STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP002488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY L. FINLEY, JR.

Defendant-Appellant.

On Notice of Appeal From a Judgment of Conviction
and Order Denying Defendant's Postconviction Motion
Entered in Brown County, the Honorable
William M. Atkinson, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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Where the Plea Colloquy is Indisputably Incorrect, and the State Fails to Prove the Defendant Understood the Maximum Potential Penalty, The Trial Court Cannot Cure the Error By Modifying the Defendant's Sentence.

The state does not dispute that the court failed to inform Timothy Finley of the correct penalty at the time that he entered his plea. Nor does the state argue it met its burden of proving, at the postconviction motion hearing, that Finley nevertheless understood the maximum penalty he faced as a result of his plea. Seeming to depart from ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) and ***State v. Brown***, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906, the state instead argues that a more "pragmatic" test should apply to a motion for plea withdrawal. That is, whether a manifest injustice exists, warranting plea withdrawal, when "the defendant knew that the sentence which was *actually imposed* on him, whether the maximum or something less, could have been imposed on him." (State's brief at 3, emphasis in original).

While the state is correct that plea withdrawal cases use the phrase "manifest injustice," the state misreads those cases in a way that ignores both Wis. Stat. § 971.08, and cases which hold that a plea which is not knowing, intelligent and voluntary violates due process. *See e.g.* ***Brown*** at ¶18.

As noted, plea withdrawal cases use the term "manifest injustice." Thus, in ***Brown***, the court said: "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to

allow withdrawal of the plea would result in "manifest injustice." In the next sentence, however, the court explained that a defendant may meet this burden by showing he did not knowingly, intelligently, and voluntarily enter the plea. The court continued: "when a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea 'violates fundamental due process.'" ***Id.*** at ¶19.

As Justice Prosser has explained, over time the court has shifted its focus in plea withdrawal cases from the "manifest injustice" test to "the development of rules for particular fact situations." ***State v. Taylor***, 2013 WI 34, ¶66, 347 Wis. 2d 30, 69, 829 N.W.2d 482. (Prosser, J. concurring). Justice Prosser wrote:

> For instance, our rules for plea withdrawal because of a defective plea colloquy were established in ***Bangert*** and restated in ***Brown***. Our rules for plea withdrawal on account of ineffective assistance of counsel are found in ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433. In recent years, our attention has often been directed more toward the application of these rules than to the broader mantra of "manifest injustice."

Id.

"Manifest injustice" then, is more of a concept, or an umbrella term for the various theories for plea withdrawal. A specific theory for plea withdrawal is that presented here: a plea is not knowing and intelligent when the defendant does not know the correct maximum penalty at the time he enters his plea. To repeat ***Brown***, a plea which is not knowing, intelligent and voluntary violates fundamental due process, and the defendant is therefore entitled to withdraw that plea as a matter of right. ***Brown***, 293 Wis. 2d at 611, ¶19.

The state also misstates the law when it discusses ***Bangert***. The state writes that the defendant need only show "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." (State's brief at 6). This is incorrect. The defendant must demonstrate a lack of conformance to Wis. Stat. § 971.08 or other mandated duties, *and* must also allege he did not in fact know or understand the information which should have been provided at the plea hearing. ***Bangert***, 131 Wis. 2d at 274. As such, it is not enough that the court missed a step in the colloquy, for example. The defendant must also be able to allege he did not in fact know or understand that information--a significant allegation which will be subject to cross-examination at a subsequent postconviction hearing.

The state continues its misreading of ***Bangert*** when it says that 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 justice." (State's brief at 6). The burden is not shifted to the state to prove "no justice." ***Bangert*** is clear. The burden shifts to the state to prove that the defendant's plea was knowingly, voluntarily, and intelligently entered despite the inadequacy of the record at the time of the plea's acceptance. ***Bangert***, 131 Wis. 2d at 274. *See also* ***Brown***, 293 Wis. 2d at 619, ¶40. Pursuant to ***Bangert*** and ***Brown***, then, the relevant inquiry is whether the defendant's plea was knowing, voluntary and intelligent. If it is not, that plea is a violation of due process, and can be withdrawn. The question is not a broader "manifest injustice" test as the state suggests. If the plea is not knowing and voluntary, then it does not comply with the constitutional or statutory requirements for a valid plea, and to deny the defendant the opportunity to withdraw that plea constitutes a

manifest injustice. *See* ***State v. Dawson***, 2004 WI App 173, ¶6, 276 Wis. 2d 418, 423, 688 N.W.2d 12.

The state also contends the court cured any error in this case by modifying Finley's sentence to the maximum term he had been told at the time of the plea hearing. The state argues at page 5 of it brief:

> 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.

While the state relies on ***Taylor*** for its argument, that reliance is misplaced because in that case, the supreme court expressly concluded that Taylor was aware of the correct maximum penalty. The court relied in part on the plea questionnaire tendered there, which correctly stated the maximum penalty. ***Id.*** at ¶38. In Finley's case, it is undisputed that the plea questionnaire stated the wrong maximum penalty. Therefore, although the supreme court did find significant the fact that Taylor actually received the sentence he had been informed he could receive, the court also reasoned that in fact Taylor knew the correct maximum penalty. ***Taylor***, 347 Wis. 2d at 65, ¶54. Here, although the court ultimately modified Finley's sentence so that it did not exceed the misinformation on the plea questionnaire and the number stated aloud at the plea hearing, there has been no finding that Finley in fact entered his plea knowing the correct maximum possible penalty.

The state also contends that a defendant like Finley, who receives incorrect information about the maximum potential penalty and then receives that sentence, "benefits" from that error. The state writes: "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." (State's brief at 4). Under the state's logic, a defendant who faces a 40-year felony, but pleads with the understanding that the maximum penalty is 10 years, and who then is sentenced to 10 years, is not entitled to withdraw his plea, as he has somehow received a benefit. Such a suggestion is directly contrary to the requirement that for a plea to be valid, the defendant must understand the effects of that plea. *See e.g.* ***Brown***, 293 Wis. 2d at 618, 37. In addition, the ill that ***Bangert*** seeks to cure is not simply a sentence that is unexpected, but should also be that the criminal justice system benefits when a defendant's plea is knowing and voluntary, and indeed, the constitution so requires. *See* ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969).

CONCLUSION

For these reasons, and for the reasons argued in his first brief to this court, Mr. Finley respectfully requests that the court reverse the trial court's denial of his motion to withdraw his no contest plea.

Dated this 17th day of March, 2015.

Respectfully submitted,

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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 1,410 words.

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 17th day of March, 2015.

Signed:

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