the State's interest in the finality of convictions, and reflects the fact that the presumption of innocence no longer exists." ***State v. Cross***, 2010 WI 70, ¶42, 326 Wis. 2d 492, 786 N.W.2d. 64. "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" ***Thomas***, 232 Wis. 2d 714, ¶16 (quoting ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995)). A defendant can show a serious flaw in the fundamental integrity of the plea by establishing that the plea was not knowingly, voluntarily or intelligently entered. ***State v. Ravesteign***, 2006 WI App 250, ¶11, 297 Wis. 2d 663, 727 N.W.2d 53.

¶12 On appeal, Graf does not point to any defect in the court's plea colloquy. Instead, he argues his pleas were involuntary because he "entered into the plea agreement based upon the incorrect belief that he would be able to keep his job." (Capitalization omitted.) Specifically, he asserts he entered his pleas believing the Department of Corrections would be able to supervise him in his current employment. Graf contends that, because the Department of Corrections would not allow him to continue his current employment, he should be permitted to withdraw his pleas. In support, Graf relies on ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543.

¶13 In ***Brown***, Brown and the state structured a plea agreement so that Brown would only plead to offenses that would not require him to register as a sex offender or subject him to potential postincarceration confinement under WIS. STAT. ch. 980. ***Id.***, ¶2. Brown's counsel explained the purpose of the agreement on the record at the plea hearing, and the prosecutor agreed with the explanation, stating the charges were "not strike offenses, are not a Chapter 980." ***Id.*** Following sentencing, however, Brown learned the charges required him to register as a sex offender and subjected him to potential postincarceration confinement. ***Id.***, ¶3. On appeal, we observed that, although not every misunderstanding of law by a defendant entitled the defendant to plea withdrawal, Brown's misunderstanding was "not the product of his own inaccurate interpretation, but was based on affirmative, incorrect statements on the record by Brown's counsel and the prosecutor. The court did not correct the statements." ***Id.***, ¶¶11, 13. We concluded that, under the circumstances, Brown was entitled to withdraw his pleas because his misunderstanding undermined the pleas' knowing and voluntary nature. ***Id.***, ¶13.

¶14 Graf's situation, however, is not analogous to Brown's. Brown was entitled to withdraw his pleas because he was erroneously and affirmatively misled to believe that by pleading to the offenses, he would not be subjected to certain legal collateral consequences. In this case, nothing in the record reflects that Graf was affirmatively misled to believe that, by pleading to the offenses, he would be able to keep his job. The court was not bound by any plea agreement and could have sentenced him to imprisonment. Graf himself acknowledges in his brief that he understood the court had "discretionary freedom at sentencing." Further, Graf argued at sentencing that imprisonment would cost him his job, and he implored the court to not impose six months' jail as the State requested. Graf also advised the court that it was not guaranteed that he would keep his job because of issues with the boat's insurance carrier. We therefore cannot conclude Graf was affirmatively misled to believe that by pleading to the offenses he would be able to keep his job.

¶15 Instead, Graf appears to rely on ***Brown*** to argue that he should be allowed to withdraw his pleas because he was erroneously misled to believe that, if the court imposed probation with limited or no jail time and if he did not lose his job because of the insurance carrier, the Department of Corrections would be able to supervise him in his current employment. He faults the State and the court for failing to correct his misperception.

¶16 Graf's alleged misunderstanding about the Department of Corrections does not amount to a manifest injustice requiring plea withdrawal. First, unlike the situation in ***Brown***, where the prosecutor and defense attorney affirmatively advised Brown about a legal impossibility—i.e., avoiding certain collateral consequences by pleading to select offenses, in this case, it is not a legal impossibility for the Department of Corrections to supervise a probationer who

leaves the state for employment purposes. *See* WIS. ADMIN. CODE § DOC 328.06 (explaining travel permits for probationers). We cannot conclude that, similar to ***Brown***, Graf was given information that amounted to a legal impossibility.

¶17 Second, and more importantly, Graf failed to prove by clear and convincing evidence a basis for plea withdrawal. He never presented any evidence regarding the details of his pre- and post-sentencing conversations with the Department of Corrections or explained why the Department of Corrections advised him that it would be able to issue travel permits only to later declare he was "unavailable for supervision." As the State points out in its brief, we cannot assume that Graf provided the same information about his employment to the Department of Corrections on both occasions. Graf has not proven that a manifest injustice would result if he were not entitled to withdraw his pleas based on his alleged misunderstanding regarding the Department of Corrections.

By the Court.—Judgment and order affirmed.

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