COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1394-CR **Cir. Ct. No. 2010CM482**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOWARD E. WELLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Howard Wells appeals a judgment of conviction for disorderly conduct and an order denying postconviction relief. Wells asserts

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

he is entitled to withdraw his no contest plea because the circuit court's participation in the plea negotiations rendered his plea involuntary. We conclude the court did not participate in the plea negotiations and affirm.

BACKGROUND

¶2 The State charged Wells with battery and disorderly conduct, both with the repeater enhancer. A jury trial was scheduled for July 20, 2010. At the pretrial conference on July 16, Wells presented the circuit court with a signed plea questionnaire and waiver of rights form. The agreement provided that upon a plea of no contest to the disorderly conduct charge, the State would move to dismiss the repeater enhancer and battery charge. The parties jointly recommended a time-served disposition, and Wells was entitled to more than ninety days' sentence credit.[2]

¶3 Near the end of the plea colloquy, the following exchange occurred:

> THE COURT: You want to have a trial?
>
> THE DEFENDANT: I do.
>
> THE COURT: But—
>
> THE DEFENDANT: But, advice of my attorney not to.
>
> THE COURT: Well, he'll represent – he is a pretty vigorous advocate. If you want a trial, he will represent you at a trial. This is the downside we talked about, if you get convicted of both of these, you get convicted of either of them, and if it's true that you have this robbery conviction from Brown County in '03, then you're looking at two years on each of these. So it could be a total of four

[2] The maximum penalty for a disorderly conduct conviction is ninety days' imprisonment and/or a $1,000 fine. WIS. STAT. §§ 941.01, 939.51(3)(b).

years, could be two years. The upside is you might be found not guilty of both.

I could tell you this: Defendants sometimes say to me, well, what do I have to lose? I'll roll the dice. You have a lot to gain. You could be found not guilty of both, but there is a lot to lose too. And Judges – I mean, I could tell you I'll probably go along with the recommendation today because I don't know of a good reason not to, but if you come to trial, I hear all the evidence, I hear all the facts, and if you are found guilty by a jury, that's a whole different ballgame.

THE DEFENDANT: Yes, ma'am.

THE COURT: Then I don't know what I'll sentence you to. They [the State] are free to argue for whatever they want. Now, they are locked into time served. Also, while you have a right to remain silent at the trial, nobody, not even a defendant, has a right to lie under oath so if you decide to take the stand and you fib and the jury tells me by their verdict that they don't believe you, that's not a good thing either. So those are the potential downsides. The upside is you could walk out of here without convictions, with nothing.

So your decision, there's pros and cons, it's up to you. What do you want to do?

THE DEFENDANT: I'm going with my attorney for the day.

THE COURT: All right. What does that mean?

THE DEFENDANT: Accept the plea.

THE COURT: Well, here's the thing. Your lawyer is paid and trained and educated. That's why he goes to school and is paid to give you advice, but it is ultimately your decision. He's obviously, read the police reports, he obviously has some idea how, you know, strong the DA's case is, but none of us can predict what 12 jurors will do. We don't know who the people are coming in, how they look at things so we don't know. …

So you got to make a decision and telling me that you will do just what your lawyer tells you to do isn't going to work because I need to hear that this is what you want to do. If you tell me you've listened to his advice, you think it's good advice, you understand he'll represent you at a

trial, I'm okay with that, but you can't just tell me uhn-uhn, he's making me do this, I got to do it.

THE DEFENDANT: Well, if it … was up to me, I would go to trial.

THE COURT: Then you want a trial, you want to go to trial on the two charges as repeater?

THE DEFENDANT: I do, but I – I'm undecided because my attorney says not to. I mean, the way he is talking, he's talking me into it.

THE COURT: What?

THE DEFENDANT: You make me feel like I need to.

THE COURT: Need to what?

THE DEFENDANT: Go to trial.

THE COURT: I'm not – if you can cut a deal, if I take myself out of this job –

THE DEFENDANT: Right.

THE COURT: – put myself out there –

THE DEFENDANT: Right.

THE COURT: – I got a client and the client can get out of jail today, I'd probably tell that client to take the deal. Yeah, because you got [] big exposure. That's not my job, my job is to be sure that you understand what your options are and that it's your choice and not your lawyer's choice. I'm not trying to talk you out of it. I mean, if I look at this deal and just sit back and say, okay, he's looking at four years, potentially, get out potentially today, not a bad deal, but it's up to you.

THE DEFENDANT: Can I?

THE COURT: Sure.

(The defendant conferring with attorney off the record.)

THE DEFENDANT: Excuse me, your Honor?

THE COURT: Yes.

THE DEFENDANT: I take the plea.

> THE COURT: You want to take the plea. I'm not second-guessing your decision. The people that really wrestle with th[is] are people that have no criminal record, that's not you. You got a bunch of convictions. So I could see where people wrestle with this if they don't want a record. You already got a bunch, but it's your call. It's your decision. You got a good lawyer, I think he's trying to help you make the best decision for yourself, but it's your decision, I'm not second-guessing you.
>
> You want to plead no contest?
>
> THE DEFENDANT: Yes, ma'am.

¶4 The court subsequently sentenced Wells to ninety days' jail and ordered ninety days' sentence credit. Wells filed a postconviction motion and moved to withdraw his no contest plea. He asserted, in part, the court rendered his plea involuntary by participating in the plea negotiation. The court denied the motion, reasoning it did not participate in the plea negotiation and the realities of its case-management responsibilities made it necessary to obtain a decision from Wells, whose answers about whether he wished to enter a plea were ambiguous.

DISCUSSION

¶5 On appeal, Wells renews his argument that he should be permitted to withdraw his no contest plea. "A defendant who seeks to withdraw a plea after sentencing has the burden of showing by 'clear and convincing evidence' that a 'manifest injustice' would result if the withdrawal were not permitted." ***State v. Hunter***, 2005 WI App 5, ¶5, 278 Wis. 2d 419, 692 N.W.2d 256 (citation omitted). A defendant can establish a manifest injustice by proving his plea was involuntary. ***State v. Lopez***, 2010 WI App 153, ¶7, 330 Wis. 2d 487, 792 N.W.2d 199.

¶6 In ***State v. Williams***, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58, we adopted a bright-line rule prohibiting judicial involvement in plea negotiations. We concluded that a plea entered following a judge's participation

in the plea negotiation is "conclusively presumed" to be involuntary and is subject to withdrawal. In ***Hunter***, 278 Wis. 2d 419, ¶12, we declined to extend this presumption of involuntariness to "any and all comments [made by the circuit court] that might later be characterized as having prompted a defendant to enter into a plea agreement." We concluded "our holding in ***Williams*** … applies only to direct judicial participation 'in the plea bargaining process itself.'" ***Id.*** Therefore, when a court does not participate in the plea negotiation but its "comments to a defendant are arguably coercive of a plea, it remains the defendant's burden to show that the plea that followed was involuntary." ***Id.***, ¶9.

¶7 Wells nevertheless asserts he is entitled to the presumption that his plea was involuntary because the court's comments constituted participation in the plea negotiation. While he concedes the court did not participate in the plea negotiation to the same extent as the court did in ***Williams***,[3] he asserts that because the court's statements went "further than the statements in ***Hunter***," the court thus participated in the plea negotiation.

¶8 In ***Hunter***, 278 Wis. 2d 419, ¶2, the court, following a suppression motion, told the defendant that, based on the evidence, he was likely to be convicted at trial and urged the defendant to consider whether it was in his best interest to go to trial. The court also warned the defendant that if he went to trial, he would forgo the credit he would get by coming forward and admitting his guilt.

[3] In ***State v. Williams***, 2003 WI App 116, ¶3, 265 Wis. 2d 229, 666 N.W.2d 58, the circuit court held a conference with the parties on the morning of trial. Following the conference, the court placed on the record that with the "assistance or urging" of the court, the parties had reached a plea agreement. ***Id.*** During the plea colloquy, it was revealed that the court had told the defendant he faced "eight to ten as possibly years in prison" if he went to trial and lost, and "there was a discussion of a range from one to three as a possibility" if there was a plea. ***Id.***, ¶5.

Id. We concluded the court's comments did not constitute participation in the plea negotiation. ***Id.***, ¶11. In support, we reasoned "the court … did not convene an impromptu settlement conference," did not "make or solicit specific offers of potential sentence ranges," did not give "the parties any input whatsoever regarding what it considered an appropriate disposition of the charge," and did not "suggest or advocate for a particular plea agreement." ***Id.***

¶9 Here, Wells argues the court participated in the plea negotiation because it alluded to the disposition it would enter if Wells accepted the plea and advocated for a particular plea agreement. He relies on two statements in support of his contention. First, when the court asserted, "I'll probably go along with the recommendation today because I don't know of a good reason not to … [but] if you are found guilty by a jury, that's a whole different ballgame." Second, when it stated, "[I]f I take myself out of this job … put myself out there … I got a client and the client can get out of jail today, I'd probably tell that client to take the deal … because you got [] big exposure."

¶10 We conclude that, taken in context, these comments do not reveal an improper participation in the plea negotiation. First, given that, at the time of the hearing, Wells had more than ninety days' sentence credit and a disorderly conduct conviction's maximum imprisonment penalty is ninety days' jail, any allusion the court may have made to imposing a time-served disposition was a statement of fact and not improper.

¶11 Second, the court did not advocate for a particular plea agreement when it stated that it would "probably" advise a client facing big exposure to accept a plea that would allow him to be released immediately. Taken in context, this comment occurred after Wells indicated to the court that he was torn because

he felt the court was telling him to go to trial but his attorney was advising him to take the deal. Immediately following this comment, the court informed Wells that it was not the court's job to tell him whether he should plead, rather, the court works to make sure that Wells understands his options and that whatever he chooses is his choice alone, not his attorney's. Taken in context, we conclude the court's comments as a whole reflect an exhaustive effort on the part of the court to ensure that Wells' decision to plead was in fact voluntary.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.