COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2350 **Cir. Ct. No. 1995CM4117**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIAN C. BETHEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Julian Bethel appeals from an order denying his motion for postconviction relief. He contends that he is entitled to withdraw his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1995-96). All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

plea of no contest to battery and disorderly conduct because he was denied effective assistance of counsel and because his plea was involuntary. Bethel claims his counsel was ineffective because he (1) failed to advise Bethel of all the consequences of his plea, including the possible use of the conviction to enhance his sentence in a future criminal case, and (2) failed to explain to Bethel that he was being charged under the habitual criminal statute, which Bethel argues was erroneously applied to him. Bethel argues he would not have entered a plea if his counsel had provided that information to him, and thus his plea was involuntary. We conclude that Bethel's arguments are without merit, and therefore affirm.

Background

¶2 On November 14, 1995, Bethel was charged with misdemeanor battery and disorderly conduct, with an increased penalty for habitual criminality.[2] On February 28, 1996, Bethel pled no contest to battery, contrary to WIS. STAT. § 940.19(1), as a habitual offender. Bethel admitted that he had a prior felony conviction dated June 7, 1994. The court withheld sentence, placed Bethel on probation for two years, and imposed forty-five days in the Dane County Jail as a condition of probation. Bethel did not appeal from the conviction.

¶3 In 2001, several years after he completed his Wisconsin sentence, Bethel committed a federal offense and was convicted in federal court. The federal court sentencing Bethel classified him as a career offender based on his

[2] Under the increased penalty for habitual criminality statute at the time Bethel was sentenced, a maximum term of imprisonment of one year or less could be increased to not more than three years, if the actor was convicted of a felony during the five-year period immediately preceding the commission of the present crime, and the conviction remained of record and unreversed. WIS. STAT. § 939.62(1)(a), (2).

Wisconsin convictions, consisting of the first felony and the misdemeanor battery. The court explained that the misdemeanor battery qualified as a felony crime of violence under the federal guidelines. Thus, Bethel was subject to an increased penalty range for his federal conviction.

¶4 On July 13, 2007, Bethel filed a motion for postconviction relief from his Wisconsin conviction for misdemeanor battery pursuant to WIS. STAT. § 974.06, asserting that the trial court and his attorney failed to inform him of this potential consequence. The trial court found that "the fact that this conviction may be considered in the future in another case and result in a longer sentence in that future case" was a collateral consequence. The trial court explained that neither "the sentencing court nor original counsel in this case were derelict in their respective duties" because "[n]either … [was] required to advise a defendant of collateral consequences." The trial court denied the motion for postconviction relief, finding it had no merit. Bethel appeals.

Standard of Review

¶5 When a defendant seeks to withdraw a guilty or no contest plea after sentencing, he must prove "by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. James***, 176 Wis. 2d 230, 236-37, 500 N.W.2d 345 (Ct. App. 1993). "A manifest injustice occurs where a defendant makes a plea involuntarily or without knowledge of the consequences of the plea—or where the plea is entered without knowledge of the charge or that the sentence actually imposed could be imposed." ***Id.*** at 237 (citation omitted). "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently

whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted).

Discussion

¶6 Bethel argues that he did not enter his plea knowingly, intelligently and voluntarily because he did not fully understand the nature and consequences of his plea. He asserts that neither the trial court nor his attorney informed him that he could receive a longer federal prison sentence if he committed a federal crime based on his state conviction. He also asserts that he was not informed that he was being charged as a habitual offender, and that he should not have been so charged because he did not meet the criteria of a habitual offender. Bethel contends that he was denied effective assistance of counsel based on his attorney's failure to provide this information to him before he entered his plea. He contends that if he had known that a future court could consider the conviction to enhance a future sentence and that he was being charged as a habitual offender, he would have insisted on a jury trial. We reject each of Bethel's claims.[3]

¶7 The problem with Bethel's first argument is that neither the court nor counsel had an obligation to inform Bethel of the possible future use of a state conviction to enhance a federal sentence. A defendant need only be informed of

[3] Bethel spends the first part of his brief arguing that his arguments are properly before us. The State replies that Bethel's arguments are barred by the equitable doctrine of laches, asserting in a conclusory fashion that Bethel has delayed an unreasonable amount of time in bringing his motion and that the State has been prejudiced by the delay. *See generally* ***Smart v. Dane County Bd. of Adj.***, 177 Wis. 2d 445, 458, 501 N.W.2d 782 (1993). However, we need not address this argument; even assuming Bethel's arguments are properly before us, we see no merit in his claims.

the direct consequences of his guilty plea in order to enter a plea knowingly, intelligently, and voluntarily. *See* ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999). "If the court fails to disclose a direct consequence of a plea, a defendant may withdraw the plea as a matter of right." ***State v. Brown,*** 2004 WI App 179, ¶7, 276 Wis. 2d 559, 687 N.W.2d 543. "However, if the court does not disclose a collateral consequence of a plea, a defendant may not withdraw his plea on the basis of that lack of information." ***Id.*** Furthermore, "defense counsel's failure to advise a defendant of collateral consequences is not a sufficient basis for an ineffective assistance of counsel claim." ***Id.***, ¶7 n.3. We turn, then, to whether the possible use of Bethel's state conviction to enhance a federal sentence in a future criminal proceeding is a direct or collateral consequence of his plea.

¶8 "A direct consequence is one that definitely, immediately and largely automatically flows from the conviction." ***State v. Parker***, 2001 WI App 111, ¶8, 244 Wis.2d 145, 629 N.W.2d 77. A consequence is collateral if it might or might not occur in a given case and if it is the result of a separate decisionmaking process. ***Id***. "Collateral consequences do not automatically flow from the plea, but rather will depend upon a future proceeding, or may be contingent on a defendant's future behavior." ***State v. Yates***, 2000 WI App 224, ¶7, 239 Wis. 2d 17, 619 N.W.2d 132.

¶9 The use of Bethel's state conviction to enhance his federal sentence depended, first and foremost, upon Bethel's committing a federal crime. As such, it did not automatically flow from Bethel's state conviction, but was contingent upon Bethel's own future behavior. Additionally, the use of the state conviction to enhance the federal sentence was a decision by a separate court in a separate proceeding. Because the federal court's treatment of the state conviction did not

flow automatically from the state conviction, but rather depended on Bethel's own behavior and the decision of a separate court, the consequence was collateral rather than direct. It therefore cannot support a claim that Bethel's plea was involuntary or that he was denied effective assistance of counsel in entering his plea.

¶10 Bethel also argues that the trial court erred in accepting his no contest plea to the battery charge with a habitual criminal enhancer because he did not admit to being a habitual criminal.[4] *See* ***State v. Theriault***, 187 Wis. 2d 125, 132 & n.1, 522 N.W.2d 254 (Ct. App. 1994) (requiring either defendant's express admission to prior felony conviction or that State prove the elements of the habitual criminal statute beyond a reasonable doubt). The record reveals, however, that Bethel did expressly admit to having committed a felony within five years of the battery conviction, as required by the habitual criminal statute. The transcript of Bethel's plea and sentencing hearing contains the following exchange between Bethel and the court:

> Q: …. Mr. Bethel, this complaint further alleges the habitual offender charge or statute which asserts that on June 7th of 1994 you were convicted of a felony offense of possession of a controlled substance with intent to deliver contrary to section 161.41(1m) of the statutes, is that true?
>
> A: Yeah.
>
> Q: And to your knowledge that conviction is still there, it wasn't appealed, it hasn't been reversed?

[4] The State did not respond to Bethel's argument that his plea was involuntary and that he was provided ineffective assistance of counsel based on the use of the habitual criminal statute. We remind the State that arguments it does not refute may be deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

A: No.

This admission is sufficient to satisfy the increased penalty for habitual criminality statute.[5]

¶11 Finally, Bethel argues that his attorney provided ineffective assistance of counsel because he failed to inform Bethel that his plea included an increased penalty for habitual criminality and, presumably, for advising him to enter a plea with a habitual criminal enhancer that did not apply to him. Because the record establishes that Bethel was subject to the habitual criminal statute, and was informed of that fact by the court, Bethel's argument that his counsel provided him ineffective assistance necessarily fails. We therefore affirm.

By the Court.— Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] Bethel's argument seems to be that he was not convicted of three or more separate misdemeanors; however, the statute requires conviction for three or more misdemeanors *or* a felony. *See* WIS. STAT. § 939.62(1)(a), (2). We do not understand the other parts of Bethel's arguments about the habitual criminality statute sufficiently to respond to them, but we are satisfied that Bethel met the definition of a habitual criminal under the statute and that the court conducted a sufficient colloquy into this aspect of his plea.