**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 16, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal Nos. 2012AP1353-CR**
**2012AP1354-CR**

**Cir. Ct. Nos. 2009CF569**
**2009CF776**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NAHUM SANCHEZ-VILLAGOMEZ,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Nahum Sanchez-Villagomez appeals judgments convicting him of nine counts related to delivery of cocaine. He also appeals an order denying his postconviction motion to withdraw his no contest pleas. He

contends he should be allowed to withdraw his pleas because the plea agreement was not recited at the plea hearing or in the plea questionnaire, and his attorney was ineffective for failing to explain the plea agreement and for failing to inform the sentencing court of Sanchez-Villagomez's willingness to testify against a co-conspirator. We reject these arguments and affirm the judgments and order.

## BACKGROUND

¶2 Sanchez-Villagomez was charged with fifteen counts of drug-related offenses. He entered no contest pleas to nine counts and the remaining counts were dismissed and read in for sentencing purposes. The court imposed sentences totaling fifteen years' initial confinement and ten years' extended supervision.

¶3 Sanchez-Villagomez then filed a postconviction motion to withdraw his no contest pleas. He asserted the pleas were not knowingly entered because no record was made of the plea agreement and his counsel failed to inform him of the terms of the agreement, particularly whether the State's sentence recommendation would be capped. Although the motion indicated Sanchez-Villagomez believed the State's recommendation would be capped, he testified at the postconviction hearing that he did not understand anything about the plea agreement. He could not recall what his trial counsel told him about the agreement. When asked whether his counsel ever told him the State's recommendation would be capped at fifteen years, Sanchez-Villagomez answered, "No."

¶4 Sanchez-Villagomez's trial attorney testified at the postconviction hearing that the State's initial offer was to cap the sentence recommendation at fifteen years' initial confinement and ten years' extended supervision if Sanchez-Villagomez agreed to cooperate in the prosecution of other defendants. On March 15, 2009, defense counsel informed the State that Sanchez-Villagomez

would not cooperate. The next day, the State modified the offer, stating that both parties would be free to argue at sentencing. Counsel testified that he relayed this information to Sanchez-Villagomez.

¶5 The circuit court denied the postconviction motion, finding the only agreement that existed between the State and Sanchez-Villagomez was that some counts would be dismissed and both sides would be free to argue the sentence. The plea questionnaire did not mention any agreement regarding a cap on the State's sentence recommendation because there was no such agreement.

## DISCUSSION

¶6 After sentencing, a defendant may withdraw a guilty or no contest plea only if he establishes a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Entering a plea without knowing the terms of a plea agreement or with ineffective counsel would constitute a manifest injustice. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891; ***State v. Rock***, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). Whether a plea was knowingly entered and whether counsel was ineffective present issues of constitutional fact. ***State v. Cross***, 2010 WI 70, ¶14, 326 Wis. 2d 492, 786 N.W.2d 64. This court accepts the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous, but independently determines whether the plea was knowingly entered and whether counsel's performance was prejudicially deficient. ***Id.***; ***State v. Leighton***, 2000 WI App 156, ¶33, 237 Wis. 2d 709, 616 N.W.2d 126. Whether a defendant misunderstood the nature or consequences of a plea turns on the defendant's credibility, which is determined by the circuit court. ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999).

¶7 Sanchez-Villagomez's claim that he did not understand the plea agreement and his counsel never explained it fails for lack of factual foundation. The circuit court believed Sanchez-Villagomez's trial counsel's testimony that he informed Sanchez-Villagomez of the State's final offer which did not include any cap on the sentence recommendation. The court found Sanchez-Villagomez's testimony "unsustainable and contrary to what in fact occurred." Because Sanchez-Villagomez presented no credible evidence that he was unaware of the terms of the plea agreement and his trial counsel's testimony established Sanchez-Villagomez was informed, he has not established any manifest injustice upon which he could withdraw his no contest pleas.

¶8 For the same reason, Sanchez-Villagomez's first argument regarding the performance of his trial counsel fails. The arbiter of the witnesses' credibility believed counsel fully informed Sanchez-Villagomez of the terms of the plea agreement.

¶9 Sanchez-Villagomez's second argument, that trial counsel failed to inform the sentencing court of Sanchez-Villagomez's willingness to testify against a co-conspirator, fails because he established neither deficient performance nor prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's strategic choices, made with full understanding of the facts and law, are virtually unchallengeable on appeal. ***Id.*** at 690-91. To establish prejudice, a defendant must show a reasonable probably that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694.

¶10 At the postconviction hearing, Sanchez-Villagomez's counsel testified he was informed by Sanchez-Villagomez's wife of his willingness to

testify against a co-conspirator. That decision was made after the co-conspirator had negotiated a plea agreement. Therefore, the offer to testify would have been of no benefit to the State. Sanchez-Villagomez's offer to testify after the testimony was no longer needed suggests a cynical attempt to manipulate the judicial system. In addition, any mention of his history of cooperation would have reminded the court of his earlier refusal to cooperate. Sanchez-Villagomez's trial counsel's decision not to inform the court of his untimely willingness to provide unnecessary testimony constituted a reasonable strategic decision.

¶11 Sanchez-Villagomez also failed to establish any prejudice from his counsel's decision not to inform the court of his belated decision to cooperate. The offer to testify against a defendant who has decided not to go to trial is of such little value that counsel's decision to withhold this information does not undermine our confidence in the outcome.

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).