COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1287-CR **Cir. Ct. No. 2009CM31**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT D. NEIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

¶1 DYKMAN, P.J.[1] Kurt Neis appeals from his conviction following his guilty plea to disorderly conduct under WIS. STAT. § 947.01, with a domestic

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

abuse surcharge under WIS. STAT. § 973.055(1). Neis argues that the circuit court erred in denying his motion to withdraw his guilty plea without an evidentiary hearing. He argues that the circuit court did not establish that he understood the nature of the charge and his potential punishment if convicted as mandated under WIS. STAT. § 971.08, because (1) the circuit court did not inform him that he would be subject to the federal firearm ban following domestic violence convictions, 18 USC §§ 921(a)(33)(A)(i) and (ii) and 922(g)(9), upon conviction; and (2) the court did not inform him that "domestic abuse," as defined under § 968.075(1)(a), was an element of his conviction. We conclude that the record establishes that the circuit court properly informed Neis of all required information before accepting his guilty plea, and therefore Neis is not entitled to an evidentiary hearing or plea withdrawal. Accordingly, we affirm, but only because we are unable to write a principled opinion reversing.

Background

¶2 In January 2009, Dodge County police responded to a 911 hang-up call from Neis's residence in Williamstown Township. When police arrived at Neis's home, Neis appeared agitated, argued with police, and refused to answer police questions. Neis's wife appeared upset. Eventually, Neis informed police that he had grabbed his wife and thrown her from their garage and slapped her in the face at least once. Neis was then arrested for disorderly conduct under WIS. STAT. § 947.01 and battery under WIS. STAT. § 940.19(1). The State charged Neis with disorderly conduct under § 947.01. The criminal complaint lists the charge as "Disorderly Conduct, Domestic Abuse." It then alleges that Neis "did engage in disorderly conduct under circumstances in which such conduct tended to cause or provoke a disturbance, contrary to [WIS. STAT. §§] 947.01 [(prohibiting disorderly conduct)], 939.51(3)(b) [(setting forth the penalty for Class B

misdemeanors)], [and] 968.075(1)(a) [(defining "domestic abuse")]." In February 2009, Neis appeared pro se at his plea and sentencing hearing. The court engaged Neis in a colloquy, during which Neis pled guilty to "disorderly conduct, domestic abuse related." Neis admitted that the State could prove every element of the crime of disorderly conduct, establishing that Neis had "engaged in … loud, boisterous, violent, or otherwise disorderly conduct under circumstances which tended to cause or provoke a disturbance." He further admitted that "it was involving an individual that [he] either lived with or had a child with." The court accepted Neis's guilty plea, found him guilty of disorderly conduct, and sentenced him to one year of probation. The court entered a judgment of conviction, which listed the disorderly conduct statute, WIS. STAT. § 947.01, under "Violation," and stating "(968.075(1)(a) Domestic Abuse) Disorderly Conduct" under "Description."

¶3 Neis subsequently moved to withdraw his guilty plea, arguing that it was not knowingly, intelligently, and voluntarily entered because the court did not inform him that he would be subject to the federal firearm ban upon conviction or that "domestic abuse" was an element of his conviction. The circuit court denied Neis's motion to withdraw his plea without a hearing. Neis then filed a motion for reconsideration, arguing that he was charged with and convicted of domestic abuse under WIS. STAT. § 968.075(1)(a), and therefore the court was required to establish that Neis understood the definition of "domestic abuse" before accepting his guilty plea. The court determined that the judgment of conviction erroneously stated that Neis was sentenced under § 968.075(1)(a). It therefore ordered the judgment amended to state that Neis was subject to the domestic abuse surcharge pursuant to WIS. STAT. § 973.055(1). It declined to modify its decision in any other respect. Neis appeals.

Standard of Review

¶4 A circuit court's decision to allow a defendant to withdraw a guilty plea is within the court's discretion, "subject to the erroneous exercise of discretion standard on review." ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. When we review a discretionary decision, we examine the record to determine if the court applied the facts in the record to the proper legal standard, "and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999).

Discussion

¶5 Neis argues that he is entitled to an evidentiary hearing on his motion to withdraw his plea because his motion alleges that the circuit court failed to comply with WIS. STAT. § 971.08 when it accepted his guilty plea without informing him that his conviction would subject him to the federal firearm ban or that one of the elements of his conviction was "domestic abuse." We disagree.

¶6 If a motion to withdraw a plea makes a prima facie showing that the circuit court did not comply with WIS. STAT. § 971.08 and the defendant did not understand the information that should have been provided, the defendant is entitled to an evidentiary hearing at which the State bears the burden to establish the plea was nonetheless knowing, intelligent, and voluntary.[2] ***State v. Howell***, 2007 WI 75, ¶¶27, 29, 301 Wis. 2d 350, 734 N.W.2d 48. Thus, we begin with an

[2] In ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, the supreme court established additional duties for the circuit court before accepting a guilty plea. We discuss only the circuit court duties pertinent to this case.

analysis of whether Neis's motion alleges a deficiency in the plea colloquy under § 971.08.

¶7 Neis argues first that the circuit court did not comply with WIS. STAT. § 971.08 because it did not inform him that his conviction would subject him to the federal firearm ban, and thus did not inform him of the potential punishment he faced if convicted. *See* § 971.08(1)(a) (before accepting a guilty plea, the court must determine the defendant understands "the potential punishment if convicted"). Neis concedes that we held in ***Kosina*** that § 971.08 does not require a circuit court to inform a defendant that a conviction will subject the defendant to the federal firearm ban. Neis argues, however, that Kosina is distinguishable on its facts and that his rights under the Second Amendment to the United States Constitution are significant enough to render his plea involuntary absent knowledge that he would be subject to the federal firearm ban on conviction. We conclude that we are bound by ***Kosina***'s holding that a circuit court need not inform a defendant of the federal firearm ban before accepting a guilty plea, and that we have no other basis to conclude that the circuit court did not comply with § 971.08.[3] *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶8 In ***Kosina***, 226 Wis. 2d at 483-84, as here, Kosina argued that the circuit court erred in denying his motion to withdraw his guilty plea because "he was not informed that his conviction would result in a permanent prohibition of

[3] We ordered supplemental briefing on the issue of whether Article I, Section 25 of the Wisconsin Constitution requires a circuit court to inform a defendant that a conviction will subject a defendant to the federal firearm ban. After reviewing the parties' briefs, we conclude that there is no reason to address this issue separately. We address Neis's Second Amendment constitutional arguments below.

firearms possession under 18 U.S.C.A. §§ 921 and 922." Kosina argued that because he did not know that he would be subject to the federal firearm ban due to his conviction, his plea was not knowingly and voluntarily entered, and thus he was entitled to withdraw his plea to correct a manifest injustice. ***Id.***

¶9 We began by explaining that WIS. STAT. § 971.08(1)(a) requires the circuit court to determine that a defendant understands the potential punishment that may be imposed before accepting a guilty plea. ***Id.*** at 485. We also explained that "[a]n understanding of potential punishments or sentences includes knowledge of the direct consequences of the plea, but does not require that a defendant be informed of consequences collateral to the plea." ***Id.*** In assessing whether the effect of the federal firearm ban is a "direct" or "collateral" consequence of a guilty plea, we reiterated that "[a] direct consequence of a plea has a definite, immediate, and largely automatic effect on the range of a defendant's punishment." ***Id.*** at 486. Collateral consequences, unlike direct consequences, do not "automatically flow from the plea." ***Id.*** We said that "[i]n some cases, a particular consequence is deemed 'collateral' because it rests in the hands of another government agency or different tribunal. It can also be collateral because it depends upon a future proceeding." ***Id.*** (citation omitted).

¶10 We concluded first that the application of the federal firearm ban to Kosina was not a direct consequence of his plea because the circuit court made no explicit finding that Kosina's disorderly conduct related to domestic violence, a requirement for the federal firearm ban to apply. ***Id.*** at 487. We said that "[b]ecause the application of the federal statute to Kosina's conviction can still be contested, the federal statute's effects are not automatic in time or impact on Kosina's conviction." ***Id.*** at 488. We then conclude that even if the federal firearm ban applied to Kosina immediately upon conviction, it was a collateral

consequence because it arose under federal rather than Wisconsin law, and therefore did not have an "effect on the range of Kosina's punishment for disorderly conduct" in Wisconsin. ***Id.*** at 488-89. We explained that "[b]ecause the prohibition to possessing firearms arises from a body of law that is collateral to the state court proceedings, any consequence arising under that law must also be collateral." ***Id.*** at 488. Thus, we concluded that, for two independent reasons, "the federal statutes' effect is a collateral consequence of Kosina's guilty plea and cannot form the basis of a claim of manifest injustice requiring plea withdrawal." ***Id.*** at 489. Because "[d]efendants do not have a due process right to be informed of consequences that are merely collateral to their pleas," we held that the circuit court properly denied Kosina's motion. ***Id.***

¶11 We conclude that ***Kosina*** is controlling, and therefore Neis is not entitled to an evidentiary hearing on his motion to withdraw his plea. Under ***Kosina***, the circuit court need not inform a defendant of the application of the federal firearm ban to comply with WIS. STAT. § 971.08. We need not address Neis's argument that his case is distinguishable from ***Kosina*** because here the circuit court made an explicit finding that his conviction was for disorderly conduct related to domestic violence; regardless, it remains that the federal firearm ban arises under federal law, which we explained in ***Kosina*** was an independent basis for our conclusion that it was a collateral consequence. Because the effect of the federal firearm ban is a collateral consequence of Neis's plea, the circuit court did not err under § 971.08 in failing to inform Neis of that consequence.

¶12 Neis also asserts that his right to bear arms under the Second Amendment to the United States Constitution is a significant right, and the court should not have accepted his guilty plea without ensuring that he understood that he was losing that right. Neis argues that the legislature requires courts to inform

defendants that if they are undocumented immigrants, they may be subject to deportation on conviction, and that the Second Amendment rights of United States citizens are superior to the rights of undocumented immigrants to be free from deportation.

¶13 This argument, however, must be addressed to the legislature or the supreme court; we cannot read new requirements into WIS. STAT. § 971.08 that are not there based on our assessment of the importance of those rights. Moreover, to the extent Neis argues that a court must inform a defendant of the loss of significant constitutional rights following a conviction under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, we disagree. We have explained that due process does not require a court to inform a defendant of the collateral consequences of a guilty plea, even if those consequences are the loss of constitutional rights.[4] *See, e.g.*, ***State v. Madison***, 120 Wis. 2d 150, 160-61, 353 N.W.2d 835 (Ct. App. 1984).

¶14 Next, Neis argues that the circuit court erred in failing to inform him that "domestic abuse" was an element of his conviction. The problem with Neis's argument, however, is that Neis was convicted of disorderly conduct under WIS.

[4] The distinction between direct and collateral consequences as determinative of the constitutional validity of a plea seems to be problematic. "The Constitution sets forth the standard that a guilty or no contest plea must be affirmatively shown to be knowing, voluntary, and intelligent." ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). ***State v. Brown***, 2006 WI 100, ¶29, 293 Wis. 2d 594, 716 N.W.2d 906, speaks of a "full understanding of the charges against [the defendant]." A full understanding of charges against Neis would include that by pleading guilty, Neis would lose the right to possess a firearm, and would be prosecuted for a federal crime if he did so. This is a significant enough right for United States and Wisconsin citizens that we have included it in both constitutions. It is difficult to conclude that this right is nonetheless so insignificant that it is only a "collateral" consequence of pleading guilty to a disorderly conduct charge. But that is all it is. *See* ***State v. Kosina***, 226 Wis. 2d 482, 489, 595 N.W.2d 464 (Ct. App. 1999).

STAT. § 947.01, which does not contain an element of "domestic abuse." The elements of disorderly conduct under § 947.01 are that the defendant has "engage[d] in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Neis does not argue that he was not informed of the elements under the statute. He argues, however, that because the criminal complaint and conviction originally listed WIS. STAT. § 968.075(1)(a), which defines "domestic abuse" as including "[i]ntentional infliction of physical pain" against a spouse, the court was required to explain this definition to him. We disagree.

¶15 While WIS. STAT. § 968.075(1)(a) appears in the court documents, the statute, entitled "Domestic abuse incidents; arrest and prosecution," plainly governs law enforcement procedures in domestic abuse cases. It does not create criminal liability for the domestic abuse perpetrator. Neis was charged with and convicted of disorderly conduct under WIS. STAT. § 947.01, as explained above. He was then subject to the domestic abuse surcharge under WIS. STAT. § 973.055(1), which provides that if a court imposes a sentence for specified crimes, including disorderly conduct, and the offense "involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child," the court is required to impose a "domestic abuse surcharge."[5] The court engaged Neis in a colloquy, establishing that Neis

[5] Neis argues that the circuit court did not cure its defect by amending the judgment of conviction. However, the circuit court amended the judgment of conviction to accurately reflect Neis's conviction and sentence. We perceive no error with this procedure.

understood the elements of disorderly conduct and that he was charged with disorderly conduct based on an act against a person with whom he either resided or had a child. Nothing more was required. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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