

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 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 Nos. 2008AP1711-CR
2008AP1712-CR**

**Cir. Ct. Nos. 2007CF85
2007CF179**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. SELL,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. David A. Sell appeals from judgments convicting him upon his no-contest pleas to two drug-related charges and one count of bail jumping and from orders denying his postconviction motions seeking to withdraw

his pleas. Sell has not demonstrated that plea withdrawal is necessary to correct a manifest injustice. We affirm.¹

¶2 In February 2007, the State filed case number 07-CF-85 against Sell. The four-count criminal complaint alleged that Sell delivered marijuana (THC) on two occasions, possessed THC with intent to deliver and kept a drug-trafficking house. In April 2007, the State filed case number 07-CF-179 against him. The four-count criminal complaint in that case alleged that Sell delivered THC on two occasions and committed felony bail jumping on those two occasions. The informations in each case renewed the same charges.

¶3 The parties negotiated a joint plea bargain. Sell agreed to plead no contest to count three in 07-CF-85, possession of THC with intent to deliver, and to counts one and two in 07-CF-179, delivery of THC and felony bail jumping, respectively. Penalty enhancers for second and subsequent offenses applied to each of the offenses to which he agreed to plead. The settlement conference summary notes indicate that, in exchange for Sell's no-contest pleas, the State would move to dismiss and read in all remaining counts. The State also would recommend a total sentence of twelve years in case number 07-CF-85, bifurcated as seven years' initial confinement (IC) and five years' extended supervision (ES). In case number 07-CF-179, the State would recommend a total sentence of seven and a half years on the delivery charge, bifurcated as five years' IC and two and a half years' ES, and a total sentence of six years on the bail-jumping charge, bifurcated as three years' IC and three years' ES. After some discussion, set forth

¹ The trial court informally consolidated the two underlying cases for purposes of the plea and postconviction motion hearings. This court granted Sell's motion to consolidate the cases for appeal.

below, clarifying the “seven/five” recommendation on case number 07-CF-85, the court accepted the agreement and Sell’s pleas. It sentenced Sell to three years’ IC plus two years’ ES in 07-CF-85, and to two years’ IC plus two years’ ES on each of the 07-CF-179 convictions. The court ordered the two 07-CF-179 sentences to run concurrent with each other, but the sentence on the delivery conviction to run consecutive to the 07-CF-85 sentence. Practically speaking, therefore, Sell would spend five years in IC and four on ES.

¶4 Postconviction, Sell moved to withdraw his pleas on grounds that the joint agreement was based on a legal impossibility because the State recommended an illegal sentence for the possession charge in case number 07-CF-85. Possession with intent to deliver between 200 and 1,000 grams of THC is a Class H offense, which carries a possible six-year maximum. *See* WIS. STAT. §§ 961.41(1m)(h)2. and 939.50(3)(h) (2007-08).² The penalty enhancer adds up to four more years, *see* WIS. STAT. § 961.48(1)(b), making Sell’s maximum exposure ten years. As noted, the State had recommended twelve years, bifurcated seven/five. Sell contended his pleas thus were not knowingly and understandingly entered because a plea to a legal impossibility renders the plea an uninformed one. *See State v. Woods*, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992).³

¶5 At the postconviction hearing, the court reviewed the transcript of the plea hearing where it had discussed with counsel the maximum penalties. The

² All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

³ Sell also contended trial counsel was ineffective for failing to object to the illegality fully and to timely and fully advise him regarding the State’s offer. As he does not renew this claim on appeal, we deem it abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

court also heard from Sell's trial counsel, who testified that his discussion with Sell focused on the total time to which the global plea exposed Sell. The court acknowledged that, while "more precision certainly would have been welcome" in stating the sentencing parameters, defense counsel's testimony and the court's own review of the plea hearing transcript satisfied it that Sell fully understood his exposure. The court denied the motion.

¶6 On appeal, Sell again seeks to withdraw his no-contest pleas. He contends the seven/five sentencing recommendation on 07-CF-85 is a legal impossibility which renders his pleas involuntary and uninformed and the entire joint plea agreement void as a matter of law. We ultimately disagree.

¶7 A defendant wishing to withdraw no-contest pleas after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). To meet this standard, he or she must show that serious questions affect the fundamental integrity of the plea. *State v. Dawson*, 2004 WI App 173, ¶6, 276 Wis. 2d 418, 688 N.W.2d 12. A plea to a legal impossibility renders the plea an uninformed one, *Woods*, 173 Wis. 2d at 140, and thus constitutionally invalid. *See Dawson*, 276 Wis. 2d 418, ¶6. Post-sentence plea withdrawal is a matter of right, not trial court discretion, when a defendant establishes a constitutional violation. *See id.*, ¶¶6-7. Whether a plea was knowingly and voluntarily entered is a question of constitutional fact. *Id.*, ¶7. We affirm the trial court's findings of evidentiary or historical facts unless they are clearly erroneous, but we independently determine whether the established facts constitute a constitutional violation warranting plea withdrawal. *Id.*

¶8 Sell relies on the written settlement conference summary which states the seven/five sentencing recommendation on 07-CF-85. We agree that such a sentence standing alone exceeds permissible limits, but this was part of a global recommendation. We may consider any remarks the court made during postconviction proceedings to explain the sentence imposed. See *State v. Santana*, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998). Our review of the whole record persuades us Sell understood and voluntarily entered the plea.

¶9 We begin with the transcript of the plea hearing. The trial court reviewed the settlement conference notes, recited the basics of the proposed agreement, and reminded Sell that he would be free to argue the sentence imposed. The court then described the proposed sentence, including the seven/five recommendation. Sell confirmed that he understood the proposed sentence and that the court was not bound by it.

¶10 At that point, the court recognized the discrepancy between the State's twelve-year recommendation in 07-CF-85 and the ten-year statutory maximum. Defense counsel and the prosecutor attempted to clarify the disparity. The prosecutor confirmed that, the notes notwithstanding, when they reviewed the cases, the "maximum IC was ... ten years" for 07-CF-85, and the twelve years was "the total sentence." The court then commented that, while it understood that the settlement conference notes indicated that all twelve years related to 07-CF-85, "I also understand what the statute says." The court continued:

My point is this: ... [T]he 12 years can be arrived at not necessarily with simply 07CF85, it ... can involve some consecutive time for one of the counts in [07-CF-179]... So just so it's understood that ... the maximum you're going to recommend is 12 years with a maximum of 7 years initial confinement; is that right?

The prosecutor assented, and defense counsel and Sell confirmed that they understood the total IC recommendation portion to be seven years.

¶11 At the postconviction motion hearing, the court recounted what transpired at the plea hearing. It reviewed the portion of the plea hearing transcript where it had recited the seven/five terms of the State’s proposal, advised Sell that it could sentence him to the maximum and that he faced a penalty enhancer, and Sell acknowledged that he understood all he had been told. The State conceded “that the parties contemplated too much [ES] as to Count 3” in 07-CF-85, and the court, too, acknowledged that “it was clear that the [S]tate was incorrect about what the maximum penalty could be in 07-CF-85.” The court is not bound by the terms of a plea agreement, however, and may accept the plea while rejecting the sentencing recommendation. *See Melby v. State*, 70 Wis. 2d 368, 384-85, 234 N.W.2d 634 (1975).

¶12 Indeed, the court stated that it “correctly understood that [the State’s recommendation] was a legal impossibility that really didn’t make much difference to me at that point one way or another because I wasn’t involved in it and it seemed to me the defendant really wasn’t either.” Since the agreement left Sell free to argue the sentence, the court said, “there had never been an agreement as to twelve years.” The court summarized the plea hearing as follows:

[M]y understanding of the upshot [was] the defendant realized that the maximum the state was going to be recommending, *and this is recommending and the defendant was free to argue*, seven years initial confinement and five years extended supervision, and I then took it because it was clear that the state was incorrect about what the maximum penalty could be in 07-CF-85 was that this was going to be then a combination of both of the cases, both 07-CF-85 and 07-CF-179. And ultimately that is what I conveyed to the defendant in this case (Emphasis added.)

The court concluded that the recommendations in the two cases were “bundled together,” and nothing suggested that Sell misunderstood at any time that the State would be recommending a seven/five sentence.

¶13 We appreciate that Sell’s assertion that his plea was uninformed is tied to his argument that pleading to a legal impossibility renders the plea an uninformed one. The cases he cites in support are distinguishable, however, because in each the defendant’s plea was *conditioned upon* a legal impossibility of which the defendant was unaware. In *Dawson*, for instance, the State agreed that it would move to reopen Dawson’s case and amend the charge to a lesser one upon his successful completion of probation. *Dawson*, 276 Wis. 2d 418, ¶2. Dawson’s agreement to an unconferrable future benefit rendered his plea unknowing and involuntary. *Id.*, ¶25. Likewise, in *Woods*, the defendant’s decision to plead guilty was influenced by inaccurate information that his adult-court sentence would be ordered consecutive to his current juvenile adjudication, a misapprehension shared by the defendant, the lawyers and the judge. *Woods*, 173 Wis. 2d at 137, 140. Agreeing to that legal impossibility necessarily rendered the plea an uninformed one. *Id.* at 140. Such is not the case here. Sell’s plea was not “conditioned upon” the length of ES. Rather, the credible evidence is that his focus was on the maximum IC the State would recommend. Further, the court made clear it knew the law permitted a ten-year maximum.

¶14 Beyond that, Sell’s claim that his plea was uninformed contradicts his representations at the plea hearing. The seven/five discussion played out in front of him, with his counsel present. He never indicated to the court or to his counsel that this was not the bargain he intended or desired to make, nor did he indicate that he had any questions. To the contrary, he assured the trial court that he understood the gist of the discussion and later answered “No” when the court

asked whether there was anything he did not understand. In addition, trial counsel testified at the postconviction motion hearing that Sell's greatest concern was the overall maximum incarceration and that Sell appeared to understand that portion of the plea. The trial court had observed Sell at the plea hearing and could assess his credibility. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The court reasonably could resolve the conflict between Sell's postconviction assertions that his plea was uninformed in favor of his earlier assurances from the plea hearing. The record as a whole satisfies us that Sell understood his plea when he entered it. *See State v. Van Camp*, 213 Wis. 2d 131, 149, 569 N.W.2d 577 (1997).

¶15 We heartily agree with the trial court that “more precision would have been welcome.” We admonish lawyers and judges alike to exercise more vigilance and clarity in crafting and accepting plea agreements. Based on the whole record, however, we cannot say that we have serious questions about the fundamental integrity of Sell's plea. *See Dawson*, 276 Wis. 2d 418, ¶6. He has not carried the heavy burden of showing that withdrawal is necessary to correct a manifest injustice. *See McCallum*, 208 Wis. 2d at 473.

By the Court.—Judgments and orders affirmed.

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

