

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2009

David R. Schanker
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. 2008AP993-CR

Cir. Ct. No. 2007CF737

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY H. SHATTUCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge, and JOHN A. FIORENZA, Reserve Judge.¹ *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¹ The Honorable Kathryn W. Foster presided at the trial and entered the judgment of conviction. The Honorable John A. Fiorenza, Reserve Judge, heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Timothy Shattuck appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. Shattuck argues that the State violated the terms of the plea agreement when the prosecutor mentioned during sentencing a charge that had been dismissed, and that as a result, he should be allowed to withdraw his guilty plea. Because we conclude that the sentencing court stated that it would not consider the dismissed charge, we conclude that Shattuck has not established that there was a manifest injustice, and is not entitled to withdraw his plea.

¶2 Shattuck was charged with one count of armed robbery and one count of felony bail-jumping. As the result of a plea agreement, Shattuck pled guilty to armed robbery, and the bail-jumping charge was dismissed and read in. Another case involving, among other things, another charge of armed robbery, was dismissed outright because the victim had died. A third case involving a charge of personal identity theft was also dismissed and read in.

¶3 At sentencing, the prosecutor referred to the dismissed armed robbery case saying that the case was significant “because it shows what could happen in an armed robbery involving a knife. Clerk in this case fought back and suffered a significant injury to his hand. And the case in which the defendant has been convicted that didn’t happen. That didn’t mean it couldn’t have happened.” Defense counsel did not object to the prosecutor’s statement. The court then sentenced Shattuck to eight years of initial confinement and eight years of extended supervision.

¶4 Shattuck filed a motion for postconviction relief asking the court to be allowed to withdraw his plea. Shattuck argued that the prosecutor violated the plea agreement by mentioning the case that had been dismissed outright, and that

he should be allowed to withdraw his plea to correct a manifest injustice, or in the alternative, that he received ineffective assistance of trial counsel. The circuit court held a hearing on the motion. The court denied the motion.

¶5 The arguments Shattuck raises in this court are based on his allegation that the State breached the plea agreement by discussing the “dismissed outright” case at sentencing. Specifically, he argues that: (1) the terms of the plea agreement were ambiguous, and he believed that the term “dismissed outright” meant that the case would not be mentioned or taken into consideration at sentencing; (2) as a matter of contract law, the term “dismissed outright” means that the matter may not be referred to at the time of sentencing; (3) because the State breached the plea agreement by referring to the dismissed case at sentencing, Shattuck should be allowed to withdraw his guilty plea to correct a manifest injustice; and (4) in the alternative, Shattuck is entitled to be resentenced because his counsel was ineffective for failing to object when the State mentioned the case at sentencing.

¶6 After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *State v. Booth*, 142 Wis. 2d 232, 235, 418 N.W.2d 201 (Ct. App. 1987). A defendant has the burden of proving a manifest injustice by clear and convincing evidence. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. *See id.*

¶7 We conclude that Shattuck has not established that there was a manifest injustice. The record of the sentencing hearing shows that the prosecutor only briefly referred to the dismissed charges. He explained only what the court already knew—that the case had been ready for trial, but the victim had died.

Further, and more importantly, the sentencing court specifically said that while it understood the State’s argument about the case, that case had been dismissed and “not read in.” The court concluded: “So it is not part of my sentencing.”

¶8 We conclude that there can be no fundamental flaw in the integrity of the plea when the court tells everyone before the sentencing that it is not going to consider the charges that were dismissed. Even if the prosecutor’s comment violated the plea agreement, the court refused to consider it at sentencing. Because we conclude that the sentencing court did not consider the case that was dismissed outright, the integrity of the plea was not damaged. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

