COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1878-CR **Cir. Ct. No. 2007CF349**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER PENEAU-WYCKLENDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jennifer Peneau-Wycklendt appeals from a judgment entered upon her guilty plea convicting her of operating a motor vehicle while intoxicated (OWI), sixth offense, and from an order denying her motion for

postconviction relief. She has not shown sufficient grounds to withdraw her plea or that a new factor warrants sentence modification. We affirm.

¶2 A criminal complaint charged her with sixth-offense OWI. The complaint recited the potential penalties, including that, if convicted, she "shall be fined not less than $600 and imprisoned for not less than 6 months." Pursuant to a negotiated agreement, Peneau-Wycklendt agreed to plead guilty.

¶3 At the plea hearing before entering her plea, defense counsel summarized the terms of the agreement. He said he at first understood the State's offer to be "imposing and staying the maximum prison sentence and putting her on probation for three years. Period." He now confessed to "some confusion" about whether the State's offer included any condition time because its written offer included unspecified condition time, but when discussing the State's offer just before the plea hearing, again no mention was made of condition time. This exchange followed:

> [DEFENSE COUNSEL]: …. But to make a long story short, Ms. Peneau-Wycklendt knows that … whether the State is asking for some condition time or not, the Court can do it and she knows that I'm going to, ultimately, hope that she doesn't get any condition time but there's a possibility that she will. And there is—
>
> THE COURT: And [the] State will be affirmatively asking for it, you understand that, ma'am?
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> THE DEFENDANT: Yes.
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> [DEFENSE COUNSEL]: …. I told Ms. Peneau-Wycklendt that unless I'm misreading the statute, and I didn't look at a statute book this morning, there's a very high probability that there is a mandatory minimum of six months in this case. And I feel as an officer of the Court, I'm obligated to say that. I'd have to look at that, but I think it's included in the Complaint. And I would have to double-check that but if there is, then I don't even know—

> THE COURT: It is. It's a fine of not less than $600 and imprisonment for not less than six months.
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> [DEFENSE COUNSEL]: I told Ms. Peneau-Wycklendt that as well.
>
> THE COURT: Is that correct, ma'am?
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> THE DEFENDANT: Yes, it is, Your Honor.
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> THE COURT: All right. So are you ready to proceed with a plea?
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> ….
>
> THE DEFENDANT: Yes, ma'am.
>
> ….
>
> THE COURT: All right…. The maximum possible penalty I can impose is a fine up to $10,000, imprisonment up to six years, I can revoke your driver's license for up to 36 months, and there is a minimum fine of $600 and imprisonment for not less than six months, with the number of convictions in your lifetime counted equals five or more. Do you understand the charge?
>
> THE DEFENDANT: Yes, I do, Your Honor.

¶4 The court then ascertained that Peneau-Wycklendt intended to plead guilty, had read the complaint, agreed that a factual basis supported her plea, reviewed the elements and the plea questionnaire/waiver of rights form with her attorney, and discussed with him and understood the constitutional rights she would waive by pleading guilty. The court reiterated each of those rights and Peneau-Wycklendt acknowledged that she understood she was giving them up. Peneau-Wycklendt confirmed that she made her plea freely, voluntarily and intelligently and was "[a]bsolutely" satisfied with her lawyer's representation. The court accepted Peneau-Wycklendt's plea.

¶5 At sentencing, both parties acknowledged the mandatory minimum sentence attendant to a sixth-offense OWI. The State then recommended three

years' probation, with six years' imprisonment (three years' confinement followed by three years' extended supervision) imposed and stayed, and unspecified condition time. Defense counsel concurred with that recommendation. The court recognized Peneau-Wycklendt's many efforts at rehabilitation. It also observed, however, that "this is not just a mistake. This is a continuing pattern that's spiraled out of control…. [Y]ou can't stop drinking. And you can't stop driving, which is the really bad part." It thus rejected the parties' recommendations and Peneau-Wycklendt's appeal for leniency, and sentenced her to a five-year term, two years' confinement and three years' extended supervision.

¶6 Postconviction, Peneau-Wycklendt moved to withdraw her plea on grounds that it was (1) not knowingly entered because she was affirmatively misinformed about the mandatory minimum sentence, and (2) premised upon a legal impossibility—i.e., on the belief that the plea preserved a chance at no confinement. Peneau-Wycklendt also sought to have her sentence modified on the basis of a "new factor" because the court's remarks suggested that Peneau-Wycklendt "fit[] the pattern of the typical serial drunk driver." The motion was denied without a hearing. Peneau-Wycklendt appeals.

¶7 We first address the issue of plea withdrawal. A defendant seeking to withdraw a guilty plea after sentencing has the heavy burden of showing by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A plea not knowingly, voluntarily or intelligently entered creates a manifest injustice because it fails due process requirements. *See* ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994). A plea is not knowingly, voluntarily and intelligently entered when a defendant does not know what

sentence actually could be imposed. ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999).

¶8 The decision to allow plea withdrawal ordinarily rests in the trial court's discretion. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). But where a defendant establishes the denial of a constitutional right, withdrawal of the plea is a matter of right. ***Id.*** The determination of whether a plea is voluntarily made presents a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. We will uphold the circuit courts findings of historical or evidentiary fact unless the findings are clearly erroneous, but we review questions of constitutional fact independent of the circuit court's determination. ***Id.***

¶9 Finally, the defendant has the initial burden of making a prima facie case—a "pointed showing"—that the trial court accepted the plea without conforming to WIS. STAT. § 971.08 or other mandatory procedures. ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. In addition, the defendant must allege that he or she in fact did not know or understand the information which should have been provided at the plea hearing. ***Id.*** If a prima facie violation is shown, the court must hold an evidentiary hearing at which the State is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent and voluntary despite the colloquy's identified inadequacy. ***State v. Brown***, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906. With these standards in mind, we turn to the case at hand.

¶10 Peneau-Wycklendt argues that the plea colloquy was defective because it did not inform her that the court was absolutely required to impose a sentence of at least six months' condition time and that she therefore did not know

or understand the potential for it. She seizes on counsel's "confusion" and that he told her only that imprisonment was a "high probability," not a certainty.

¶11 The record belies Peneau-Wycklendt's claim that she misunderstood. The complaint states that Peneau-Wycklendt "shall be … imprisoned for not less than 6 months" for fifth or greater offenses. She knew this was her sixth. She also affirmatively told the court that she read the complaint. Further, when counsel observed the "high probability" that she faced imprisonment, the court immediately confirmed the mandatory minimum penalties and verified that Peneau-Wycklendt had been so informed. Moments later when reciting the charge to Peneau-Wycklendt, the court again advised her of the mandatory minimum and asked if she understood. Peneau-Wycklendt responded, "Yes, I do, Your Honor." We conclude, as did the trial court, that Peneau-Wycklendt has not made a prima facie showing. She therefore has not established a right to an evidentiary hearing.

¶12 Peneau-Wycklendt alternatively argues that she should be allowed to withdraw her plea because she entered it under a misapprehension that she had preserved the possibility of a material benefit—that she had a chance at no condition time—that in fact was legally impossible for her to obtain. *See* ***State v. Dawson***, 2004 WI App 173, ¶14, 276 Wis. 2d 418, 688 N.W.2d 12. She contends that believing her counsel was free to argue for no condition time was a primary inducement for her to plead.

¶13 A plea to a legal impossibility renders the plea neither knowing nor voluntary, and withdrawal must be permitted. ***Id.*** Whatever confusion and misapprehension Peneau-Wycklendt and her counsel may have operated under before the plea hearing was put to rest before Peneau-Wycklendt pled guilty. As

noted above, twice the court informed her of the mandatory minimum penalty. Twice Peneau-Wycklendt confirmed her understanding. Only then did Peneau-Wycklendt enter her plea. It was not unknowing or involuntary.

¶14 Peneau-Wycklendt next contends she is entitled to a hearing to determine whether her sentence should be modified on the basis of a new factor. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the judge at the original sentencing, either because it was not then in existence or because even though it was then in existence, it was unknowingly overlooked by the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶15 The new factor here, Peneau-Wycklendt asserts, is the correction of the court's "erroneous view that [she] fits the pattern of the typical serial drunk driver." This is not a new factor. Defense counsel and Peneau-Wycklendt herself presented to the court the "correct view" of her drinking and treatment efforts—including her own past request to go to prison to address her alcoholism—and the circumstances of her relapse. The court expressly recognized that Peneau-Wycklendt was taking treatment seriously. The court's focus, however, was on the danger Peneau-Wycklendt posed to the community because of her repeated decisions to drive after drinking. Peneau-Wycklendt did not object to the court's recitation of the facts. She will not be heard now to say it was erroneous.

By the Court.—Judgment and order affirmed.

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