STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY L. FINLEY, JR.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY,
WILLIAM M. ATKINSON, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

There is no manifest injustice that might entitle Finley to withdraw his plea since he has received a sentence he was told and knew he could get when he entered the plea.

Ordinarily, a defendant who wants to withdraw a plea of guilty or no contest after sentencing has a heavy burden to show by clear and convincing evidence that his plea must be withdrawn to correct a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482; *State v. Dawson*, 2004 WI App 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12; *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. To show manifest injustice the defendant must show there is a serious flaw in the fundamental integrity of his plea. *Dawson*, 276 Wis. 2d 418, ¶ 6; *Thomas*, 232 Wis. 2d 714, ¶ 16.

When the supreme court adopted the manifest injustice test in *State v. Reppin*, 35 Wis. 2d 377, 151 N.W.2d 9 (1967), it also adopted along with that test the ABA Standards which specify several situations where a manifest injustice may be shown. *Thomas*, 232 Wis. 2d 714, ¶ 17; *Reppin*, 35 Wis. 2d at 385-86 & n.2. The standards for plea withdrawal in this state continue to conform to the ABA standards. *State v. Bollig*, 2000 WI 6, ¶ 35, 232 Wis. 2d 561, 605 N.W.2d 199.

Among other things, under the adopted standards withdrawal of a plea may be necessary to correct a manifest injustice if the defendant proves that his plea was entered "'without knowledge . . . that the sentence actually imposed could be imposed.'" *Reppin*, 35 Wis. 2d at 385 n.2 (quoting tentative ABA Standard 2.1(a)(ii)(3)). *Accord, e.g., State v. Rock*, 92 Wis. 2d 554, 558, 285 N.W.2d 739 (1979); *Ernst v. State*, 43 Wis. 2d 661, 666, 170 N.W.2d 713 (1969), *modified in part on other*

grounds, *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

So in determining whether there has been a manifest injustice, the question is not whether the defendant knew the correct maximum penalty for the offense to which he pleaded. In determining whether there has been a manifest injustice the question is more pragmatic, i.e., whether the defendant knew that the sentence which was *actually imposed* on him, whether the maximum or something less, could have been imposed on him.

The architects of this standard expressly contemplated that it would apply to the situation where the court erroneously advised the defendant that the penalty was too low. The commentary to what is now Standard 14-2.1(b)(ii)(C) states that "if the judge misstates the maximum penalty as being lower than that provided by law but the defendant's sentence does not exceed that stated as possible by the judge, there is no manifest injustice." III American Bar Association Standards for Criminal Justice, Pleas of Guilty, commentary to Standard 14-2.1(b)(ii)(C) at p.14-57 (2d ed. 1986 supp.). *See Taylor*, 347 Wis. 2d 30, ¶ 50 (noting commentary).

If the defendant pleads believing he could get a particular sentence, and he then gets the sentence he knew he could get, there is no serious flaw in the fundamental integrity of his plea. The situation is no different than if the defendant was correctly advised of the higher maximum penalty provided by law, and he actually received the statutory maximum he was told he could get. In either case, the defendant pleads believing he could expect to get a sentence of a certain severity and his expectations are not exceeded.

Indeed, when a defendant is told that the most he could get is less than what he really could get, and he gets less than what he really could get, he gets a benefit, not an injustice.

The defendant's disappointment in receiving a sentence that is harsher than the one he hoped he would get, but is no more severe than the one he knew he could get, does not transform this benefit into an injustice. *See Taylor*, 347 Wis. 2d 30, ¶ 49; *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995).

This principle was applied, if not expressly discussed, in *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906.

In *Brown* the court specifically reiterated that the test to be applied when a defendant seeks to withdraw his plea after sentencing is the manifest injustice test. *Brown*, 293 Wis. 2d 594, ¶ 18. The court reaffirmed that a defendant will not be allowed to withdraw his plea unless a refusal to allow withdrawal would be manifestly unjust. *Brown*, 293 Wis. 2d 594, ¶ 18.

Brown was advised of the maximum statutory penalty for each of the two counts to which he pleaded, but was not told that the sentences could run consecutively thereby doubling the potential punishment. *Brown*, 293 Wis. 2d 594, ¶ 78. Brown argued that the failure to advise him that he could be imprisoned for more than the maximum of either individual sentence rendered his plea unknowing, involuntary and unintelligent. *Brown*, 293 Wis. 2d 594, ¶¶ 35, 78.

Reasoning that most defendants would know they could get consecutive sentences, the court was unwilling to let Brown withdraw his plea in the absence of an allegation that he did not know his maximum potential penalty could be more than he was told if his sentences were made consecutive. *Brown*, 293 Wis. 2d 594, ¶ 78.

But the court added that even if it was error to fail to advise the defendant that his sentences could be consecutive, any error would not be grounds to withdraw the plea because the sentence actually imposed did not exceed the maximum he could get for concurrent sentences. *Brown*, 293 Wis. 2d 594, ¶ 78.

Implied is the same principle embodied in the *Reppin* standard, i.e., an error in incorrectly advising a defendant about the maximum potential penalty does not result in a manifest injustice when the defendant is actually given a sentence within the range of punishment he is told and knows could be imposed. When the defendant is erroneously given to believe that the maximum penalty is less than it really is, the error does not affect the knowing character of his plea when the defendant is actually given the lesser sentence he is told and knows he could get.

The court expressly applied this principle in *Taylor*.

There, the court refused to let the defendant withdraw his plea for two reasons. One reason is that Taylor was in fact aware of the correct maximum penalty. *Taylor*, 347 Wis. 2d 30, ¶ 54. The other reason was that, under the precedent of *Brown*, Taylor actually received the term of imprisonment less than the statutory maximum that he had erroneously been told he could get. *Taylor*, 347 Wis. 2d 30, ¶¶ 42, 52, 54-55.

There was no manifest injustice in erroneously advising Taylor that he could get a sentence of six years, which was less than the correct statutory maximum of eight years, when the sentence of six years actually imposed did not exceed the sentence Taylor was told and knew he could get. *Taylor*, 347 Wis. 2d 30, ¶¶ 42, 52, 54-55.

The decision in *Bangert* changed the ordinary burden of proof in the situation where the defendant was given erroneous information prior to entering his plea. *Bangert* requires the defendant to show only that the court did not provide the correct information at the plea hearing, after which the burden shifts to the state to prove that the plea was knowing, voluntary and intelligent despite the misinformation. *Bangert*, 131 Wis. 2d at 274-75.

Thus, a *Bangert* error is not harmful per se. It simply shifts the burden from the defendant to show manifest injustice to the state to show no injustice. And although there might be a procedural error if the court does not advise the defendant of the correct maximum penalty, there is no constitutional error if the defendant has sufficient information about the penalty to make his plea knowing, voluntary and intelligent.

The shift in procedure made by *Bangert* did not change or purport to change existing substantive law regarding the knowledge a defendant must possess to make his plea knowing, voluntary and intelligent. Nothing in *Bangert* suggests some constitutional requirement that the defendant know in every case the precise legal maximum potential penalty.

Nothing in *Bangert* suggests any intent to discard, replace, modify or change the substance of the manifest injustice test adopted in *Reppin* or any part of the test that was adopted. To the contrary, the manifest injustice test was reiterated in *Bangert*, where the court cited with approval the page of its decision in *Rock* where the *Reppin* standard is quoted. *Bangert*, 131 Wis. 2d at 283 (citing *Rock*, 92 Wis. 2d at 558 (quoting *Reppin*, 35 Wis. 2d at 385 n.2)).

The substantive law after *Bangert*, as it was for nearly twenty years before *Bangert*, was that withdrawal of a plea

could be necessary to correct a manifest injustice if the plea was entered without knowledge that the sentence actually imposed could be imposed. The only difference after *Bangert* was that the ultimate burden shifted to the state to prove that the plea was entered with this knowledge.

When the defendant shows that he was misinformed about the maximum penalty, the state must prove that the defendant's plea was nevertheless knowing, voluntary and intelligent. The state proves that the plea was sufficiently knowing to meet the manifest injustice test when it proves that the defendant was told and knew the sentence actually imposed could be imposed.

In this case, the state proved that the defendant-appellant, Timothy L. Finley, Jr., was told and knew that the sentence which has now been imposed on him could be imposed.

Finley was erroneously told that the maximum sentence that could be imposed was nineteen and one-half years (44:1; 90:4).

Although the circuit court initially imposed the correct maximum penalty of twenty three and one-half years (92:30-31), the court subsequently modified Finley's sentence to a term of nineteen and one-half years (93.2:23-24, A-Ap:133-34; 109:1, A-Ap:137), the sentence Finley was told and knew he could get.

The circuit court then denied Finley's motion to withdraw his plea in part because the initial injustice of sentencing him to a term that was longer than the one he was told he could get was corrected (109:3-4, A-Ap:139-40).

Although this case differs procedurally from its predecessors in that the sentence initially imposed was unjust, that fact does not dictate a different result.

When a defendant appeals from an order refusing to allow him to withdraw his plea, the issue is not whether the plea should have been accepted but whether, long after the plea was accepted, the defendant should have been permitted to withdraw it. *Thomas*, 232 Wis. 2d 714, ¶ 23; *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988); *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978).

Because any injustice in erroneously advising Finley about the penalty he faced has been corrected, there is presently no manifest injustice which would insist that Finley should be allowed to withdraw his plea.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit refusing to allow Finley to withdraw his plea should be affirmed.

Dated: February 27, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,907 words.

Dated this 27th day of February, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 27th day of February, 2015.

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