COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2631-CR **Cir. Ct. No. 2004CF005749**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NELSON GARCIA, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and MARTIN J. DONALD, Judges. *Reversed and cause remanded.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Nelson Garcia, Jr., appeals a judgment convicting him of one count of first-degree sexual assault of a child. He also appeals the order denying him postconviction relief. In his postconviction motion, Garcia

alleged that he did not enter a knowing, voluntary, and intelligent plea to the charge, and that he received ineffective assistance from his trial counsel. On appeal, he challenges the trial court's decision to deny those claims without a hearing. We conclude that a hearing on the postconviction motion is necessary, and we therefore reverse.

¶2 Garcia pleaded guilty to the charge, and conceded a factual basis for it consisting of evidence that he touched the private parts of the victim. In exchange for Garcia's plea, the State dismissed three other counts of first-degree sexual assault of a child, and one count of exposing a child to harmful material. The dismissed sexual assault charges contained allegations of far more serious assaults on the victim. They were dismissed, rather than dismissed and read-in.

¶3 At sentencing, trial counsel objected when the prosecutor began discussing the more serious assaults, arguing that the court should not consider the allegations in the dismissed counts. The court responded that there was no plea agreement to limit the sentencing arguments, and that the court could consider unproven offenses in evaluating the defendant's character. Garcia received a sentence that exceeded the State's recommendation.

¶4 After his conviction Garcia moved to withdraw his plea, alleging that he pleaded without realizing that the trial court could consider the facts underlying the dismissed charges. He further alleged that trial counsel never advised him to the contrary, but instead stressed the fact that the dismissed charges would not be read-ins. The motion indicated that trial counsel would confirm in testimony that he was responsible for Garcia's mistaken belief that the dismissed charges would not be considered at sentencing. In fact, according to the motion, counsel negotiated a dismissal of the charges without a read-in based on that

misunderstanding. Garcia also claimed that counsel's mistake amounted to ineffective assistance.

¶5 Although both parties requested a hearing on the motion, the trial court denied the motion without a hearing. Essentially, the trial court concluded that Garcia was not entitled to withdraw his plea, even if all of his allegations were true. The court cited and followed the reasoning in an unpublished opinion from this court that affirmed a conviction on comparable facts. The State concedes that the court erred by citing to and relying on an unpublished opinion of this court, and argues that we should affirm on other grounds.

¶6 The constitution requires a knowing, voluntary, and intelligent plea. ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). A defendant who is denied a constitutional right may withdraw a no contest plea as a matter of right. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). Inaccurate legal information may render a plea unknowing and involuntary. *See* ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992). We independently review whether a plea was knowing and voluntary as a matter of constitutional fact. *See* ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891.

¶7 Garcia's mistaken belief about the dismissed charges, if proven at a hearing, would entitle him to withdraw his plea. That would not be the case were the mistake solely Garcia's. *See* ***State v. Brown***, 2004 WI App 179, ¶¶11-12, 276 Wis. 2d 559, 687 N.W.2d 543 (discussing ***State v. Rodriguez***, 221 Wis. 2d 487, 585 N.W.2d 701 (Ct. App. 1998)). However, Garcia's motion alleged that his mistake was attributable to trial counsel, and that trial counsel would confirm his responsibility for the error in testimony. It does not matter that the mistake

concerned collateral rather than direct consequences of the plea. ***Brown***, 276 Wis. 2d 559, ¶8. If the defendant is not responsible for the mistake of law, the defendant has the right to withdraw the plea. *See* ***id.***, ¶13.

¶8 The State does not dispute that in some circumstances the defendant's mistaken view of the legal consequences of the plea entitles the defendant to withdraw the plea. However, the State contends that those circumstances are limited to where the error is attributable to both defense counsel and the prosecutor, and where the trial court acquiesces in the error. That, in the State's view, is the holding of ***Brown*** and the case on which ***Brown*** principally relies, ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983). The State contends that because Garcia's motion did not allege that either the prosecutor or the judge shared defense counsel's misunderstanding, it did not allege sufficient facts to obtain a hearing.

¶9 We conclude that the State's interpretation of ***Brown*** and ***Riekkoff*** is too narrow. In ***Brown*** and ***Riekkoff***, the prosecutor and trial court shared defense counsel and the defendant's misunderstanding of the law. *See* ***Brown***, 276 Wis. 2d 559, ¶¶8-9. However, we do not consider that fact to be outcome determinative in these cases. We view both cases as holding that an erroneous understanding of the legal consequences of a plea entitles withdrawal of the plea as long as the mistake is not attributable solely to the defendant.

¶10 Our decision makes it unnecessary to address the arguments concerning Garcia's claim of ineffective counsel. We remand for an evidentiary hearing on whether Garcia entered a knowing and voluntary plea.

By the Court.—Judgment and order reversed and cause remanded.

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