COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP204-CR **Cir. Ct. No. 2005CF944**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE MAZE BUCKLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Willie Buckley appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that the circuit court erred when it denied his motion to withdraw his pleas. He argues that his pleas were

involuntary and the result of ineffective assistance of counsel because he entered the plea believing he could preserve an issue for appeal. We conclude that the circuit court properly denied the motion for postconviction relief and affirm the judgment and order.

¶2 In August 2005, Buckley was charged with one count of possession of cocaine, three counts of felony bail jumping, one count of possession of drug paraphernalia, and one count of obstructing an officer. The factual basis alleged for the bail jumping charges was that Buckley was released on bond in Racine County case number 2004CF496 when he was arrested on July 21, 2005, for these crimes.

¶3 Although Buckley was on bond in the Racine County case at the time of his arrest, the charges in that case were subsequently dropped. Buckley had been bound over for trial after a preliminary hearing held on January 5, 2005. In June 2005, he moved for reconsideration of the bindover decision. The circuit court, by Judge Simanek, granted the motion and dismissed 2004CF496 on September 22, 2005, *nunc pro tunc* to January 5, 2005.

¶4 On the day the of trial in this case, November 8, 2005, the prosecutor told the court that she would not proceed with the possession of cocaine charge and the bail jumping charge that went with it because another person had admitted the cocaine was hers. Buckley then moved to dismiss the other bail jumping charges as well. He argued that because the dismissal in 2004CF496 was nunc pro tunc to January 5, then he was not on bond when he was arrested on July 21. The court took the motion under advisement. The parties also discussed whether Buckley would stipulate that the offense in 2004CF496 was a felony. Buckley would not agree to go forward with the stipulation at this point.

¶5 The next day, the court denied Buckley's motion to dismiss the bail jumping charges finding that because Judge Simanek had not ruled on the motion to reconsider until September 21, Buckley was on bond when he was arrested on July 21. Defense counsel then renewed the discussion of the stipulation. Counsel stated that she believed that Buckley could stipulate that he was on bond for the purposes of the jury trial, yet preserve the right to appeal the effect of the nunc pro tunc order. Counsel stated that Buckley was agreeing to the stipulation on her advice and that his agreement was premised on being able to preserve the issue for appeal. The prosecutor stated that she did not think that it was guaranteed that the issue could be preserved for appeal and noted that Buckley "has used this as a tool to say that his pleas are not voluntary when other things haven't gone his way." Judge Simanek then explained that by entering into a stipulation "it's an agreement, and he may very well in my opinion forfeit his right to raise this on appeal." Defense counsel stated that she believed it could be preserved as a claim of ineffective assistance of counsel.

¶6 The court then explained the stipulation to Buckley and told him that by agreeing to the stipulation, he was relieving the State of proving that he had been on bond when he committed the felony. Buckley then said: "All I want to say on the record is that based on your ruling about the *nunc pro tunc* issue, I have decided in consultation with [defense counsel] to agree to the stipulation." The court accepted the stipulation.

¶7 Soon thereafter, Buckley agreed to enter a no contest plea to one count of possession of drug paraphernalia and one count of bail jumping. The remaining two counts were dismissed and read in. The court conducted a plea colloquy with Buckley, which included a discussion of the elements of bail jumping, and accepted his pleas. At Buckley's request, the court held the

sentencing hearing immediately following the plea colloquy. The court sentenced Buckley to one year and six months of initial confinement and six months of extended supervision for the possession of drug paraphernalia charge, and a concurrent term of three years' initial confinement and three years' extended supervision on the felony bail jumping charge.

¶8 Buckley then brought a motion for postconviction relief seeking to withdraw his pleas based on a manifest injustice. He argued that his pleas were involuntary because he entered them believing that he would be able to appeal the denial of the motion to dismiss the bail jumping charges based on the nunc pro tunc order. He also argued that he received ineffective assistance of trial counsel because his counsel had told him that he would be able to preserve the issue for appeal.

¶9 The court held a ***Machner*** hearing.[1] Buckley's trial counsel testified that Buckley had wanted to preserve the nunc pro tunc issue for appeal. She also stated that she had researched the issue, but had not found any case that discussed whether the nunc pro tunc language in the order "would effectively erase the existence of the bond so that no bond would have been in existence" when Buckley was arrested. She also testified that the issue was significant to Buckley, that she told him the issue would be preserved for appeal, although she did not think that he would succeed on it, and that she thought he would not have entered the pleas if he had known the issue was not preserved.

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶10 Buckley also testified. He stated that his trial counsel encouraged him to accept the plea offer to reduce his potential exposure. He also testified that he believed he would be able to appeal the nunc pro tunc issue, and that he would not have entered the pleas had he known he could not appeal the issue. He also testified that he had, in the past, moved to withdraw pleas based on a statement having been made that certain issues were preserved for appeal.

¶11 The circuit court denied the motion. The court found that trial counsel had given Buckley bad advice about whether he would be able to enter the pleas and preserve an issue for appeal. The court also found, however, that Buckley knew from past experience that issues cannot be preserved for appeal once he entered the plea. Further, the court found that Buckley was "eager" to get the case wrapped up, and wanted to move right into sentencing. The court concluded:

> So I'm satisfied that in spite of the statement of [defense counsel] that the state of mind of Mr. Buckley to go forward and get this matter concluded, the fact that he had knowledge on his own that he obviously had been told in the past that by pleading issues on appeal are not necessarily preserved … and that he acknowledged that the D.A. had told him that issue—it wasn't guaranteed that issues could be preserved on appeal; that he had other experiences in other files with respect to that and that based upon the demeanor of Mr. Buckley; and in his activity in this case and others, that what really has occurred here is what the case law refers to as nothing more than Mr. Buckley's change of heart and wanting to change his mind about entering a plea.

¶12 The court further found that Buckley was told when the parties discussed the stipulation that the issue would not be preserved and that he still entered the plea, stipulating to the facts to support the elements of bail jumping.

The court found that he knew "he would thus be forfeiting his right to pursue the appeal in spite of what [defense counsel] told him."

¶13 Buckley argues to this court that the circuit court erred because his pleas were entered involuntarily and were the product of ineffective assistance of trial counsel. After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily and intelligently. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A defendant has the burden of proving a manifest injustice by clear and convincing evidence. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. ***Id.*** A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. ***Booth***, 142 Wis. 2d at 237. The circuit court, as fact finder, "is the ultimate arbiter of the credibility of the witnesses and the weight to given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted).

¶14 The trial court concluded that Buckley had not met his burden of establishing a manifest injustice. In reaching this conclusion, the court assessed the evidence before it and made a credibility determination. The court did not believe Buckley's argument that he did not know he could not appeal the issue. The court found, based on all of the evidence before it, that Buckley had not entered his plea involuntarily, but had simply had a change of heart.

¶15 We conclude that the trial court had participated in all of the proceedings, and was in the best position to assess the credibility of the witnesses and the weight to be given to the evidence. The court properly exercised its discretion, and we see no reason to disturb its findings and conclusions. Consequently, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.