COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2138-CR **Cir. Ct. No. 2003CF481**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLAN BIESTERVELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Judgment affirmed; order affirmed in part; reversed in part and cause remanded with directions.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Allan Biesterveld appeals from a judgment of conviction for repeated acts of sexual assault of a child. He seeks to withdraw his plea. Beisterveld contends that the circuit court erred when it accepted the plea agreement without ascertaining that he understood the direct consequences of his plea. He further contends that he was misled regarding the impact of a charge that was "dismissed outright." Finally, he contends that his right to due process at sentencing was violated because the circuit court relied on untrue accusations when imposing the sentence. We conclude that Biesterveld is not entitled to plea withdrawal; however, we hold that he is entitled to resentencing before a different branch of the circuit court.

BACKGROUND

¶2 The State charged Biesterveld with two counts of repeated acts of sexual assault of a child in violation of WIS. STAT. § 948.025(1)(a) (2003-04).[1] The charges arose from repeated assaults against two females, A.R.B. and A.K.B, who were both under the age of sixteen. Biesterveld and the State entered into a plea agreement under which Biesterveld would plead guilty to Count 1, Count 2 would be "dismissed outright," and the State would recommend prison, although both sides would be free to argue. At sentencing, the circuit court discovered Count 2 because the presentence investigation report (PSI) erroneously referred to this count as a read-in. The parties explained to the sentencing judge that they agreed to dismiss Count 2 "outright." However, the court informed the parties that

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise stated.

it would consider Count 2 because it reflects upon personality, character and social traits. Biesterveld's counsel objected, but the court stood by its ruling.

¶3 During sentencing, A.R.B.'s mother informed the court that Biesterveld had also sexually assaulted her when she was thirteen years old. The circuit court imposed a thirty-year sentence composed of twelve years of initial confinement and eighteen years of extended supervision. After sentencing, Biesterveld filed a motion for postconviction relief to withdraw his guilty plea. In his motion, Biesterveld argued that (1) a manifest injustice occurred when the judge considered the count that was dismissed outright and (2) he did not have an opportunity to rebut new information presented by the victim's mother at sentencing. The court denied Biesterveld's postconviction motion and Biesterveld appeals, seeking plea withdrawal or, in the alternative, resentencing before a different court.

DISCUSSION

Plea Withdrawal

¶4 To satisfy due process, a guilty plea must be made knowingly, voluntarily, and intelligently. *See* ***State v. Hampton***, 2004 WI 107, ¶22, 274 Wis. 2d 379, 683 N.W.2d 14. This means that the defendant must be aware of the nature of the crime charged, the constitutional rights being waived, and the direct consequences of the plea. *See* ***id.***, ¶¶22-24. WISCONSIN STAT. § 971.08(1)(a) protects a defendant's due process rights by requiring the circuit court to "[a]ddress 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."

¶5 To withdraw a guilty plea after sentencing, the defendant must show that a manifest injustice would result if the withdrawal were not permitted. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). The defendant carries the burden of establishing to the court, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. *See* ***State v. Brown***, 2004 WI App 179, ¶4, 276 Wis. 2d 559, 687 N.W.2d 543. On appeal, we will reverse the circuit court's determination only for an erroneous exercise of discretion. *See* ***Booth***, 142 Wis. 2d at 237. However, when a defendant establishes a denial of a relevant constitutional right, plea withdrawal must be allowed. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). In such a case, the appeal presents a question of constitutional fact, which we review independently from the circuit court. ***Id.*** With these standards in mind, we turn to Biesterveld's allegations of error.

¶6 Biesterveld first argues that he was not informed of one of the direct consequences of his plea. A "direct consequence" is one that "has a definite, immediate, and largely automatic effect on the range of [the] defendant's punishment." ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199. Specifically, Biesterveld argues that "[f]rom the time he entered his plea until the day of sentencing, [he] understood that the State's outright dismissal of Count 2 would not be considered by the court at sentencing." The failure of the circuit court to inform him that it was not bound by the plea agreement or that it could consider Count 2 at sentencing, he asserts, entitles him to withdraw his plea as a matter of right. *See* ***State v. Merten***, 2003 WI App 171, ¶7, 266 Wis. 2d 588, 668 N.W.2d 750.

¶7 We reject Biesterveld's argument for two reasons. First, the record shows that Biesterveld signed a plea questionnaire that stated, "I understand that

the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty." At the plea hearing, Biesterveld stated that he had read and understood the contents of the plea questionnaire. He knew, therefore, that the court would have the opportunity to exercise its discretion. Second, his argument that the dismissed-outright, but not read-in, charge had a "definite, immediate and largely automatic" effect on his sentence is not persuasive. The circuit court considered the dismissed count as it reflected on Biesterveld's character and social traits, which is proper for a circuit court to do. *Cf.* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990) (court can consider unproven offenses involving the defendant as relevant to character and need for incarceration or rehabilitation). The impact of the dismissed-outright charge on the punishment Biesterveld received was unknown, and unknowable, at the time of the plea taking; furthermore, the dismissed charge could not be used to extend the terms of imprisonment or extended supervision beyond the statutory maximum limits.

¶8 Biesterveld also seeks to withdraw his plea, arguing that he was misinformed by his attorney about the consequences of his plea. He directs us to ***Brown***, 276 Wis. 2d 559, ¶8, where we observed that Wisconsin courts have permitted defendants to withdraw pleas that were based on a misunderstanding of the consequences, even when those consequences were collateral. *See, e.g.*, ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983); ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992). A collateral consequence is indirect, does not automatically flow from the conviction, and may depend on the subsequent conduct of a defendant. ***State v. Byrge***, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical

to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea." ***Id.***

¶9 In ***Brown***, we stated that Brown's belief about the consequences of his plea agreement "was not the product of 'his own inaccurate interpretation,' but was based on affirmative, incorrect statements on the record by Brown's counsel and the prosecutor." ***Brown***, 276 Wis. 2d 559, ¶13. We concluded that Brown was entitled to withdraw his plea. ***Id.***, ¶14.

¶10 Biesterveld asserts that his own predicament is analogous to Brown's. He contends that his misunderstanding of the term "dismissed outright" was "the result of misinformation from his counsel and the prosecutor"; therefore his plea was involuntary and unknowing as a matter of law. *See* ***id.***, ¶14. However, Biesterveld's situation can be distinguished from that in ***Brown***. Brown's attorney and the prosecutor crafted a plea agreement for what they believed would be "non-strike" offenses under Wisconsin's sexual predator law. ***Id.***, ¶2. The purpose of the plea agreement, which was to avoid the "category of sexual predator Chapter 980 charges," ***id.***, ¶2, was placed "on the record by Brown's counsel and the prosecutor … [and] [t]he court did not correct the statements." ***Id.***, ¶13. After his sentence commenced, Brown learned that his plea had not accomplished his purpose. ***Id.***, ¶3. When Brown realized that two of the charges to which he pled required him to register as a sex offender and a third was a sexual predator offense, he moved to withdraw his plea. ***Id.***

¶11 In contrast, Biesterveld knew *prior to receiving his sentence* that his understanding of the term "dismissed outright" was not the same as the court's, and was also interpreted differently by the prosecutor. During sentencing, the State explained that it understood "dismissed outright" to mean Count 2 would be

dismissed with prejudice. The circuit court later interjected that it was "dismissing it [Count 2] with prejudice right now." Unlike Brown, Biesterveld was aware that his desired result regarding Count 2 did not align with the court's and the prosecutor's definition of "dismissed outright." Biesterveld had the opportunity to move for plea withdrawal before he was sentenced and would have faced a lesser burden had he done so. *See* ***Booth***, 142 Wis. 2d at 235 (the request to withdraw a guilty plea prior to sentencing may be granted where the defendant presents a fair and just reason for doing so, unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea).

¶12 Also, the State points out, Biesterveld received the benefit of the plea bargain. The State explains, "Biesterveld through the plea bargain got a serious charge dismissed with prejudice, with no restitution, and no admission that he had committed the charge." We agree. Charges that are dismissed and read in carry greater implications. A defendant may be required to pay restitution on read-in charges. Also, unlike unproven offenses and acquittals, read-in charges constitute admissions by the defendant to those charges. ***State v. Floyd***, 2000 WI 14, ¶¶25, 27, 232 Wis. 2d 767, 606 N.W.2d 155. The implication is that more weight is placed on the read-in charges than on unproven or acquitted charges. ***Id.***, ¶27. Here, Biesterveld was able to argue his innocence regarding Count 2 at sentencing. All in all, the State asserts, Biesterveld received precisely what he had bargained for.

¶13 We conclude that the integrity of Biesterveld's plea agreement withstands any disagreement about the impact of the dismissed charge. Beisterveld received the benefit of his plea agreement, he knew the court was not bound by the agreement, and he failed to move for withdrawal prior to sentencing

even though he was aware of the court's intended treatment of the dismissed charge. No manifest injustice results from letting Biesterveld's plea stand.

Sentencing

¶14 Having preserved the plea, we turn our attention to Biesterveld's alternative argument, that he was denied due process at sentencing. A defendant has three due process rights at sentencing: (1) to be present at the hearing and afforded the right to allocution, (2) to be represented by counsel, and (3) to be sentenced on the basis of true and correct information. ***Bruneau v. State***, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977). A defendant who seeks resentencing based on a deprivation of due process caused by inaccurate information before the sentencing court must show two things: the defendant must show, first, that the information was indeed inaccurate and, second, that the court actually relied on the information. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). The defendant bears the burden of supporting both elements by clear and convincing evidence. ***State v. Anderson***, 222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). If the defendant does so, the burden shifts to the State to show that the error was harmless. ***Id.*** An error is harmless if there is no reasonable probability that it contributed to the outcome. ***Id.*** at 411.

¶15 Biesterveld alleges error stemming from information that first came to light at the sentencing hearing. He aptly describes the circumstance: "At sentencing, [the victim's mother] addressed the court and led off with a show-stopper: When she was 13 years old, then 20-year-old Biesterveld had sexual contact with her too." The circuit court reacted, stating:

> Well, that is a dramatically – ma'am, I want you to know it's a dramatically new matter. And why it is so important is because one of the things [the psychologist] and other

> witnesses suggest is this is an aberration on the part of the defendant. And what you have just told me … is the suggestion that this is not the first time he has picked upon underaged children as the victims of his sexual contact, which would undercut greatly [the psychologist's] analysis of that particular matter as well.

In its sentencing remarks, the court made several references to the mother's testimony, referring to her as "another victim" or "the other victim," and stating that he was "bothered by the fact that when [Biesterveld] was 20 years of age, there was a 13-year-old girl there."

¶16 Beisterveld moved for resentencing and filed affidavits from his brother and mother challenging the statements of the victim's mother. In his affidavit, Beisterveld's brother describes an incident in which the victim's mother, at the age of about thirteen, attempted to initiate "inappropriate sexual activity" with him and he refused. He also stated that he had witnessed the victim's mother accuse other men of abusing her and that on numerous occasions he heard her state that someday "some man is going to pay" for what happened to her. Biesterveld's mother also relayed specific stories about the victim's mother's history of accusations and attempts at inappropriate sexual contact with men. At the motion hearing, the State accepted the allegations in the affidavits as true and the court did likewise, stating:

> We're going to assume that [the victim's mother] was sexually assaulted by a number of people, that she had even complained about that sexual abuse … and mentioned it to people, that never once did she mention that Allan Biesterveld had sexually had contact with her in any way … and that, therefore, that lends some credibility to the idea that [the victim's mother], when she gave her testimony at the sentencing hearing might have been falsifying or creating an incident to get Mr. Biesterveld in more trouble … and that the [S]tate is acknowledging that the court will accept that happened ….

¶17 The circuit court then went on to state that the allegation of the victim's mother had "at most minimal" to do with the lengthy sentence imposed on Biesterveld. It ruled that it would "stick with its decision" and denied Biesterveld's motion.

¶18 Biesterveld, by reference to the record, has met his burden to demonstrate that the circuit court relied on inaccurate information at sentencing. The burden now shifts to the State to persuade us that the sentencing error was harmless. *See* ***Anderson***, 222 Wis. 2d at 410-11. An error is harmless if there is no reasonable probability that it contributed to the outcome. ***Id.*** at 411. The State argues that the court made an extensive record regarding Biesterveld's character, the seriousness of his crime, and the need to protect the public, all proper and relevant considerations under ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). Further, it argues, any reliance on the untrue allegation was harmless because the allegation simply added to the cumulative conduct that was considered by the court. Because the sentence was based on the primary sentencing factors and does not shock the public conscience, the State asserts, it should be left undisturbed on appeal. *See* ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996).

¶19 Biesterveld disagrees and points to the multiple references the court made to the untrue allegation at sentencing. In particular, Biesterveld emphasizes the circuit court's comments immediately following the victim's mother's allegation, where the court interrupted her statements and explained that her allegation undercut the defense theory that Beisterveld's conduct was an aberration. Though the circuit court denies significant reliance on the untrue information at sentencing, we cannot accept this characterization. The court's own statements on the record demonstrate that the untrue allegation held sway.

Biesterveld also observes that the court "meticulously" reviewed the presentence report on the record and imposed a sentence more than twice that recommended by the agent who had prepared the report. Interestingly, the only information that was not in the presentence report was the untrue allegation. Though this is not dispositive, a court is not bound by an agent's recommendation; it is persuasive alongside the dramatic pause and multiple references afforded the untrue allegation at sentencing. The State has not persuaded us that the error was harmless. Biesterveld is entitled to resentencing before a different court.

¶20 Because we are remanding the matter, we choose to address the use of the term "dismissed outright" as it relates to sentencing. Although Biesterveld did not move to withdraw his plea when he became aware that the dismissed charge would be considered at sentencing, the role of that dismissed charge in his sentencing is a concern. The law provides no direct guidance as to the weight a sentencing court may place on a charge dismissed outright or if it may consider such a charge at all.[2] However, WIS. STAT. § 973.20(1g)(b) defines a read-in charge as:

> [a]ny crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.

We can infer, therefore, a dismissed-outright charge is one that a court cannot consider at the time of sentencing.

[2] We certified the following issue to the supreme court: "Whether a circuit court, for the purpose of sentencing, may consider a 'dismissed outright' charge that was part of the plea agreement?" The supreme court refused certification.

¶21 The term "dismissed outright," on its face, led Biesterveld to believe that it meant something more beneficial than "dismissed and read in" or "dismissed with prejudice." It was this belief that helped accomplish the plea agreement. At sentencing, the prosecutor did not use any of the facts underlying Count 2 in his arguments to the court. However, the court, of its own volition, seized upon those facts and incorporated them into its sentencing decision. We conclude that this was an improper exercise of its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (when sentencing discretion is exercised on the basis of an improper factor, there is an erroneous exercise of discretion).

CONCLUSION

¶22 We hold that Biesterveld has not demonstrated a manifest injustice such that plea withdrawal is required. However, he has demonstrated that the sentencing court relied on untrue information in pronouncing sentence. The State has failed to show that the error was harmless. Thus, Biesterveld's due process right to be sentenced on true and correct information was violated and he is entitled to resentencing. Furthermore, we conclude that the circuit court erroneously exercised its discretion when it disregarded the parties' agreement that Count 2 would be dismissed outright and not considered at sentencing. We therefore affirm the judgment of the circuit court and that portion of the order denying plea withdrawal. We reverse that part of the order that denied resentencing and remand for resentencing before a different branch of the circuit court.

By the Court.—Judgment affirmed; order affirmed in part, reversed in part and remanded with directions.

Not recommended for publication in the official reports.