09AP0003

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 3

Case No. 2009AP3-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS VONDELL CROSS,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENTS OF CONVICTION AND THE ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, THE HONORABLE ERIC J. LUNDELL PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

WILLIAM E. SCHMAAL
Assistant State Public Defender
State Bar No. 1017331

Office of State Public Defender
PO Box 7862
Madison, WI 53707-7862
(608) 267-1773

Attorney for Defendant-Appellant

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BRIEF OF DEFENDANT-APPELLANT

ISSUE PRESENTED

Whether the trial court erred in denying Cross's post-sentencing motion to withdraw his guilty plea because Cross had been affirmatively misinformed about the potential penalties?

Trial court answered: Judge Lundell entered duplicate post-conviction orders denying Cross's motion to withdraw his guilty plea and granting re-sentencing, without further explanation (48; 50).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Travis Vondell Cross does not request oral argument because this brief fully presents and develops the issue raised on appeal and the applicable legal authorities. Wis. Stat. Rule § 809.22(2)(b).

Publication of the Court of Appeals' opinion is not warranted because the issue may be decided by the application of controlling precedents. Wis. Stat. Rule § 809.23(1)(b)3.

STATEMENT OF THE CASE

Defendant-Appellant Travis Vondell Cross ("Cross") appeals from his original judgment of conviction of second-degree sexual assault of a child contrary to Wis. Stat. § 948.02(2) entered on March 28, 2007 (25), and from the duplicate orders denying post-conviction relief entered on April 11, 2008 (48), and April 15, 2008 (50), as well as the superceding judgment of conviction after re-sentencing entered on July 28, 2008 (58), all in the St. Croix County circuit court, the Honorable Eric J. Lundell presiding.

The case was commenced on December 8, 2005, with the filing of a one-count criminal complaint which alleged that Cross had initiated hand-to-genital area sexual contact with a child under the age of 13 years identified as "ADF," in the City of Hudson, "on or between December of 2002 to January of 2003 [*sic*]" (docket entries; 1). Cross was subsequently bound over for trial at the conclusion of a preliminary hearing (67:20), and he initially entered a plea of not guilty to a one-count information (6) which renewed the same charge as the complaint (67:21).

Thereafter, the trial court was informed that a plea bargain had been negotiated in which Cross would enter a guilty plea to an amended charge of second-degree sexual assault of a child contrary to Wis. Stat. § 948.02(2) (69:3-5). In addition, the state agreed to make certain sentencing recommendations (*id.*). The trial court engaged in a personal colloquy with Cross and ultimately accepted Cross's guilty plea under the agreement (69:7-16).

On March 26, 2007, the trial court sentenced Cross to a term of 25 years initial confinement plus 15 years extended supervision, to be served consecutively to Cross's ongoing prison sentence in the State of Minnesota (25; 70:15-18).

Cross later filed a post-conviction motion which sought re-sentencing or modification of sentence (31). At the motion hearing, Cross also filed a supplement to the post-conviction motion which sought to withdraw his guilty plea (36) and Cross told the court that he was withdrawing all of the other claims for relief (71:4-6, 28-31). The trial court initially took the supplemental motion under advisement pending the submission of written briefs (71:24-34), and the court ultimately entered a written order denying the withdrawal of Cross's guilty plea but granting re-sentencing (48; 50).

On July 23, 2008, the trial court re-sentenced Cross to a term of 20 years initial confinement plus 10 years extended supervision, to be served consecutively to Cross's ongoing prison sentence in the State of Minnesota (58; 72:14-16).

Cross's notice of appeal (62) is taken from the judgments of conviction (25; 58) and the duplicate orders denying post-conviction relief (48; 50). In an order dated February 20, 2009, the Court of Appeals denied Cross's motion for summary disposition.

SUMMARY OF FACTS

At the arraignment on the information (6), which charged Cross with one count of first-degree sexual assault of a child contrary to Wis. Stat. § 948.02(1), the trial court advised Cross that the offense was a Class B felony punishable by up to 60 years imprisonment (67:21).

The ensuing joint plea agreement between Cross and the state provided, in part, that Cross would enter a guilty plea to an amended charge of second-degree sexual assault of a child contrary to Wis. Stat. § 948.02(2) (69:3-4). Cross's written plea questionnaire and waiver of rights form included an attached information sheet which described the amended offense as a Class C felony punishable by 25 years initial confinement plus 15 years extended supervision and a $100,000 fine (13:2). Judge Lundell also orally recited the maximum penalties as 25 years initial confinement plus 15 years extended supervision during his colloquy with Cross (69:8-9).

Cross's supplemental post-conviction motion alleged that Cross's guilty plea and sentence were both defective because the alleged offense had been committed shortly before the effective date of Truth In Sentencing II, or February 1, 2003 (36:2). The motion alleged that the offense had been a Class BC felony with potential penalties of 20 years imprisonment plus 10 years extended supervision, citing Wis. Stat. §§ 948.02(2), 939.50(3)(bc) and 973.01(2)(b)2. (*id.*). The motion further alleged that Cross had "not, in fact, otherwise correctly understood the applicable maximum penalties." (*id.*).

At the post-conviction hearing, Cross's trial counsel testified that she had erroneously advised Cross that the maximum potential penalties under the plea agreement were 25 years initial confinement plus 15

years extended supervision (71:15, 17-18, 22-24). No evidence was presented to contradict counsel's assertion.

Such additional facts as may be relevant to this appeal will be set forth, and cited to the trial court record, in the Argument below.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING CROSS'S POST-SENTENCING MOTION TO WITHDRAW HIS GUILTY PLEA.

A. The Relevant Statute and Applicable General Principles of Law, and the Standard of Review.

The constitutional mandate that a plea be knowing, voluntary and intelligent is codified in Wis. Stat. § 971.08. ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 571, 605 N.W.2d 199. This statute provides, in relevant part, as follows:

> **971.08 Pleas of guilty and no contest; withdrawal thereof.** **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> * * *

After sentencing, a defendant who seeks to withdraw a guilty plea or no contest plea has the burden of showing by clear and convincing evidence that withdrawal is necessary in order to correct a manifest injustice. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d

615, 635, 579 N.W.2d 698 (1998). This determination is ordinarily entrusted to the trial court's discretion. ***Id.***

A plea that is not entered knowingly, voluntarily and intelligently violates due process, ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997), and represents a manifest injustice. ***State ex rel. Warren v. Schwarz***, *supra*, at 636. An unknowing plea may be withdrawn as a matter of right, and the trial court has no discretion in the matter. ***State v. Bollig***, 2000 WI 6, ¶15, 232 Wis. 2d 561, 571, 605 N.W.2d 199; ***State v. Van Camp***, *supra,* at 139.

Such a defective guilty plea occurs when the defendant was not correctly informed about the potential punishment. Wis. Stat. § 971.08(1)(a); ***State v. Van Camp***, *supra*, at 143-44. The defendant is not required to demonstrate that the erroneous penalty information actually motivated his plea decision. ***State v. Bartelt***, 112 Wis. 2d 467, 475, 334 N.W.2d 91 (1983); ***State v. Harden***, 2005 WI App 252, ¶¶1, 4-6, 287 Wis. 2d 871, 873-74, 707 N.W.2d 173.

On appeal, the trial court's findings of historical fact will not be disturbed unless they are clearly erroneous, but the ultimate validity of a guilty plea is reviewed independently as a question of "constitutional fact." ***State v. Byrge***, 2000 WI 101, ¶¶54-55, 237 Wis. 2d 197, 231-32, 614 N.W.2d 477; ***State v. Van Camp***, *supra*, at 140.

B. Cross's Plea Was Not Entered Knowingly and Intelligently Because He Had Been Affirmatively Misinformed About the Potential Penalties.

The information charged that Cross had engaged in sexual contact with a child "on or between December of 2002 to January of 2003 [*sic*]" (6).

Between December 31, 1999, and February 1, 2003, the orally amended offense to which Cross ultimately entered a guilty plea, second-degree sexual assault of a child contrary to Wis. Stat. § 948.02(2), was a Class BC felony crime punishable by a fine not to exceed $10,000 and imprisonment not to exceed 30 years. Wis. Stat. § 939.50(3)(bc) (1999-2000 ed.); 1997 Act 283, §§ 323, 455, 456; 2001 Act 109, §§ 552, 553, 879, 9459.

Nevertheless, Cross's trial counsel and the trial court both told Cross that the maximum potential punishment was 40 years imprisonment for purposes of entering a guilty plea (13:2; 69:4, 8-9).

Cross's supplemental post-conviction motion alleged that Cross had been affirmatively misinformed about the applicable maximum penalties at the plea hearing (36:2). The supplemental motion also alleged that Cross had not otherwise understood the correct applicable penalties (*id.*).

The allegations in Cross's supplemental post-conviction motion were undisputed at the post-conviction hearing (71). Indeed, Cross's trial counsel agreed that she had inadvertently misinformed Cross about the applicable penalties (71:15, 18, 22-24).

Under these circumstances, Cross respectfully maintains that his guilty plea was constitutionally

defective. ***State v. Van Camp***, 213 Wis. 2d 131, 143-44, 569 N.W.2d 577 (1997); ***State v. Bartelt***, 112 Wis. 2d 467, 475, 334 N.W.2d 91 (1983); ***State v. Harden***, 2005 WI App 252, ¶¶1, 4-6, 287 Wis. 2d 871, 873-74, 707 N.W.2d 173.

The trial court denied post-conviction relief, however, apparently in the belief that the defect in Cross's plea could be remedied by re-sentencing in accordance with the correct penalties (44; 48; 50; 71:72:4-5).

But the fundamental flaw in Judge Lundell's solution is that the re-sentencing does nothing to cure the unknowing and unintelligent nature of Cross's guilty plea, itself. This is why the law of Wisconsin provides that Cross shall be entitled to withdraw his guilty plea and the parties returned to the *status quo* prior to the plea agreement. *Cf.* ***State v. Brown***, 2006 WI 100, ¶¶36-37, 293 Wis. 2d 594, 618, 716 N.W.2d 906.

CONCLUSION

For the reasons set forth above, Cross respectfully requests the Court of Appeals to enter an order reversing the trial court's duplicate orders denying post-conviction relief and vacating the original judgment of conviction and the superceding judgment of conviction after re-sentencing, with leave for Cross to withdraw his guilty plea together with the reinstatement of the original charge.

Dated this 19th day of March, 2009.

Respectfully submitted,

WILLIAM E. SCHMAAL
Assistant State Public Defender
State Bar No. 1017331

Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608) 267-1773

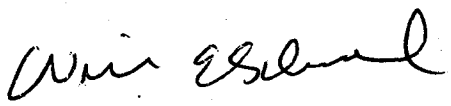
Attorney for Defendant-Appellant

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 1,604 words.

Dated this 19th day of March, 2009.

Signed:



WILLIAM E. SCHMAAL
Assistant State Public Defender
State Bar No. 1017331

Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608) 267-1773

Attorney for Defendant-Appellant