STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2022AP199-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KASEY ANN GOMOLLA,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING POSTCONVICTION RELIEF, EACH ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE JOHN ZAKOWSKI, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## INTRODUCTION

Kasey Gomolla pleaded no contest to conspiracy to commit delivery of methamphetamine. Gomolla now contends that she is entitled to withdraw her no contest plea because she did not enter it knowingly, intelligently, or voluntarily. Gomolla, however, is not entitled to plea withdrawal. Although the circuit court failed to discuss the potential range of punishments, the State presented sufficient evidence that she nevertheless understood a potential range of punishments. Included in the State's evidence was the plea questionnaire, which had Gomolla's initials next to the potential maximum sentence, and Attorney Lennon's testimony, which described how she went over the plea questionnaire with Gomolla. And, while it is true that the potential maximum sentence communicated to Gomolla was higher than allowed by law, the miscommunicated maximum was not substantially higher than the 40 years that she faced. She therefore is not entitled to plea withdrawal.

Accordingly, this Court should affirm.

## STATEMENT OF THE ISSUE

Did Gomolla enter her no contest plea knowingly, intelligently, and voluntarily despite the circuit court's failure to discuss her maximum potential sentence?

Answered by the circuit court: Yes.

This Court should answer: Yes.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-settled precedent to the facts of the case.

## STATEMENT OF THE CASE

The State charged Gomolla with one count of conspiracy to deliver methamphetamine as a second and subsequent offense, and one count of soliciting the delivery of THC as a second and subsequent offense. (R. 23:2.)[1] The State and Gomolla entered into a plea agreement wherein Gomolla would plead to Count 1. (R. 163.) The State agreed to dismiss the second and subsequent enhancer and dismiss and read in Count 2. (R. 163.) Absent the second and subsequent enhancer, Gomolla faced 40 years of maximum exposure instead of 46. (R. 23:1.)

The State offered to agree to a stipulated recommendation of seven years of initial confinement followed by ten years of extended supervision for at total bifurcated sentence of 17 years. (R. 163.) If the defense wished to argue, the State agreed to cap its recommendation at eight years of initial confinement and eight years of extended supervision. (R. 163.)

Gomolla and Attorney Lennon completed a plea questionnaire and waiver of rights form. (R. 78.) The plea questionnaire correctly removed Count 2 from Gomolla's plea; however, the questionnaire retained the second and subsequent enhancer along with the 46-year potential maximum sentence based on that enhancer. (R. 78:1.) Gomolla's initialed each section of the questionnaire and signed it, indicating her understanding of its terms. (R. 78:1–2.)

At the plea hearing, the circuit court confirmed with Gomolla and Lennon that they went through the plea questionnaire and that Gomolla understood it. (R. 92:2–4.)

[1] The probable cause section of Gomolla's criminal complaint is presently under seal. However, the factual background of her charges is not imperative to the resolution of this appeal.

The circuit court confirmed with Gomolla that she understood that the court was not required to abide by any sentencing recommendation and could sentence her to the maximum. (R. 92:4.) However, apparently relying on the plea questionnaire, the court did not discuss the potential range of punishment that Gomolla faced with or without the second and subsequent enhancer. (R. 92:4–5.) During the hearing, however, the State did confirm that it was dismissing the enhancer. (R. 92:5.)

Following the circuit court's imposition of her sentence, Gomolla filed a postconviction motion to withdraw her plea.[2] (R. 151:7–8.) Gomolla contended that she was entitled to withdraw her plea because the circuit court failed to confirm her understanding of the potential range of punishment during her plea colloquy. (R. 151:7–8.)

The circuit court held an evidentiary hearing on Gomolla's motion. The hearing testimony was a mix between Gomolla's claim of ineffective assistance of counsel and her claim for plea withdrawal, and indeed the parties largely focused on the ineffective assistance of counsel claim. Related to the *Bangert* claim, however, Attorney Lennon testified that she "had over 25 meetings with [Gomolla]" between her Brown County case and her Marathon County case. (R. 166:11.) Lennon testified that that number did not include letters and phone calls. (R. 166:11.) Lennon explained that because "the concept of a bifurcated prison sentence is fairly difficult for people to understand," and because Gomolla had never been to prison, she "diagrammed what a bifurcated sentence is" and "tried to explain . . . the options of the

[2] Gomolla also raised a claim of ineffective assistance of counsel. (R. 151:4–7.) She does not renew that claim on appeal and has therefore abandoned it. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

contested sentencing versus the stipulated sentencing." (R. 166:12.) Lennon "believed that [Gomolla] understood that." (R. 166:12.)

On cross-examination, Lennon confirmed that the Brown County offer was the same from July of 2018 until she ultimately pleaded no contest in February of 2019. (R. 166:15.) Lennon testified that it was her practice to do a plea questionnaire in "every case" and was careful to not proceed with the plea unless she was confident her clients understood the offer and its terms. (R. 166:21–22.) She testified that specifically for Gomolla, she postponed the plea in the Marathon County case because Gomolla was not on her medication at the time they were going through the plea. (R. 166:22.)

Lennon understood "that [she] did not delete the penalty enhancer as far as the maximum penalty," but she "believe[d] [Gomolla] understood the offer." (R. 166:22.) She testified that her "practice is to go through the plea advisement line by line with the client and have them initial it." (R. 166:29.) Further, Lennon explained that "after I'm satisfied that they understand it I normally read it to them and ask them to explain it back to me." (R. 166:29.) Lennon was "sure" that she went over the maximum penalty with Gomolla, and she again acknowledged that she "made a mistake and included the enhancer, which the State was willing to dismiss and read in." (R. 166:30.)

Gomolla also testified at the hearing. Gomolla testified that she remembered going through the plea questionnaire with Lennon and remembered signing the form. (R. 166:33.) Gomolla did not state that she did not understand the offer or the questionnaire. Rather, she testified that Lennon "went over [the questionnaire] with [her] . . . but [she was] sure [Lennon] didn't go over it with [her] properly." (R. 166:34.) According to Gomolla, Lennon "rushes through stuff" and "doesn't just take her time." (R. 166:39.) While Gomolla stated

that she "can't even remember doing the questionnaire," she answered the circuit court's question as to whether she remembered stating at the plea hearing that she understood the offer and that the court didn't have to accept the recommendations. (R. 166:40.)

Following the hearing, the circuit court denied Gomolla's postconviction motion for plea withdrawal. (R. 167.) As to the *Bangert* claim, the court concluded that its reference to the plea questionnaire was sufficient to render the plea colloquy effective. (R. 167:10–11.) Alternatively, the circuit court concluded that the State met its burden to prove by clear and convincing evidence that Gomolla understood a range of potential punishment. (R. 167:11.) Relying on *State v. Cross*, the court found that there was no due process violation regarding Gomolla's understanding a potential range of punishment that was higher than the actual potential maximum. (R. 167:11–13.)

Gomolla now appeals her judgment of conviction and the circuit court's decision and order denying postconviction relief. (R. 168.)

## STANDARD OF REVIEW

When a circuit court denies a defendant's postconviction motion for plea withdrawal after an evidentiary hearing, this Court reviews "whether the State met its burden of showing that the defendant's guilty plea was entered knowingly, intelligently, and voluntarily." *State v. Hoppe*, 2009 WI 41, ¶ 45, 317 Wis. 2d 161, 765 N.W.2d 794. This Court "accept[s] the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous." *Id.* "[W]hether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary" is a question of law that this Court reviews independently. *Id.*

## ARGUMENT

### Gomolla is not entitled to withdraw her plea.

#### A. Plea withdrawal is required only to correct a manifest injustice.

"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.'" *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). "A manifest injustice occurs when there has been 'a serious flaw in the fundamental integrity of the plea.'" *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, ¶ 42, 486 N.W.2d 64 (citation omitted). "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." *Brown*, 293 Wis. 2d 594, ¶ 18. As relevant here, for a plea to be knowing, intelligent, and voluntary, a defendant must have an understanding of the "the range of punishment which [the crime] carries." *State v. Bangert*, 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986).

Ordinarily, the first step in this inquiry is to assess whether a defendant's postconviction motion was sufficient to entitle her to an evidentiary hearing. A defendant's postconviction plea withdrawal motion "must (1) make a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing." *Brown*, 293 Wis. 2d 594, ¶ 39. Here, Gomolla had an evidentiary hearing on her postconviction motion.

When a defendant is entitled to a postconviction plea withdrawal evidentiary hearing, the burden shifts to the State to "show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary

despite the identified inadequacy of the plea colloquy." *Id.* ¶ 40. "In meeting its burden, the state may rely 'on the totality of the evidence, much of which will be found outside the plea hearing record.'" *Id.* (citation omitted). Such evidence may include "testimony of the defendant and defense counsel to establish the defendant's understanding." *Id.* "The state may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden." *Id.*

### B. The State provided sufficient evidence to prove Gomolla understood a potential range of punishment that was not substantially higher that that allowed by law.

There were two distinct issues with Gomolla's plea that should not be combined. The first was the circuit court's failure to reference the potential range of punishment other than a passing reference to the plea questionnaire and its attachments. The court's failure to discuss the range of punishment likely merited an evidentiary hearing by itself. *Brown*, 293 Wis. 2d 594, ¶¶ 35–36; *State v. Finely*, 2016 WI 63, ¶ 12, 370 Wis. 2d 402, 882 N.W.2d 761. And, because this case is past the *Bangert* hearing stage and, because the circuit court failed to mention Gomolla's potential maximum sentence, the State will not dispute that Gomolla made a prima facie showing of a *Bangert* violation. (Gomolla's Br. 13–15.) The question then became: did the State present sufficient evidence that Gomolla otherwise understood the potential range of punishment? The State easily met that burden.

The State pointed to the plea questionnaire, which it called "one of the more detailed plea questionnaires" it had seen. (R. 166:46–47.) The questionnaire had a potential maximum sentence (of 46 years rather than the correct number, which was 40), and Gomolla's initials were next to that potential max. Further, the State and the circuit court

could rely on Lennon's testimony that she thoroughly went over the plea questionnaire with Gomolla. *Brown*, 293 Wis. 2d 594, ¶ 40. Lennon testified that she was "sure" that she went over the plea questionnaire maximum with Gomolla. (R. 166:29–30.) The circuit court did not believe Gomolla's testimony to the contrary. (R. 167:12.) Gomolla does not challenge any of those facts as clearly erroneous.

Because the State provided sufficient evidence that Gomolla understood a potential range of punishment despite the circuit court's failure to discuss it, the State disagrees that Gomolla is now entitled to withdraw her plea merely because the range of potential punishment was higher than allowed under the circumstances. That error is an entirely separate issue, which is discussed below.

The second issue is the mistaken maximum sentence on the plea questionnaire and the evidence that defense counsel communicated a potential maximum higher that that actually allowed under the circumstances. Because the plea questionnaire still contained the second and subsequent enhancer, it stated that Gomolla's maximum potential sentence was 46 years, when, in reality, it was 40. But that is where *Cross* comes in. *Cross* stands for the proposition that no *Bangert* violation occurs, and there is therefore no manifest injustice warranting plea withdrawal, where the "maximum sentence communicated to the defendant is higher, but not substantially higher, than the actual allowable sentence." *Cross*, 326 Wis. 2d 492, ¶ 38. That is what occurred here.

Had it been the circuit court that informed Gomolla that she faced 46 years instead of 40, that mistake alone would not have warranted a *Bangert* hearing at all, let alone plea withdrawal. *Id.* ¶ 30. While it is true that the exact posture of *Cross* was pre-*Bangert* hearing, *Cross*'s overarching reasoning should apply here, where the *Bangert* hearing has already occurred. It would be illogical for the same mistake to not merit an evidentiary hearing on one hand but permit plea

withdrawal on the other. Defense counsel's miscommunication of a potential range of punishment is still communication of a potential range of punishment. And, according to *Cross*, "where the sentence communicated to the defendant is higher, but not substantially higher, than that authorized by law, the incorrectly communicated sentence . . . will not, as a matter of law, be sufficient to show that the defendant was deprived of his constitutional right to due process of law." *Id.* ¶ 40.

If the reasoning of *Cross* applies, there was plenty of evidence that Gomolla understood a potential maximum sentence that was not substantially higher than that allowed under the circumstances. As discussed above, Lennon explained that she and Gomolla went through the plea questionnaire in detail before she signed it. (R. 166:29–30.) Lennon was very conscious of Gomolla's mental health issues and careful to not let her acquiesce to the plea offers unless she was confident Gomolla understood the terms. (R. 166:22.) The circuit court did not believe Gomolla's testimony that Attorney Lennon rushed through the plea questionnaire and did not discuss. (R. 167:12.) And, because the maximum sentence communicated to Gomolla was not substantially higher than that allowed by law, her plea was knowing, intelligent, and voluntary despite the erroneous potential maximum. Accordingly, Gomolla is not entitled to withdraw her plea, and this Court should affirm.

### C. Gomolla did not otherwise suffer a manifest injustice solely by being informed of an insubstantially higher potential maximum sentence.

Manifest injustice can occur even if a plea is entered knowingly, intelligently, and voluntarily. As stated above, a manifest injustice generally occurs where there "has been 'a serious flaw in the fundamental integrity of the plea.'" *Cross*, 326 Wis. 2d 492, ¶ 42 (citation omitted). This higher post-

sentence requirement both promotes the general interest in finality of convictions and "is a deterrent to defendants testing the waters for possible punishments." *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482 (citation omitted). The supreme court has articulated a non-exhaustive list of scenarios wherein a manifest injustice may occur, including ineffective assistance of counsel, the defendant not receiving concessions, the defendant not personally ratifying the plea, and the prosecutor failing to fulfill the plea agreement, among others. *Id.* ¶ 49. However, "[d]isappointment in the eventual punishment does not rise to the level of a manifest injustice" nor does being told an insubstantially higher sentence than allowed by law. *Id.* ¶ 49; *see also Cross*, 326 Wis. 2d 492, ¶ 43.

Like in *Cross*, there is no alternative manifest injustice requiring plea withdrawal here. The defendant in *Cross* "entered into a highly favorable plea agreement." 326 Wis. 2d 492, ¶ 43. So too did Gomolla. Under the original information, Gomolla faced 46 years of possible exposure on count 1 alone. (R. 23:2.) Count 2, which the State agreed to dismiss and read in as part of the plea agreement, exposed Gomolla to another 10 years for a total of 56 years. (R. 23:2; 163.) The plea agreement ultimately reduced Gomolla's potential maximum exposure by 16 years, and the State agreed to cap its sentencing recommendation at 16 total years if Gomolla argued for a sentence. (R. 163.) That the circuit court ultimately sentenced her to 27 total years with 12 years of initial confinement and 15 years of extended supervision is of no moment because courts are never required to adhere to the parties' recommendations.

Gomolla does not allege any other alternative form of manifest injustice, nor could she, based on the record before this Court. She signed and personally ratified the plea, she received the concessions she bargained for, she did not receive ineffective assistance of counsel, and the State fulfilled its

duties under the agreement. *Taylor*, 347 Wis. 2d 30, ¶ 49. Gomolla appears to merely be disappointed in the sentence that she received, but that disappointment alone is insufficient to prove that she suffered a manifest injustice. *Id.* ¶ 48. Because Gomolla did not suffer a manifest injustice, she is not entitled to withdraw her plea, and this Court should affirm.

## CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated this 16th day of March 2023.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2950 words.

Dated this 16th day of March 2023.

Electronically signed by:

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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of March 2023.

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