RECEIVED
08-07-2009
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

SUPREME COURT

Case No. 2009AP3-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS VONDELL CROSS,

Defendant-Appellant.

ON PETITION TO BYPASS THE COURT OF APPEALS FROM AN APPEAL OF THE JUDGMENTS OF CONVICTION AND THE ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, THE HONORABLE ERIC J. LUNDELL PRESIDING

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

WILLIAM E. SCHMAAL
Assistant State Public Defender
State Bar No. 1017331

Office of State Public Defender
PO Box 7862
Madison, WI 53707-7862
(608) 267-1773
schmaalw@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

STATE OF WISCONSIN

SUPREME COURT

Case No. 2009AP3-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS VONDELL CROSS,

Defendant-Appellant.

ON PETITION TO BYPASS THE COURT OF APPEALS FROM AN APPEAL OF THE JUDGMENTS OF CONVICTION AND THE ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, THE HONORABLE ERIC J. LUNDELL PRESIDING

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

SUPPLEMENTAL ARGUMENT

CROSS IS ENTITLED TO WITHDRAW HIS GUILTY PLEA AS A MATTER OF RIGHT BECAUSE HE WAS AFFIRMATIVELY MISINFORMED ABOUT THE POTENTIAL MAXIMUM PUNISHMENT.

A. The State's Proposed New Test For "Manifest Injustice" In This Context Is Illogical and Unreasonable On Its Own Terms.

First, to the extent that the state's appellate position (respondent's brief, at 20) and the Supreme Court's bypass jurisdiction in this case rely upon a posited conflict between the court of appeals' decisions in

State v. Harden, 2005 WI App 252, 287 Wis. 2d 871, 707 N.W.2d 173, and ***State v. Quiroz***, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, such reliance is misplaced.

In ***State v. Quiroz***, the court of appeals concluded that the trial court had correctly informed Quiroz about the maximum term of imprisonment at the plea hearing. 2002 WI App 52, ¶¶4, 8, 12, 251 Wis. 2d 245, 249, 250, 252. Nevertheless, the court went on to hypothesize that "even if the maximum penalty had been overcalculated [*sic*], which we have determined it was not," Quiroz could not credibly argue that his motive to plead guilty would have changed. ***Id***., ¶16 at 253-54.

In ***State v. Harden***, however, the court of appeals correctly determined that the "even if" hypothesis in ***State v. Quiroz*** was non-controlling "dicta." 2005 WI App 252, ¶6, 287 Wis. 2d 871, 875. *See* ***State v. Sartin***, 200 Wis. 2d 47, 60 at n.7, 546 N.W.2d 449 (1996) ("dictum is a statement in a court's opinion that goes beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it"); ***State v. Harvey***, 2006 WI App 26, ¶19, 289 Wis. 2d 222, 237, 710 N.W.2d 482 (the court of appeals is not bound by dicta). This was so because Quiroz had not, in fact, been misinformed about the potential penalty, and his motives for deciding to enter the guilty plea were legally immaterial. ***State v. Bartelt***, 112 Wis. 2d 467, 484, 334 N.W.2d 91 (1983).

Second, the state's proposed new test for "manifest injustice" is apparently confined to guilty pleas which are the product of over-exaggerated information about the maximum penalties (respondent's brief, at 7-8, 10, 14-22). But why should this be so?

Certainly, an over-exaggeration of the maximum punishment might intimidate a defendant into entering a guilty plea out of fear. The accused could believe that it is better to curry favor with the judge by entering a guilty plea than to face the risk of a retributory punishment after a contested trial.

However, an under-exaggeration of the maximum punishment might equally entice a defendant into entering a guilty plea. The accused could believe that his or her punishment is "on sale," so to speak, and conclude that it is better to buy off the prosecution with a guilty plea than to risk paying a higher price after a trial. Why should such guilty pleas be immune from the state's proposed new test?

Indeed, why should guilty pleas that were entered without a correct understanding of either the charged offense or the waived constitutional rights be treated differently?

Third, the state's proposed new test for "manifest injustice" has no principled limits in terms of how much the maximum penalty may be over-exaggerated without affecting the withdrawabilty of the guilty plea.

Hence, the accused could presumably be misinformed about the applicable maximum penalty by a ratio of 101% to the correct penalty, or a ratio of 133-1/3% (as Cross was), or even a ratio of 500% and still be bound by his or her misinformed plea decision.

Fourth, the state's argument is flawed by the fallacy of equivocation. To be specific, the Attorney General uses the term "manifest injustice" in two different senses.

That is, in summarizing the applicable general principles of law, the state's appellate brief uses the phrase as a legal term of art, properly conceding that a guilty plea which is founded upon a defective understanding about the direct consequences of conviction constitutes a manifest injustice (respondent's brief, at 11-12).

Nevertheless, the state's brief also uses the phrase in a common way, concluding that Cross's misinformed guilty plea should not be withdrawable because the plea bargain was ostensibly so favorable to Cross that there is no manifest injustice, generally (respondent's brief, at 23-26).

Fifth, the central premise of the state's new test for "manifest injustice" is that the courts are capable of accurately determining whether misinformed defendants would have entered guilty pleas, anyway (respondent's brief, at 14-23).

But what special qualifications do trial judges and appellate judges have that would allow them to retrospectively assess why criminal defendants entered their guilty pleas? Truly, how many present Wisconsin judges have ever previously represented any criminal defendants in the trial courts so as to obtain realistic insight into the plea decision?

Additionally, the guilty plea decision is frequently influenced by "imponderable questions for which there are no certain answers." ***Brady v. United States***, 397 U.S. 742, 756 (1970). Criminal defendants can and do make judgments which seem improvident or are based upon a mistaken calculus, ***id***., or possibly even on irrational hopes or fears.

Further, how can the courts meaningfully gauge the strength of the state's case or the accused's prospects of defense from the meager record of a guilty plea hearing, in any event? Such an assessment would inevitably require a post-plea evidentiary hearing that is tantamount to a full-blown trial.

B. The State's Proposed New Test Is In Conflict With Wis. Stat. § 971.08(1)(a).

Wisconsin Statute § 971.08 provides, in relevant part, as follows:

> **971.08 Pleas of guilty and no contest; withdrawal thereof.**
>
> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

* * * *

On its face, the statutory phrase "with understanding of. . .the potential punishment" is plain and unambiguous. The defendant must comprehend the correct maximum penalty. If the defendant is given over-exaggerated or under-exaggerated penalty information, then the defendant does not understand the potential punishment.

The Attorney General makes no attempt to argue that § 971.08(1)(a) is facially ambiguous. Instead, the state cites to Federal Rule of Criminal Procedure 11 and case decisions from foreign jurisdictions as legal support for the proposed new test (respondent's brief, at 15-20).

However, Wisconsin law has previously developed the test to be applied when a mandatory statutory procedure is violated by the court. Under such circumstances, reversible error occurs unless there had been "substantial compliance" with the statute and the legislative goals were not frustrated. ***State v. Lehman***, 108 Wis. 2d 291, 314, 321 N.W.2d 212 (1982); ***State v. Coble***, 100 Wis. 2d 179, 211-13, 301 N.W.2d 221 (1981).

The Supreme Court has previously determined that the trial court's duty under § 971.08 is a mandatory duty. ***State v. Douangmala***, 2002 WI 62, ¶31, 253 Wis. 2d 173, 185-86, 646 N.W.2d 1. The Supreme Court has also previously determined that § 971.08 was patterned after Federal Rule of Criminal Procedure 11 as that rule existed when ***McCarthy v. United States***, 394 U.S. 459 (1969), was decided. ***State v. Bangert***, 131 Wis. 2d 246, 260-61, 389 N.W.2d 12 (1986). Consequently, the legislative goal of § 971.08 is to facilitate an accurate, contemporaneous determination that the defendant's guilty plea was knowing, intelligent and voluntary. ***State v. Bangert***, *supra*, at 261; ***McCarthy v. United States***, *supra*, at 467-69.

Applying these principles to Cross's guilty plea, it is readily seen that the trial court did not substantially comply with § 971.08(1)(a) when the court erroneously

told Cross that the maximum penalty was 40 years imprisonment, rather than 30 years imprisonment.

Correspondingly, the statutory goals were frustrated because the misinformation did not accurately and contemporaneously assure that Cross's plea was knowing and intelligent.

Therefore, a reversible error occurred.

Alternatively, even under the ordinary "harmless error" test (which the Attorney General does not argue for in this appeal), the Supreme Court may simply say that it cannot conclude beyond a reasonable doubt that Cross would have entered his guilty plea even if he had been correctly informed about the applicable penalty. *Cf*. ***State v. Carlson***, 2003 WI 40, ¶¶3, 46, 261 Wis. 2d 97, 100, 117, 661 N.W.2d 51 (violation of statutory mandate that jurors be able to understand the English language). *See also* ***State v. Smith***, 207 Wis. 2d 258, 280, 558 N.W.2d 379 (1997)(prejudice may be presumed when measurement of the harm would necessarily involve retrospective speculation).

C. The State's Proposed New Test Is In Conflict With Settled Wisconsin Law and the Doctrine of *Stare Decisis*.

Judicial respect for the rule of law, itself, means that a court should not depart from precedent without special justification. ***Johnson Controls, Inc. v. Employers Insurance of Wausau***, 2003 WI 108, ¶¶94-95, 264 Wis. 2d 60, 115-16, 665 N.W.2d 257. It is not sufficient for a court to overrule its precedent merely because courts in other jurisdictions have reached opposing conclusions. ***Id***., ¶100 at 119. Once a statute has been authoritatively interpreted, the chosen construction must ordinarily be maintained unless and until the legislature amends or repeals the statute. ***State v. Anthony D.B.,*** 2000 WI 94, ¶20, 237 Wis. 2d 1, 10-11, 614 N.W.2d 435.

Applying the doctrine of *stare decisis* to this case, the Wisconsin Supreme Court has repeatedly declared

that Wis. Stat. § 971.08(1)(a) means what it says, namely that the defendant must understand the potential punishment that he or she faces before entering a guilty plea. ***State v. Brown***, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 616-17, 716 N.W.2d 906; ***State v. Byrge***, 2000 WI 101, ¶¶57-60, 237 Wis. 2d 197, 233-34, 614 N.W.2d 477; ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 571, 605 N.W.2d 199; ***State v. Van Camp***, 213 Wis. 2d 131, 143, 569 N.W.2d 577 (1997); ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986); ***State v. Bartelt***, 112 Wis. 2d 467, 475, 334 N.W.2d 91 (1983).

Neither the defendant's subjective motives in deciding to enter the plea, ***State v. Bartelt***, *supra*, at 483-84, nor the likely outcome at a hypothetical trial, ***State v. Van Camp***, *supra*, at 153, are relevant to the validity of the guilty plea, itself.

If the record as a whole does not demonstrate that the defendant had a correct understanding of the requisite information, then the guilty plea is "void," ***State v. Bartelt***, *supra*, at 485, and the plea may be withdrawn "as a matter of right." ***State v. Brown***, *supra*, ¶19 at 611; ***State v. Van Camp***, *supra*, at 139, 154; ***State v. Bangert***, *supra*, at 283; ***State v. Bartelt***, *supra*, at 486. These pronouncements are not *dicta*, but rather controlling statements of Wisconsin law. *See* ***State v. Kruse***, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981); ***State v. Yancey***, 32 Wis. 2d 104, 109, 145 N.W.2d 145 (1966).

D. The State's Proposed New Test Is In Conflict With the Due Process Clause of the United States Constitution.

The federal constitution is the supreme law of the land, and it is binding on all state courts. U.S. CONST., Art. VI; ***State v. Jennings***, 2002 WI 44, ¶18, 252 Wis. 2d 228, 237-38, 647 N.W.2d 142.

In particular, the Due Process Clause of the Fourteenth Amendment requires that a guilty plea be knowing, intelligent and voluntary. ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969).

Under this standard, the defendant must be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel." ***Mabry v. Johnson***, 467 U.S. 504, 509 (1984), *quoting* ***Brady v. United States***, 397 U.S. 742, 755 (1970).

The direct consequences of a criminal conviction are the consequences that have a direct, immediate and largely automatic effect on the range of punishment. ***State v. Byrge***, 2000 WI 101, ¶60, 237 Wis. 2d 197, 234, 614 N.W.2d 477; ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 571, 605 N.W.2d 199; ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 636, 579 N.W.2d 698.[1]

How could a defendant be fully aware of the direct consequences of conviction if he or she had been told an over-exaggerated maximum penalty? And how could such a defendant be fully aware of the actual value of the plea bargain?

Moreover, it is impossible to determine whether the defendant would have decided to enter a guilty plea even if he or she had not been misinformed about the applicable penalties. Testimony on this point is merely "hypothetical," and any corresponding judicial "assumption" is "an insufficient predicate for a conviction" under the federal constitution. ***Henderson v. Morgan***, 426 U.S. 637, n. 12 at 643-45 (1976).

---

[1] For this reason, the Supreme Court should now overrule ***State v. Sutton***, 2006 WI App 118, 294 Wis. 2d 330, 718 N.W.2d 146, *rev. den*. 2006 WI 113, 296 Wis. 2d 63, 721 N.W.2d 486, pursuant to the Court's responsibility to comply with the directive of the United States Supreme Court in ***Mabry v. Johnson***. *See* ***State v. Ferguson***, 2009 WI 50, ¶30 at n.9, ___ Wis. 2d ___, 767 N.W.2d 187.

In ***Sutton***, the court of appeals declared that a guilty plea is constitutionally valid even though the defendant had not understood the maximum term of initial confinement that could be imposed. ***State v. Sutton, supra,*** ¶1 at 334, ¶15 at 341. This was an incorrect interpretation because the hypothetical possibility of additional confinement if the defendant's term of extended supervision is revoked in the future is plainly not a direct consequence of conviction.

In the end, the Attorney General's references to case decisions from foreign jurisdictions (respondent's brief, at 15-20) must be rejected because those case decisions did not meaningfully address ***Mabry v. Johnson*** and ***Henderson v. Morgan***.

Indeed, the state's proposed new test for "manifest injustice" is expressly refuted by the United States Supreme Court's forty-year-old decision in ***Boykin v. Alabama***, 395 U.S. 238, 244 (1969) (*emphasis added*):

> The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that *there was reversible error* 'because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty.'

CONCLUSION

For the reasons set forth above, Cross respectfully requests the Supreme Court to enter an order reversing the trial court's orders denying post-conviction relief, and vacating the original judgment of conviction and the superceding judgment of conviction after re-sentencing, with directions for Cross's guilty plea to be withdrawn and the original charge reinstated.

Dated this 6th day of August, 2009.

Respectfully submitted,

WILLIAM E. SCHMAAL
Assistant State Public Defender
State Bar No. 1017331

Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608) 267-1773
schmaalw@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,447 words.

Dated this 6th day of August, 2009.

Signed:

WILLIAM E. SCHMAAL
Assistant State Public Defender
State Bar No. 1017331

Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608) 267-1773
schmaalw@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of August, 2009.

Signed:

WILLIAM E. SCHMAAL
Assistant State Public Defender
State Bar No. 1017331

Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608) 267-1773
schmaalw@opd.wi.gov

Attorney for Defendant-Appellant