STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP2062-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRANDON E JORDAN,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S REPLACEMENT BRIEF AND APPENDIX

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 16, THE HONORABLE RHONDA L. LANFORD, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication as it believes that this case involves well-established principles of law and the parties' briefs fully address the issues on appeal.

STATEMENT OF THE FACTS

On April 26, 2013, the defendant, Brandon Jordan, entered a guilty plea to one count of violating a harassment order, contrary to Wis. Stat. § 813.125(7), He was represented by Attorney Tonya Turchik for this initial hearing. (58:5; Ap. A). He was referred to the Deferred Prosecution Program (DPP) and on June 12, 2013 he signed the contract, agreeing to the conditions set forth by DPP. (20:1; Ap. B). Since that time, there were extensive correspondences between DPP, Jordan, Attorney Winnig, and Assistant District Attorney (ADA) Schlipper, as listed below:

- August 8, 2013: Warning letter sent to Defendant from DPP stating that he has done nothing to fulfill his contract.

- March 12, 2014: Defendant signed a Contract Extension, extending his contract to September 12, 2014.

- June 27, 2014: Letter to the court outlining Defendant's total non-compliance with services.

- July 2, 2014: DPP agreement revoked, Adjudication/Sentencing set for July 17, 2014.

- July 15, 2014: Attorney Turchik withdrew from the case.

- July 17, 2014: Defendant appears with Attorney Winnig.

- July 17, 2014: Modification of Bond Condition: “Defendant is to notify Deferred Prosecution Unit (DPU) when entering Dane County with dates after July 24, 2014”.

- July 17, 2014: State agreed to check with DPP regarding a re-referral.

- July 29, 2014: ADA Schlipper sent Attorney Winnig a list of things that needed to be completed in order for Defendant to be re-referred to DPP. That list included evidence of enrollment in an abuser treatment program, submitting essays, and paying a program fee.

- July 29, 2014: Attorney Winnig responds that he will get the information to Defendant immediately.

- October 7, 2014: ADA Schlipper received an email from Pat Hrubesky (DPP Director) stating that Defendant may be re-referred when he is enrolled and participating in certified abuser treatment.

- October 16, 2014: ADA Schlipper sent an email to Attorney Joel Winnig stating that Defendant cannot be re-referred until he enrolls in certified abuser treatment.

- October 8, 2014: Received an email from Pat Hrubesky indicating that Defendant had an appointment scheduled with Family Services on October 28, 2014 (ADA Schlipper did not receive this until after ADA Schlipper had sent the October 16 email to Attorney Winnig).

- October 28, 2014: Defendant attended an assessment appointment with Family Services, but the Family Services staff was unable to complete the assessment until she received the police reports. She asked Defendant to provide a copy of the police report, and an appt. was scheduled for November 4, 2014.

- November 4, 2014: Family Services appointment was cancelled because Defendant did not provide the police reports. DPP staff Sue Barnett did fax them the report, but it was after the scheduled appointment time. Defendant did not notify Ms. Barnett of the dates that he would be staying in Madison.

- November 4, 2014: Family services offered Defendant two appointment times for the week of November 4th, and he had not called back to confirm either appointment

- November 7, 2014: Letter sent to Defendant stating that to be considered for re-referral, Defendant must answer appeal questions and be enrolled and participating in abuser treatment and provide evidence within five days of the November 7 letter.

- November 10, 2014: Defendant attended another intake session at Family Services. He reported that he would get back to Family Services about where he plans to attend treatment. He did not sign a contract for treatment.

- Between November 10 and November 14, 2014: Defendant was given a packet from DPP, through Family Services.

- November 17: Defendant called Family Services inquiring about DV treatment, information about therapists in NY, and what would be considered as acceptable treatment. The Family Services treatment provider gave him the criteria as well as some options that she had found in NY. Defendant stated that he would be in touch with her.

- November 19, 2014: Defendant provided an income verification worksheet to DPP.

- November 17, 2014: Defendant received an email from Sue Barnett, stating that everything needed to be provided to DPP by November 21, 2014 for a re-referral to be considered.

- November 21, 2014: Defendant hand delivered a note stating that he was given five referrals for treatment providers in NY. He had not enrolled or participated in certified abuser treatment as of November 21, 2014.

- November 21, 2014: Defendant did not notify DPP that he was entering Dane County, violating a condition of bond.

- December 30, 2014: Letter to court from the Director of DPP stating that Defendant is not eligible for a re-admission to DPP.

(40:1-3; Ap. C)

After extensive efforts on behalf of the State, and the defendants refusal to comply with the terms stated in his DPP agreement, Jordan was terminated from the DPP and now seeks to object to his termination from the DPP as well as withdraw his guilty plea.

STATEMENT OF THE ISSUES

1. Whether Jordan's termination from the Deferred Prosecution Program was proper and a violation of Jordan's due process rights. The trial court ruled that there was no contract or due process violations.
2. Whether Jordan should be allowed to withdraw his guilty plea. The trial court ruled that Jordan should not be allowed to withdraw his guilty plea.

ARGUMENT

I. JORDAN'S TERMINATION FROM THE DEFERRED PROSECUTION PROGRAM WAS PROPER AND DID NOT VIOLATE JORDAN'S DUE PROCESS RIGHTS

A. Jordan's termination from the deferred prosecution program was proper.

The deferred prosecution agreement entered into between the defendant and the district attorney creates an obligation on the defendant to adhere to specific requirements as are stated in the agreement between both parties. If the defendant fails to meet these requirements, then he is subject to termination from the deferred prosecution program and the district attorney is entitled to "resume prosecution at any time." This procedure is explicitly stated in the Deferred Prosecution unit (DPU)contract agreement:

> *"If you violate any terms of this contract or if new information becomes available concerning this/these offense(s), the Dane County District Attorney may, during the period of deferred prosecution: (1) revoke or modify, add or delete conditions of this deferred prosecution contract to include changing the period of deferral or, (2) prosecute you for the offense(s). If a decision is made to terminate you from the program, you may follow the grievance procedure, which is provided to you at the time you sign the contract. The District Attorney may also resume prosecution at any time prior to a court's dismissal of the charge(s) for breach of a deferred prosecution agreement that occurred at any time during the term of the deferral*

period. Automatic termination from the program will occur and the grievance procedure will not apply to the following: If you engage in conduct that creates probable cause to believe you have committed a crime; if you are currently on supervision for criminal charges or if you fail to comply with any requirement of the treatment program. Whether you have failed the treatment program will be decided by the treatment provider and no one else. If you comply with the contract conditions, either the charge against you will be dismissed or no criminal prosecution will be instituted as a result of this offense."

(20:1; Ap. B)

The contract language states that, "The District Attorney may also resume prosecution at any time prior to the court's dismissal of the charge(s) for breach of deferred prosecution agreement that occurred at any time during the term of the deferral period." *Id*. This language allows the District Attorney to resume prosecution at any time prior to the court's dismissal of the charge. The State did resume prosecution of the defendant when he was first terminated from DPP on July 17, 2014 but then agreed to re-refer him if he satisfied certain conditions. At that point, Assistant District Attorney (ADA) Schlipper sent several emails to Attorney Winnig, outlining specific tasks that the defendant needed to complete to gain a re-referral, specifically, he was to enroll in certified

abuser treatment. *Id*. Defense never complained that this condition was too burdensome or unreasonable.

The defendant failed to satisfy the requirements set forth in the DPU agreement, and as a result, the State resumed prosecution, which was consistent with the terms express stated in the DPP agreement. *Id*. The language of the Deferred Prosecution Program contract is clear that prosecution may resume at any time prior to the court's dismissal of the charge. *Id*. The State's position was upheld by the trial court's finding that Jordan had ample notice and opportunity to comply with the terms and conditions stated in his DPU contract, as well as to comply with the various efforts put forth by the State. (59:7-9; Ap. D). As a result of Jordan's lack of compliance with regard to fulfilling the terms and conditions set forth in his contract, he was properly terminated form the DPP.

B. There is no violation of Jordan's due process rights.

Jordan claims that a violation of his due process rights occurred based on the circumstances surrounding his termination from the DPP. There is however, no such violation of Jordan's due process rights: the contract language expressly laid out in the DPU grievance procedure

provided him with due process; and, Jordan fails to meet the burden for a violation of his due process rights.

1. The state properly complied with the terms and conditions express provided in the DPU grievance procedure.

Jordan failed to comply with the terms stated in the contract for the DPP, and he was thus subject to termination from the program as explicitly stated in the agreement. (20:1; Ap. B). Further, the circumstances surrounding his termination were consistent with the grievance procedure explicitly stated in the DPU agreement. With regard to termination from the DPU program the grievance procedure expressly provides:

> *" If you sign a contract and fail to follow through with the agreed upon conditions, the following procedures will be followed by the program: (1) you will be sent a warning letter by your assigned counselor, which will outline your non-compliance. This letter will ask you to appear for a case review appointment. If the conflict is resolved, you will receive a letter summarizing the issues discussed and the agreed upon steps which will be taken to complete the contract within the program. . ."*
>
> (39:9; Ap. E)

Prior to termination from the program the state followed the proper grievance procedure and the defendant

was given adequate due process. As is stated in the grievance procedure, if the defendant is not in compliance with the terms and conditions of his DPU agreement the State will issue a warning letter outlining the non-compliance. *Id*. This procedure was applied to Jordan, the State notified him that he had done nothing to fulfill his contract. (40:1-3; Ap. C).The State then made further efforts to work with Jordan and made attempts to extend his contract, even after it initially sought termination from the DPP program. *Id*. After extensive correspondence between Jordan and the State, Jordan still was not in compliance with the necessary terms of his contract with the DPP program, specifically with regard to seeking treatment. *Id*. As a result, he was terminated properly form the DPP. The State's action to pursue Jordan's termination from the DPP was consistent with the grievance procedure specifically with reference to the portion stating:

> *"If you do not appear for the scheduled appointment and/or are unable at the appointment to resolve the dispute over your contract, you will receive a letter stating you are to be terminated from the program*."
>
> (39:9; Ap. E)

Jordan was provided with the necessary warning letter, as well as ample opportunity to avoid termination based on the State's displayed willingness to negotiate an opportunity to avoid his potential termination from the program. (40:1-3; Ap. C). Because Jordan did not comply with the State's extensive efforts to resolve this matter, the State then terminated his DPP contract. *Id*. As a result of the State's lawful compliance with the steps allocated in the grievance procedure there is no violation of Jordan's due process rights.

2. The necessary requirements of a due process violation are not met.

Jordan's claim asserting a violation of his due process rights, does not satisfy the requirements necessary for a cognizable claim. Termination from the deferred prosecution program generally does not create a liberty interest to which due process guarantees would attach. This is specifically the case in situations where the defendant failed to show prejudice by establishing a likelihood that the deferred prosecution arrangement would not have been terminated if there had been a hearing. The only potential due process violation that could arise in a situation of this nature would be if the defendant was in some way

misled about the conditions of a deferred prosecution contract or the manner in which his participation could be terminated from the program.

As a result of the language of the DPU grievance procedure, the State was acting properly with regard to their termination of Jordan's contract. Because termination from deferred prosecution programs generally do not create a liberty interest to which due process guarantees would attach, Jordan is precluded from bringing a claim of this nature. This is especially true because Jordan has failed to show he was prejudiced at the hands of the state. Jordan was provided with ample notice and opportunity to comply with the terms of his DPP contract and as a result of his decision not to do so, was lawfully terminated from the DPP. Furthermore the only way in which Jordan would be able to properly raise a claim with regard to his due process rights would be if he was able to make a showing that he was misled about the conditions of a deferred prosecution contract or the manner in which his participation could be terminated from the program. Jordan fails to do so. There is nothing in the record to support that Jordan was unaware of the conditions under which he could be properly and lawfully terminated from the DPU.

Conversely, everything in the record supports the State's contention that Jordan was expressly aware of his pending termination based on the agreement he signed, the warning letter that he received and the many attempts the State made to work with him prior to his termination. (40:1-3; Ap. C).Because Jordan does not meet the necessary requirements to assert a due process violation with regard to the termination from a DPP, there is no violation of his due process rights.

I. JORDAN SHOULD NOT BE ALLOWED TO WITHDRAW HIS GUILTY PLEA BECAUSE THERE WAS A FACTUAL BASIS FOR HIS PLEA AND JORDAN HAS FAILED TO SHOW THERE WAS A MANIFEST INJUSTICE THAT NEEDS TO BE CORRECTED

A. Legal Standard

The standard for evaluating a plea withdrawal depends on whether the motion for the withdrawal comes before or after the defendant has been sentenced. *See State v. Daley*, 2006 WI App 81, ¶ 14, 292 Wis. 2d 517, 526, 716 N.W.2d 146, 150. Prior to sentencing, a defendant's motion "should be freely allowed if the defendant presents a 'fair and just reason' to justify the withdrawal." *Daley* at ¶ 14 (*quoting State v. Timblin*, 2002 WI App 304, ¶ 19, 259 Wis. 2d 299, 657 N.W.2d 89 (further citation omitted). If the motion is brought after sentencing, the defendant "carries

the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." *Daley* at ¶ 14 (*quoting State v. Fosnow*, 2001 WI App 2, ¶ 7, 240 Wis. 2d 699, 624 N.W.2d 883 (further citation omitted). In either case, the ultimate decision whether to allow withdrawal of the plea is committed to the trial court's discretion. *See Daley* at ¶ 14. Thus, this Court should not reverse the trial court's decision unless it is clearly erroneous. *See Daley* at ¶ 14 (*citing State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

Jordan's burden is that of proving a manifest injustice. Acceptance and ordered implementation of the deferred prosecution agreement constitutes sentencing for purposes of determining which standard to apply. *See Daley* at ¶ 18. Because Jordan did not move to withdraw his plea until after the deferred prosecution agreement was accepted and implemented (and revoked), the manifest injustice standard should be applied in reviewing Jordan's motion.

B. There is no manifest injustice present as to entitle Jordan to withdraw his guilty 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 there was a deficient plea colloquy-ie, the plea was not knowingly, voluntarily and intelligently made. *State v. Bangert,* 131 Wis.2d 246, 389 N.W.2d 12 (1986). In order to determine this, this Court will look at the totality of the record. (60:43; Ap. F). Jordan has failed to show that the trial court's decision was clearly erroneous. *Spears* at 434.

In looking at the totality of Jordan's file, the trial court made the finding that the guilty plea entered into by Jordan was indeed made knowingly, voluntarily and intelligently. (60:43; Ap. F). This was evidenced by Jordan's apparent intelligence, his professional exposure and familiarity with contracts, and his completed plea questionnaire stating that he understood the nature of his guilty plea. *Id.* Further, the trial court found that there were "no grounds for the court to allow Mr. Jordan to withdraw his plea under these circumstances" and it denied his motion. *Id.* The trial court has already found that there are no sufficient grounds for Jordan to withdraw his guilty plea with regard to a manifest injustice occurring. This was within the trial court's proper exercise of discretion to combine the totality of the file with logic

and reasoning in order to make its final determination. *see State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 535, 261 N.W.2d 434 (1978).

C. There was a proper factual basis for the charge to which Jordan plead.

The circuit court properly denied Jordan's claim that there was not a factual basis for his guilty plea. The court addressed the merits of Jordan's claim and denied it based on its lack of merit. (60:43; Ap. F). The court concluded that information in the criminal complaint provided a factual basis for Jordan's guilty plea. *Id*; (1;1-3; Ap. G). Specifically, the court concluded that the criminal complaint provided a sufficient factual basis for the plea and discussed this as well as the nature of Jordan's charges with him at the time he chose to enter his guilty plea. (58:5,7; Ap. A).

Jordan now argues that the circuit court incorrectly used the complaint as a factual basis for the plea and did so without confirming that the facts in the complaint constituted the charged offense. (Jordan Br. at 16) This assertion is unfounded because the circuit court used the complaint as a factual basis for the plea with the

permission of Jordan’s counsel, and further asked the defendant himself if the facts stated in the complaint were true, which the defendant confirmed.(58:5,7; Ap. A). "It is not necessary that guilt be the only inference that can be drawn from the facts in the complaint, nor that the inference of guilt is established beyond a reasonable doubt." *State v. Payette*, 2008 WI App 106, ¶ 7, 313 Wis. 2d 39, 756 N.W.2d 423.

> [A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one.

Id., (quoting *State v. Black*, 2001 WI 31, ¶ 16, 242 Wis. 2d 126, 624 N.W.2d 363).

The State maintains that the circuit court decision was correct, and should be affirmed. As the circuit court concluded, the information in the criminal complaint was sufficient to show that Jordan violated an harassment injunction issued under Wis. Stat. § 813. 125 (4). It also found that there was an adequate factual basis for the entering of this plea, all of which was discussed with Jordan prior to entering his plea. (58:5,7; Ap. A). Further, the court concluded that the victim's statements

with regard to the incident that gave rise to the charges were sufficient to support a factual basis. *Id*. In the same manner, the information contained in the complaint was sufficient to show a reasonable belief that Jordan did indeed violate the harassment injunction and therefore to support a plea to his guilt with regard to those charges. Even if Jordan now claims there is an exculpation inference within the complaint, the factual basis for the plea, admitted by Jordan, was found by the court. *Id*. Jordan fails to show how the courts finding was clearly erroneous.

Moreover, in determining whether a factual basis exists for a guilty plea, a reviewing court considers the entire record, including the sentencing hearing. *State v. Thomas*, 2000 WI 13, ¶¶ 23-24, 232 Wis. 2d 714, 605 N.W.2d 836, citing *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978); *Bangert*, at 251. In this case, at the sentencing hearing, the court reviewed the totality of the record and correctly concluded that the information in the complaint was sufficient to show a factual basis for Jordan's guilty plea. The court's order denying Jordan's motion to withdraw his plea should therefore be affirmed.

CONCLUSION

The State respectfully requests that this Court affirm the circuit court's order denying post-conviction relief.

Dated this 2nd day of August, 2016.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 19 pages.

Dated: August 2, 2016.

Signed,

_____
Attorney

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 2nd day of August, 2016.

_____

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of August, 2016.

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