COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2246-CR **Cir. Ct. No. 2006CF34**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD R. MCCLINTOCK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 SNYDER, J. Gerald R. McClintock appeals from an order denying his motion to withdraw his guilty plea. He contends the trial court erred in accepting his plea to a charge of sexual assault of a child with additional read-in

charges because he was not aware of the fourth count, a read-in charge, until sentencing. Further, he asserts that he never would have pled guilty to count one had he known about count four. As a result, McClintock argues manifest injustice occurred when he was denied the ability to withdraw his guilty plea. We disagree with McClintock and affirm the order of the trial court.

BACKGROUND

¶2 On January 24, 2006, the State filed a complaint charging McClintock with one count of sexual assault of a child under the age of thirteen, one count of physical abuse of a child, and one count of felony intimidation of the victim. The court held a preliminary hearing and set a trial date. Subsequently, the State filed an information that contained the three counts from the complaint plus a fourth count of repeated sexual assault of a child. The maximum penalty for count one, sexual assault of a child under the age of thirteen, is sixty years in custody. The maximum penalty for the read-in counts is six years for physical abuse of a child, ten years for felony intimidation of the victim, and sixty years for repeated sexual assault of a child.

¶3 McClintock appeared by video at the arraignment hearing. Defense counsel told McClintock that the same criminal charges that were in the criminal complaint, or in other words only counts one through three, were being asserted. McClintock waived the reading of the information and pled not guilty.

¶4 On March 30, the prosecutor made the following offer to McClintock: "If the defendant pleads guilty to count #1, the State would move to dismiss and read-in the remaining counts. A [presentence investigation (PSI)] would be requested by the parties, and both sides would be free to argue for the appropriate sentence." McClintock accepted.

¶5 During the plea colloquy, the trial court asked McClintock if he understood the charge he was pleading guilty to, count one, which had a maximum penalty of sixty years in custody, and he answered yes. The elements of the offense were attached to the plea questionnaire and McClintock stated he understood those as well. McClintock also expressed that he understood he was giving up constitutional rights by pleading guilty to count one.

¶6 When the trial court asked McClintock about the two read-in charges, he said he understood what those were, but the court went on to explain the impact of read-in charges, stating "the sentencing judge may consider these when imposing sentence, although it does not increase the maximum penalty, and that they may be considered for restitution purposes but they prevent the State from prosecuting you again on these read-in charges." The court also asked about the plea agreement and questionnaire, and whether defense counsel went over those documents with McClintock, and McClintock answered yes. In addition, defense counsel stated at the plea hearing that McClintock had been given all discovery and investigative reports, except a statement by the witness that he did not care to see. The court found him guilty of count one, dismissed counts two and three as read-in charges for sentencing, and ordered a PSI.

¶7 The court signed the Judgment of Dismissal/Acquittal, which specified three read-in charges rather than two. In addition, the court's order for the PSI listed three read-in counts. Though the sentencing memorandum contained only the three original charges, the PSI prepared for the trial court included all four counts.

¶8 At sentencing, the court reviewed the charges, including count four, which was to be read in. The following dialogue ensued:

> THE COURT: Do you agree with my recitation so far?
>
> [DEFENSE COUNSEL]: No. Because he is not—the read-ins are physical abuse of a child, felony intimidation of a victim. There is no read-in for repeated sexual assaults of a minor.
>
> THE COURT: The clerk's records indicate repeated first degree sexual assault of a child.
>
> [PROSECUTOR]: Count four of the information.
>
> [DEFENSE COUNSEL]: Hold please, Your Honor. I would acknowledge it, Your Honor, yes.

¶9 Defense counsel then stated, "[McClintock] did enter a plea to one specific event. He understands that there were read-in charges, however he does not—he is not admitting any read-in charges." The court then questioned defense counsel, asking:

> THE COURT: Now, as a result of the very serious nature of this crime, I ordered a presentence investigation which I have received; that was filed on August 17th of this year. In addition, we have received a presentence memorandum or a sentencing memorandum from … your office… Have you gone over the … Court ordered presentence investigation with your client?
>
> [DEFENSE COUNSEL]: Yes.

The court heard sentencing arguments and sentenced McClintock to twenty years, fourteen years of initial confinement and six years of extended supervision.

¶10 On May 14, 2007, McClintock moved to withdraw his guilty plea. At the post-conviction, evidentiary hearing, McClintock stated that he was not aware of a fourth count until the sentencing hearing. However, he did admit that he went over the PSI himself and with his attorney prior to sentencing. McClintock told the court that he pled guilty to count one with the understanding that counts two and three were dismissed and would be read in; however, he

would not have taken the plea bargain if he had known about count four. Defense counsel testified that he forgot about the fourth count and that he was aware there was a fourth count through the information and PSI. Defense counsel also stated that McClintock was supplied with a copy of the PSI, but McClintock never questioned the report's reference to count four. The trial court judge denied McClintock's motion for plea withdrawal. McClintock appeals.

DISCUSSION

¶11 McClintock raises two issues on appeal. First, he argues that read-in charges have a direct impact at sentencing and because he did not know of the fourth count, a direct consequence, until sentencing, he did not make his plea knowingly, intelligently, and voluntarily. Second, he asserts that manifest injustice occurred when he was unable to withdraw his guilty plea after sentencing.

¶12 We begin by observing that it is much easier to withdraw a plea before sentencing than it is to withdraw a plea after sentencing. Although a defendant does not have an absolute right to withdraw a guilty plea before sentencing, *see* ***State v. Jenkins***, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24, the burden on the defendant is to show by a preponderance of the evidence that he or she has a fair and just reason. ***Id.*** A "fair and just reason" is an adequate reason for the defendant's "change of heart." ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).

¶13 In contrast, a defendant looking to withdraw his or her guilty plea after sentencing must show that if he or she is refused the chance to withdraw the plea, that refusal would result in manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. Manifest injustice may be shown with

clear and convincing evidence that a defendant's plea was not made knowingly, intelligently, and voluntarily. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. "Whether a plea is knowing, intelligent and voluntary is a question of constitutional fact." ***Brown***, 293 Wis. 2d 594, ¶19. On review, we accept the circuit court's findings of historical and evidentiary facts unless they were clearly erroneous; however, we independently determine if those facts demonstrate the defendant's plea was knowing, intelligent, and voluntary. ***Id.*** If the defendant meets his or her burden of proof, the State must show by clear and convincing evidence the defendant did know and understand the information necessary to make a knowing and voluntary plea. ***State v. Bangert***, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986). With these standards in mind, we turn to McClintock's arguments.

¶14 McClintock asserts that his first knowledge of a fourth count was at the sentencing hearing, where the court mentioned it multiple times. He stresses that he would not have taken the plea bargain if he knew there was a fourth count. McClintock observes that his plea was made without full knowledge of all of the read-in charges that would be considered at sentencing and that, because the trial court ruled he could not withdraw his plea, a manifest injustice has occurred. The State responds that whether McClintock knew of the fourth count does not matter, no manifest injustice occurred because the sentence is well within the statutory limits.

¶15 McClintock contends that had he known about the fourth charge, he would have changed his mind about entering the guilty plea. But this claim rings false in light of the fact that McClintock had many opportunities to withdraw his plea before he was sentenced. For instance, had McClintock not waived the reading of the Information, he would have known about the newly added fourth

charge at the arraignment hearing. McClintock was also advised of the fourth charge through the PSI, which he told the court he had reviewed with his attorney. He had another chance when the court mentioned the fourth charge at the beginning of the sentencing hearing. McClintock must have known of the fourth charge prior to being sentenced because he objected to the fourth count on the record at the sentencing hearing. He could have moved for plea withdrawal immediately, but he did not.

¶16 We are not persuaded that McClintock was unaware of the fourth charge, that his plea was unknowing or involuntary, or that he would have decided not to enter a plea had he known of the fourth charge. The record indicates otherwise. McClintock fails to demonstrate that a manifest injustice has occurred in this case. Accordingly, his motion for plea withdrawal was properly denied.

¶17 We do not address McClintock's alternative argument that the read-in charges are direct consequences of his plea and therefore he should have been made aware of the fourth charge at the plea hearing. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (where there is at least one sufficient ground to support the trial court order we need not discuss other grounds). Because no manifest injustice has occurred, the appeal is resolved and McClintock's plea stands.

CONCLUSION

¶18 McClintock knew the range of punishment he faced when he entered his guilty plea, and the sentence he received was well within the statutory limit. The additional read-in charge did nothing to change the range of punishment. Furthermore, the record facts demonstrate that McClintock knew or should have known about the fourth charge before he was sentenced and, therefore, could have

moved to withdraw his plea at that time. We conclude that McClintock has not demonstrated that a manifest injustice occurred. We therefore affirm the order of the trial court.

By the Court.—Order affirmed.

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