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STATE OF WISCONSIN

SUPREME COURT

Case No. 2014AP2488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TIMOTHY L. FINLEY, JR.,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT III,
REVERSING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY,
THE HONORABLE WILLIAM M. ATKINSON, PRESIDING

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

Reduction of a defendant's sentence is a proper remedy for misinforming him about the maximum penalty.

This appeal is not about "protect[ing] the plea-taking process," as Finley thinks. Brief for Defendant-Appellant at 2.

This appeal involves only the appropriate remedy for the admitted error in taking Finley's plea.

In *State v. Bangert*, 131 Wis. 2d 246, 252, 272-76, 389 N.W.2d 12 (1986), this court adopted a remedy for defects in the plea acceptance process. This court is free to modify its adopted remedy to cover a kind of error it has not expressly considered in previous cases.

Finley attempts to blame the State for this error. Brief for Defendant-Appellant at 4.

But the blame plainly lies with Finley's attorney who added up the several applicable penalties wrong in the first place, and with the circuit court which repeated counsel's mathematical mistake (63:3; 90:4; 93.2:12, 15). Defense counsel has an obligation to correctly inform his client of the consequences of a plea, while the ultimate duty to comply with plea procedures falls squarely on the court. *Bangert*, 131 Wis. 2d at 278-79 & n.6.

The prosecutor may have some responsibility for the mistake, *see Bangert*, 131 Wis. 2d at 279, but only because he did not correct it, not because he made it.

Thus, Finley makes another mistake when he asserts that the "state's argument here is that when it makes a mistake . . . the state gets to choose the remedy that is most convenient for the state." Brief for Defendant-Appellant at 4.

Actually, the State is offering the remedy for the mistake made by Finley's attorney and the court that is most equitable for everyone concerned in this case. Since the mistake is primarily attributable to Finley, *see Coleman v. Thompson*, 501 U.S. 722, 752 (1991), he should not get to choose the remedy that is most convenient for him.

Finley errs again when he accuses the State of conflating the manifest injustice test. Brief for Defendant-Appellant at 7.

The State is not basing its argument in this case on the manifest injustice test. Rather, the State is focusing on the development of a rule for a particular factual situation. *See State v. Taylor*, 2013 WI 34, ¶ 66, 347 Wis. 2d 30, 829 N.W.2d 482 (Prosser, J., concurring).

The fact that there is no manifest injustice when a defendant's sentence does not exceed that stated as possible by the court, *State v. Reppin*, 35 Wis. 2d 377, 385 n.2, 151 N.W.2d 9 (1967) (quoting tentative ABA Standard 2.1(a)(ii)(3)); III American Bar Association Standards for Criminal Justice, Pleas of Guilty, commentary to present Standard 14-2.1(b)(ii)(C) at p.14-57 (2d ed. 1986 supp.), is just one component of the State's argument for a rule regarding the proper remedy for a misstatement of the maximum penalty.

Finley suggests no reason why the absence of a manifest injustice is not one factor that can properly be considered in determining the appropriate remedy for the misstatement.

The authority cited above shows that Finley is wrong when he asserts that "a *Bangert* violation is in and of itself a manifest injustice." Brief for Defendant-Appellant at 8. A failure to advise a defendant of the correct maximum penalty is a manifest injustice only when the sentence imposed exceeds the sentence the defendant is told he can get.

Finley misses the State's point when he questions whether *Taylor* and *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, support the State's argument. Brief for Defendant-Appellant at 9-11.

Bangert stated that "when a defendant establishes a denial of a relevant constitutional right, withdrawal of the plea is a matter of right," and the court "has no discretion . . . in such an instance." *Bangert*, 131 Wis. 2d at 283.

However, the State's point regarding *Taylor* and *Cross* is that these more recent cases hold that a defendant's failure to know the correct maximum penalty is not necessarily a due process violation. *Taylor*, 347 Wis. 2d 30, ¶ 33 & n.8; *Cross*, 326 Wis. 2d 492, ¶¶ 29-30, 33, 36-37. Indeed, as Finley correctly notes, *Cross* indicated that a misstatement about the maximum penalty may not even be a *Bangert* violation, much less a due process violation. Brief for Defendant-Appellant at 9.

So as the State argued in its opening brief, if a defendant's failure to know and understand the correct maximum penalty is not a per se violation of the defendant's constitutional rights, then withdrawal of his plea is not a per se remedy for the entry of his plea without such knowledge.

Finley has no response to this logic.

Finley incorrectly asserts that the State relied on Wis. Stat. § 973.13 in the court of appeals. Brief for Defendant-Appellant at 11. The State never even mentioned this statute in its arguments in either of the two appeals pursued by Finley.

But as long as Finley brought it up, he should have explained why the rationale of the statute, i.e., that an error in misstating the maximum sentence can be cured by reduction of the sentence, should not apply when the maximum stated is lower than the actual maximum just as it applies when the maximum stated is higher than the actual maximum. *See Cross*, 326 Wis. 2d 492, ¶¶ 34-35.

Reducing a defendant's sentence obviously does not change the statutory maximum penalty, as Finley contends. Brief for Defendant-Appellant at 14-15.

The maximum penalty is not the only penalty established by statute for an offense. It is only the top of a range of penalties. A court has discretion to impose a sentence anywhere within the range. *Hanson v. State*, 48 Wis. 2d 203, 206-07, 179 N.W.2d 909 (1970).

But there are limits. A court is always constrained to impose the minimum amount of confinement consistent with sentencing objectives. *State v. Gallion*, 2004 WI 42, ¶¶ 44-45, 270 Wis. 2d 535, 678 N.W.2d 197. Furthermore, similarly to the situation in this case, a sentence previously imposed is presumed to be the maximum that could be imposed when a defendant is resentenced following a successful attack on the first sentence. *State v. Sturdivant*, 2009 WI App 5, ¶ 8, 316 Wis. 2d 197, 763 N.W.2d 185.

The remedy of reducing a defendant's sentence to the maximum he is told he could get does not change the maximum statutory penalty. It simply limits the court's discretion to impose a sentence within the range established by the legislature. This might have the practical effect of lowering the available maximum penalty, but it does not actually change the maximum.

Finley contends that reduction of a sentence because of a miscalculation would result in the legislature's authority being ignored, the victim's input not being fully considered and the court's original sentencing intent being thwarted. Brief for Defendant-Appellant at 15.

If it would do any of these things, it would be to much less an extent than withdrawing a plea, resulting in the

sentence being completely erased and the conviction along with it.

The only remedy that avoids the problems raised by Finley is allowing his original maximum sentence to stand.

Contrary to Finley's view, Brief for Defendant-Appellant at 16-17, this case is not about the inherent authority of a circuit court to modify a sentence. This case is about the authority of the supreme court to fashion a remedy that involves modification of a sentence.

In any event, the remedy of reducing a sentence when the defendant has been incorrectly advised of, but sentenced to, the actual maximum fits all three of the instances where the circuit court has inherent authority to modify a sentence. *See generally State v. Dowdy*, 2010 WI App 158, ¶ 12, 330 Wis. 2d 444, 792 N.W.2d 230. Reducing the sentence corrects a sentence that is illegal because it exceeds the maximum the defendant was told he could get. Reduction is based on a new factor, i.e., the correct maximum which was unknown or overlooked at the time of the original sentence. And reduction corrects a sentence that is unduly harsh because the defendant was not told he could get a sentence that severe.

Finley criticizes the cases from other jurisdictions cited by the State because most of them involve a failure to inform the defendant about a special parole term that does not affect the period of incarceration unless the defendant violates his parole. Brief for Defendant-Appellant at 18.

If Finley means to suggest that in Wisconsin the court does not have to correctly inform the defendant about the extended supervision portion of a bifurcated sentence, but only the period of incarceration, he cites no authority to support such a rule.

Finley also says that the State's federal cases are inapposite because they rely on Fed. R. Crim. P. 11, which is subject to a harmless error test that is not sanctioned by *Bangert*.

But this court had this to say about Rule 11 in *Cross*:

> Finally, we see an analogue in Federal Rule of Criminal Procedure 11, which governs pleas. The rule specifies that a court accepting a guilty plea must inform the defendant and ensure the defendant understands "any maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed. R. Crim. P. 11(b)(1)(H). Unlike the Wisconsin Statutes, the federal rules specifically require that the defendant know and understand the "maximum" penalty. Yet, Rule 11(h) states that any "variance from the requirements of the rule is harmless error if it does not affect substantial rights." By clear implication, the failure of the defendant to know and understand the precise maximum is subject to a harmless error test. It is not a per se violation of the defendant's due process rights.
>
> It is clear, then, that a defendant's due process rights are not necessarily violated when he is incorrectly informed of the maximum potential imprisonment.

Cross, 326 Wis. 2d 492, ¶¶ 36-37.

Finley's contention that only the remedy of plea withdrawal will "incentivize" courts to pay attention at plea proceedings, Brief for Defendant-Appellant at 20, conflicts with his previous argument that reduction of a sentence because of a miscalculation would result in the court's original sentencing intent being thwarted. Brief for Defendant-Appellant at 15.

Having their original sentencing intent thwarted would likely give most judges an incentive to get the maximum penalties right in future cases.

Finley argues that a defendant cannot assess the sentence he may actually get when he is misinformed about the maximum. Brief for Defendant-Appellant at 21-22.

Although a decision to plead guilty may be influenced by many imponderables, there is only one ponderable involved in this case, i.e., the maximum penalty that could be imposed on a defendant who admits his guilt. A defendant is entitled to know only the maximum sentence he could possibly get, not the lesser sentence he will actually get. *See Cross*, 326 Wis. 2d 492, ¶ 29 (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

Moreover, under Finley's hypothetical, if a defendant does not think he will actually get a sentence as severe as the sentence he is told is the maximum, he would have the same thoughts where the maximum sentence is even greater than the lesser incorrect maximum he did not think he would get.

Finley's argument about the expected sentence actually underscores the State's concern that a defendant will attempt to use misinformation about the maximum penalty as an excuse to withdraw a plea when the real reason he wants to withdraw the plea is that he did not get the particular sentence below the maximum that he thought he would get.

United States v. Padilla, 23 F.3d 1220 (7th Cir. 1994), which Finley cites, Brief for Defendant-Appellant at 23, is plainly inapposite here. The error in that case was the failure to advise the defendant about a mandatory minimum penalty, which could not be corrected by reducing the defendant's sentence below the penalty that had to be imposed by law.

Here, the maximum sentence is not mandatory and can be reduced to any penalty in the range below the maximum.

Finley's reliance on *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), is also misplaced because the error there, i.e., imposition of a sentence that was not authorized by law, could not be corrected by reducing a sentence that was void in the first place.

Finley complains that a remedy that calls for reduction of the sentence in most cases but allows for withdrawal of a plea in exceptional cases is unworkable. Brief for Defendant-Appellant at 27-28.

Yet, this court has repeatedly indicated that reversal in the interest of justice in exceptional cases is a workable test. *See, e.g., State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60; *State v. Burns*, 2011 WI 22, ¶ 25, 332 Wis. 2d 730, 798 N.W.2d 166; *State v. Armstrong*, 2005 WI 119, ¶ 114, 283 Wis. 2d 639, 700 N.W.2d 98; *State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996). *See also Bangert*, 131 Wis. 2d at 292 (where either specific performance of a plea bargain or withdrawal of the plea is available as a remedy, the remedy chosen is in the discretion of the court).

CONCLUSION

The entry of Finley's plea was defective because he was misadvised that the maximum penalty was lower than the actual statutory maximum, and he was then sentenced to the actual maximum he did not know he could get. The question on this appeal involves the proper remedy for this error.

The State respectfully submits that the proper remedy is reduction of Finley's sentence to the maximum he was told and believed he could get when he entered his plea.

When Finley entered his plea, he was told he could be given a sentence of as much as 19.5 years. Finley knowingly took the risk that he could be sentenced to 19.5 years in prison when he entered his plea. Finley has not satisfactorily explained why it would be unfair in any way to correct the error in misinforming him about the maximum sentence by conforming his sentence to the sentence he was informed and believed he could get when he pleaded.

This remedy puts Finley back in exactly the position he believed he was in when he entered his plea without unnecessarily infringing on the interests of the State, the victim, and the witnesses in the finality of Finley's conviction.

It is therefore respectfully submitted that the decision of the court of appeals should be reversed, and that the judgment and order of the circuit court should be reinstated and affirmed.

Dated: March 16, 2016.

Respectfully submitted,

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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 2,442 words.

Dated this 16th day of March, 2016.

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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 16th day of March, 2016.

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