COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2421-CR **Cir. Ct. No. 2003CF373**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC D. COOKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Eric Cooks appeals from a judgment[1] convicting him of armed robbery and from a postconviction order denying his motion to withdraw his guilty plea. We affirm because the circuit court's denial of the plea withdrawal motion is supported by the record.

¶2 Cooks was originally convicted of numerous counts in a 2004 jury trial arising out of a home invasion. In 2006, we reversed and remanded for a new trial. ***State v. Cooks***, 2006 WI App 262, 297 Wis. 2d 633, 726 N.W.2d 322. In 2007, Cooks pled guilty to armed robbery, which had been charged as party to the crime. Cooks appealed from that conviction, and his appointed appellate counsel commenced a WIS. STAT. RULE 809.32 (2007-08) no-merit appeal. ***State v. Cooks***, No. 2007AP2760-CRNM. Because the appeal contained an issue with arguable merit, Cooks was permitted to return to the circuit court to pursue a postconviction motion. The circuit court denied Cooks' postconviction motion to withdraw his guilty plea to armed robbery. Cooks appeals.

¶3 In his postconviction motion, Cooks claimed that his trial counsel unfairly induced and misled him into believing that the circuit court would follow the parties' joint sentencing recommendation of a ten-year cap. The circuit court imposed a consecutive thirty-five year sentence. Cooks also argued that party to the crime liability was not explained sufficiently at the plea hearing.

[1] Although the notice of appeal referred only to the postconviction order, we conclude that this appeal encompasses the June 25, 2007 judgment of conviction on Cooks' guilty plea to armed robbery. This appeal is Cooks' WIS. STAT. RULE 809.30 (2009-10) appeal from the judgment of conviction and the postconviction order denying his plea withdrawal motion.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 A defendant who seeks to withdraw a plea after sentencing must prove by clear and convincing evidence that plea withdrawal is necessary to avoid a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A defendant can meet this burden by showing that he or she did not knowingly, intelligently and voluntarily enter the plea. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. Whether a plea was knowingly, voluntarily and intelligently entered presents a question of constitutional fact. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). We review constitutional issues independently of the circuit court. ***State v. Harvey***, 139 Wis. 2d 353, 382, 407 N.W.2d 235 (1987). We will uphold the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. ***Van Camp***, 213 Wis. 2d at 140. The circuit court "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted). ¶5 On appeal, Cooks argues that he was unfairly induced and misled into pleading guilty because his trial counsel told him that the circuit court would follow the ten-year sentence cap set out in the plea agreement. Cooks relies heavily on a May 21, 2007 letter counsel sent to Cooks after he entered his guilty plea. In that letter, counsel stated that Cooks

> accomplished a lot in reducing your sentence and we must now do our best to make your gamble on the "cap" pay off …. I believe you've made the best out of a bad situation…. You can do this new sentence and come out with a life to lead…. I hope we can make your decision a good one and minimize your punishment time.

¶6 Cooks testified at the evidentiary hearing on his plea withdrawal motion that, based on counsel's letter, he believed that he would receive no more

than ten years in prison. He also believed that his sentence would be reduced and this induced him to enter his plea. Even though he did not have the letter in hand when he pled guilty, Cooks' counsel told him the same things before Cooks entered his plea.

¶7 Trial counsel testified that his letter was not intended to imply that he could predict the sentence. Rather, counsel intended to convey that Cooks' guilty plea to one count of the several alleged had reduced his exposure substantially. Counsel agreed that he should have used the word "exposure" in the letter to refer to the benefit Cooks received from the plea agreement. It is undisputed that at the time counsel wrote the letter, sentencing was in the offing.

¶8 The circuit court construed counsel's letter as an expression of what he and Cooks had accomplished with the plea agreement, reduced exposure, not as a prediction or promise about the outcome at sentencing. The court also found that it warned Cooks during the plea colloquy that it was not bound by the sentencing recommendation and that Cooks responded that he understood this warning. These findings are supported in the record and are not clearly erroneous. At the plea hearing, the court specifically informed Cooks that it was not bound by the parties' sentencing recommendation, including the State's agreement to cap its recommendation at ten years of initial confinement, with both sides free to argue about the length of the sentence. Cooks stated that he understood. The court found no basis for Cooks' claim that counsel induced or misled him to plead guilty by making promises about the sentence.

¶9 Cooks next argues that he did not understand the nature of party to the crime liability at the time he pled guilty. To enter a proper plea, a defendant must be advised of the nature of the charged crime. ***State v. Hoppe***, 2009 WI 41,

¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The circuit court found that Cooks' trial counsel discussed the elements of the crime with him and that Cooks understood.[2] These findings are supported in the record and are not clearly erroneous.

¶10 During the plea colloquy, the court noted that the armed robbery was charged as party to the crime, but the only reference to party to the crime liability came in the court's description of the charge. Cooks claims that this was insufficient to advise him of the nature of party to the crime liability. Cooks denied that he and counsel ever discussed the nature of party to the crime liability. Cooks thought party to the crime liability had something to do with a lesser charge.

¶11 Trial counsel testified that it is his habit to review party to the crime liability with a client who is entering a plea to a crime so charged. The plea questionnaire referred to the armed robbery charge as being party to the crime. Counsel testified that he discussed party to the crime liability with Cooks because he explains the nature of the crime when he is working with the client on a plea questionnaire. Counsel would not have signed the plea questionnaire if he did not believe that Cooks understood their discussion. Counsel believed that he covered the required information with Cooks at the time Cooks entered his plea.

¶12 The court found that trial counsel discussed the crime with Cooks and Cooks understood. In making these findings, the court necessarily found trial

[2] The court also discussed, at length, the fact that until Cooks entered his plea to armed robbery as party to the crime, the case proceeded on the basis that Cooks was a direct actor in the events. We do not address the finding or its relevance to whether Cooks understood party to the crime liability at the time he entered his guilty plea. Count two of the criminal complaint and the information charged Cooks with armed robbery as party to the crime and this is the crime to which Cooks pled guilty.

counsel more credible than Cooks. We accept the credibility determination. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶13 Cooks did not establish a basis to withdraw his guilty plea. We affirm the circuit court's refusal to let him do so.

By the Court.—Judgment and order affirmed.

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