STATE OF WISCONSIN

SUPREME COURT

Case No. 2014AP2488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TIMOTHY L. FINLEY, JR.,

Defendant-Appellant.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, REVERSING A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR BROWN COUNTY, WILLIAM M. ATKINSON, JUDGE

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ISSUE PRESENTED

When a defendant who pleads guilty or no contest is misinformed that the maximum penalty that could be imposed is lower than the maximum actually allowed by law, and the sentence imposed is more than the defendant was told he could get, can the defect be remedied by reducing the sentence to the maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea?

This issue was first raised in the postconviction motion filed by the defendant-appellant, Timothy L. Finley, Jr., in the circuit court, where Finley asked the court to permit him to withdraw his plea or in the alternative to "commute his sentence to a total of 19.5 years based on the Wisconsin Supreme Court's recent decision in *State v. Gerald D. Taylor*, 2013 WI 34, [347] Wis. 2d [30], [829] N.W.2d [482] (decided April 23, 2013)" (63:1).

Finley alternatively argued on his first appeal in the court of appeals that he was entitled to reduction of his sentence, but the court of appeals declined to reach this issue because it reversed on other grounds. *State v. Timothy L. Finley*, Case No. 2013AP1846-CR, slip op. ¶ 16 n.4 (Wis. Ct. App. Mar. 18, 2014).

Although Finley withdrew his alternative request for reduction of his sentence in the proceedings on remand after the first appeal, the state asked the circuit court to reduce Finley's sentence as the appropriate remedy based on *Taylor*, and the court reduced Finley's sentence accordingly to the maximum he was told he could get when he entered his plea (93.2:23-24; 109; 110).

The issue was briefed by both parties on the second appeal in the court of appeals.

The court of appeals decided that reduction of the defendant's sentence was not an appropriate remedy when the defendant was misinformed about the correct maximum penalty, and that the only available remedy was withdrawal of the defendant's plea. *State v. Timothy L. Finley*, Case No. 2014AP2488-CR, slip op. ¶ 37 (Wis. Ct. App. Sept. 30, 2015).

CRITERIA SUPPORTING THE PETITION

Review by the supreme court will develop, clarify and harmonize the law because this case calls for the application of a new doctrine, the question presented is a novel one, resolution of the question will have statewide impact, the question is legal rather than factual, and the question is likely to recur unless it is resolved by the supreme court, as provided in Wis. Stat. § 809.62(1r)(c) (2013-14).

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal from a judgment and order of the Circuit Court for Brown County, William M. Atkinson, Judge, denying the motion of the defendant-appellant, Timothy L. Finley, Jr., to withdraw his plea to an enhanced charge of felony domestic abuse.

The Wisconsin Court of Appeals, District III, reversed in an authored opinion recommended for publication, holding that the only remedy for an error in accepting a plea without advising the defendant of the correct maximum penalty is withdrawal of the defendant's plea, and that the defect could not be remedied by reducing the defendant's sentence to the term he was informed and believed he could get.

FACTS

The facts and procedural history of this case are correctly and comprehensively recounted in the decision of the court of appeals. The state offers this summary for the convenience of this court.

This is Finley's second appeal.

On the first appeal, the court of appeals ruled that the record failed to show that Finley had been properly advised of the correct maximum penalty he faced when he pleaded no contest to an enhanced charge of felony domestic abuse, i.e., first-degree recklessly endangering safety with penalty enhancers for being a repeater and for using a dangerous weapon. Case No. 2013AP1846-CR, slip op. ¶ 16.

The record showed that both Finley's attorney and the circuit court told him that the maximum penalty was 19.5 years when the correct maximum was 23.5 years (63:3; 90:4). The sentence initially imposed was the correct maximum of 23.5 years (92:30-31).

Under the procedure established in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the court of appeals reversed the first order denying Finley's motion to withdraw his plea because of this defect, and remanded the case to the circuit court to give the state an opportunity to prove that, despite the misinformation he received from both his attorney and the court, Finley actually knew that the correct maximum was 23.5 years. Case No. 2013AP1846-CR, slip op. ¶ 16.

The only witness called by the state at the remand hearing was the attorney who represented Finley when he entered his plea. Counsel testified that his usual practice was to advise his clients about the correct maximum penalty, but that he had no specific recollection of advising Finley of the correct maximum (93.2:9, 11). Counsel admitted that the written plea questionnaire stated the wrong maximum penalty, and that he went over the plea questionnaire, with the wrong penalty, with Finley (93.2:12, 15).

On this record, the state failed to meet its burden to prove by clear and convincing evidence that anyone ever told

Finley the correct maximum penalty, much less that Finley actually knew the correct maximum penalty when he entered his plea, having been given conflicting information at best.

Finley withdrew his alternative request for reduction of his sentence based on *State v. Taylor*, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482, but the prosecutor urged the court to reduce Finley's sentence based on that case (93.2:23).

The circuit court ruled that Finley was "entitled to have his sentence modified to no more than the amount that was represented to him by the Court and stated on his Plea Questionnaire and Waiver of Rights Form and that was nineteen years and six months" (93.2:23).

The circuit court again denied Finley's motion to withdraw his plea (93.2:24), and Finley appealed again.

DECISION OF THE COURT OF APPEALS

After correctly recounting the facts and procedural history of this case, the court of appeals noted that the state was not arguing it had met its burden to prove that Finley knew the statutory maximum penalty that could have been imposed was 23.5 years. Case No. 2014AP2488-CR, slip op. ¶¶ 21, 23-24, 31, 36.

The court correctly understood the state was arguing that "'the question is more pragmatic, i.e., whether the defendant knew that the sentence [that] was *actually imposed* on him, whether the maximum or something less, could have been imposed on him.'" Case No. 2014AP2488-CR, slip op. ¶ 23. Because Finley's sentence was ultimately reduced to a penalty he was informed and believed he could get, i.e., 19.5 years, the state contended that "when a defendant eventually receives a sentence equal to or less than the maximum sentence the defendant *thought* was applicable at the time he or she entered

the plea, the defendant cannot establish manifest injustice as a matter of law and is not entitled to plea withdrawal." Case No. 2014AP2488-CR, slip op. ¶ 23.

The court of appeals thought the state's argument was not supported by the decision of this court in *Taylor*, the case that had been relied on at one time or another by both parties below. Case No. 2014AP2488-CR, slip op. ¶¶ 25-27.

The court of appeals acknowledged that *Taylor*, citing *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, reaffirmed that in a case where the defendant was told that the maximum penalty was higher than the penalty actually authorized by law, the proper remedy may be to commute the defendant's sentence rather than let him withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 28.

But the court of appeals said that the situation in this case was not the one in *Cross* because here the defendant was told that the sentence that could be imposed was lower than the correct maximum. Case No. 2014AP2488-CR, slip op. ¶ 29.

The court of appeals distinguished this case from *Taylor* because the state never proved that Finley actually knew the correct maximum penalty. Case No. 2014AP2488-CR, slip op. ¶ 31. The court said that there were at least two related problems with the state's argument that a reduction in the defendant's sentence could overcome, as a matter of due process, the fact that the defendant's plea was not entered knowingly, intelligently and voluntarily because he misunderstood the potential maximum penalty to be less than it really was. Case No. 2014AP2488-CR, slip op. ¶ 32.

The first problem, according to the court of appeals, is that Wis. Stat. § 973.13, which provides that a sentence in excess of the maximum authorized by law is automatically commuted

to the legal maximum, does not apply in this case where no sentence in excess of the legal maximum was ever imposed. Case No. 2014AP2488-CR, slip op. ¶ 31.

The court of appeals said that a second and more significant problem with the state's argument was that it conflated *Taylor*'s analysis of whether the defendant's plea was entered knowingly, intelligently and voluntarily with *Taylor's* analysis of whether the defendant was entitled to plea withdrawal on some other basis of manifest injustice. Case No. 2014AP2488-CR, slip op. ¶ 34.

The court of appeals acknowledged that this court concluded that Taylor failed to satisfy the "fundamental-integrity-of-the-plea test" because he received a sentence he was informed he could receive. Case No. 2014AP2488-CR, slip op. ¶ 35. But the court of appeals said this did not help the state because that conclusion was reached only after this court had already determined that Taylor's plea was knowing, intelligent and voluntary. Case No. 2014AP2488-CR, slip op. ¶ 35.

In conclusion the court of appeals stated,

> Therefore, because Finley's plea was not entered knowingly, intelligently, and voluntarily, we conclude his plea was entered in violation of his right to due process, which establishes a manifest injustice requiring plea withdrawal. As we read *Taylor* and other supreme court precedent, and given the parties' arguments in this appeal, such a violation is not curable, after the fact, by "commutation" of an otherwise lawful sentence down to the maximum amount of punishment the defendant was incorrectly informed he or she faced at the time of the plea.

Case No. 2014AP2488-CR, slip op. ¶ 37.

The court of appeals therefore reversed the judgment and order of the circuit court, and remanded the case with instructions to grant Finley's motion to withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 37.

ARGUMENT

When a defendant who pleads guilty or no contest is misinformed that the maximum penalty that could be imposed is lower than the maximum actually allowed by law, and the sentence imposed is more than the defendant was told he could get, the defect may be remedied by reducing the sentence to the maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea.

As indicated in the decision of the court of appeals, the issue on this appeal is not whether Finley established a manifest injustice because his plea was not entered with knowledge of the correct maximum penalty. That has been conceded by the state on the factual record in this case.

The single issue presented for decision on this appeal is whether the remedy for that manifest injustice is plea withdrawal, or whether the manifest injustice can be remedied by reduction of Finley's sentence to the maximum penalty he was informed and believed he could receive.

Although this court has held that reduction of the sentence could be a proper remedy when the defendant was misinformed that the maximum penalty was higher than it really was, it has never been authoritatively decided whether reduction of the sentence could also be a proper remedy when the defendant was misinformed that the maximum penalty was lower than it really was.

Several Wisconsin cases have suggested that sentence reduction is an appropriate remedy in both situations.

Taylor, citing one paragraph in *Cross*, repeated the general proposition that a plea that is not entered knowingly, intelligently and voluntarily violates fundamental due process so that the plea may be withdrawn as a matter of right. *Taylor*, 347 Wis. 2d 30, ¶ 25 (citing *Cross*, 326 Wis. 2d 492, ¶ 14).

But *Cross* subsequently quoted a decision of the United States Supreme Court holding that a defendant is not entitled to withdraw his plea simply because he misapprehended the likely penalties attached to alternative courses of action, and it later developed that the maximum penalty then assumed to be applicable was inapplicable. *Cross*, 326 Wis. 2d 492, ¶ 29 (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

Cross went on to say, in accord with "the great weight of authorities from other state and federal courts," that "the failure of the defendant to know and understand the precise maximum . . . is not a per se violation of the defendant's due process rights." *Cross*, 326 Wis. 2d 492, ¶¶ 33, 36.

If a defendant's failure to know and understand the precise maximum is not a per se violation of the defendant's due process rights, then withdrawal of his plea is not a per se remedy for entry of his plea without such knowledge.

Both *Taylor* and *Cross* recognized that reduction of the sentence could be a proper remedy when the defendant was misinformed of the correct maximum penalty, at least when he was told that the maximum was higher than it really was. *Taylor*, 347 Wis. 2d 30, ¶ 33; *Cross*, 326 Wis. 2d 492, ¶ 34.

Taylor also stated that there was no manifest injustice where the defendant was told the maximum was lower than it really was when he "received a sentence that he was verbally informed he could receive." *Taylor*, 347 Wis. 2d 30, ¶ 52.

Although this statement was made after this court had previously found that there was no manifest injustice because Taylor actually knew the correct maximum penalty, this statement was not mere dictum but appears to be an alternative holding on the question before the court. *See State v. Picotte*, 2003 WI 42, ¶ 61, 261 Wis. 2d 249, 661 N.W.2d 381 (a decision on a question germane to, even if not necessarily decisive of, the controversy is not dictum but a binding decision of the court).

Considered together, these statements suggest that an appropriate remedy when a defendant is misinformed that the maximum penalty is lower than the correct maximum is reduction of the sentence to the term of imprisonment the defendant is informed and believes he could receive.

This suggestion is in conformance with general principles pertaining to pleas and remedies.

When a defendant appeals an order refusing to allow him to withdraw his plea, the issue is not whether the plea should have been accepted but whether, long after the plea was accepted, the defendant should be permitted to withdraw it. *State v. Thomas*, 2000 WI 13, ¶ 23, 232 Wis. 2d 714, 605 N.W.2d 836; *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988); *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). Thus, the relevant issue is not just whether there was a violation of some rule or right when the defendant entered his plea, but what should be done to correct the violation.

Remedies should be tailored to the circumstances and the injury allegedly suffered without unnecessarily infringing on competing interests. *State v. Anderson*, 2006 WI 77, ¶ 75, 291 Wis. 2d 673, 717 N.W.2d 74; *State v. Webb*, 160 Wis. 2d 622, 630, 467 N.W.2d 108 (1991); *Bubolz v. Dane County*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990); *State v. Monje*, 109 Wis. 2d 138, 147, 325 N.W.2d 695 (1982).

In the circumstances presented in this case, the injury is entering a plea without knowing that the court could impose a sentence that is more severe than the maximum sentence the defendant was told and thought he could get. The competing consideration is the interest of the state, the victim and the witnesses in the finality of criminal convictions without having to litigate the defendant's guilt at a trial necessitated long after the crime was committed. *Taylor*, 347 Wis. 2d 30, ¶ 48.

The defendant's injury because of this misinformation can be effectively corrected without infringing on the state's interest in finality by reducing the defendant's sentence to a sentence that is in accord with the penalty the defendant was informed and believed he could get when he entered his plea.

If the defendant enters a plea believing he could get no more than a particular sentence, and he ultimately gets a sentence that is no more than the one he believed he could get, he is not injured in any way by the earlier failure to advise him of the correct maximum penalty he does not get. *See Taylor*, 347 Wis. 2d 30, ¶ 52. What the defendant does not know does not hurt him.

Indeed, by reducing the defendant's sentence, the defendant benefits from the court's error in failing to correctly advise him of the higher maximum penalty by having his sentence capped at a term of imprisonment that is less than the

court originally thought was appropriate. In effect, the de facto maximum becomes the lesser penalty stated by the court instead of the greater penalty stated by the law.

This situation is no different from one where the court advises the defendant of the correct maximum penalty, then sentences the defendant to that penalty. In both cases, a maximum penalty is stated, the defendant agrees to plead knowing he could get the stated penalty, and he gets the penalty he knew he could get when he entered his plea.

There is no manifest injustice, no fundamental unfairness, no due process violation when a defendant gets a sentence he knew he could get when he entered his plea.

When this court adopted the manifest injustice test in *State v. Reppin*, 35 Wis. 2d 377, 151 N.W.2d 9 (1967), it also adopted along with that test the ABA standards relating to pleas of guilty. *Thomas*, 232 Wis. 2d 714, ¶ 17; *Reppin*, 35 Wis. 2d at 385-86 & n.2.

Under the adopted standards, withdrawal of a plea may be necessary to correct a manifest injustice if the defendant proves that his plea was entered "'without knowledge . . . that the sentence *actually imposed* could be imposed.'" *Reppin*, 35 Wis. 2d at 385 n.2 (quoting tentative ABA Standard 2.1(a)(ii)(3)) (emphasis added). *Accord, e.g., State v. Rock*, 92 Wis. 2d 554, 558, 285 N.W.2d 739 (1979); *Ernst v. State*, 43 Wis. 2d 661, 666, 170 N.W.2d 713 (1969), *modified in part on other grounds, Bangert*, 131 Wis. 2d at 260.

Obversely, withdrawal of a plea is not required if "the defendant's sentence does not exceed that stated as possible by the judge." III American Bar Association Standards for

Criminal Justice, Pleas of Guilty, commentary to present Standard 14-2.1(b)(ii)(C) at p.14-57 (2d ed. 1986 supp.).

So under the ABA standard, withdrawal of a plea is not required as the remedy if a court provides an adequate alternative remedy, fair to both the defendant and the state, by reducing the defendant's sentence to one that does not exceed the sentence he was told he could get and believed he could get when he pleaded.

Courts in other jurisdictions have adopted the principle set forth in this standard.

Stating the rule most bluntly, the court held in *Commonwealth v. Barbosa,* 2003 PA Super 77, 819 A.2d 81, that "if a defendant enters an open guilty plea and justifiably believes that the maximum sentence is less than what he could receive by law, he may not be permitted to withdraw the plea unless he receives a sentence greater than what he was told." *Barbosa,* 819 A.2d 81, ¶ 5.

Spelling out the justification for this rule, the court said in *Cole v. State,* 850 S.W.2d 406 (Mo. Ct. App. 1993), that where the sentence conforms to precisely what the defendant understood to be the maximum sentence to which he exposed himself by his plea, the defendant understood the consequences of his plea. *Cole,* 850 S.W.2d at 409-10 (citing *United States v. Rodrigue,* 545 F.2d 75 (8th Cir. 1976); *Bell v. United States,* 521 F.2d 713 (4th Cir. 1975); *United States v. Sheppard,* 588 F.2d 917 (4th Cir. 1978)). *See also Vanzandt v. State,* 212 S.W.3d 228, 235-36 (Mo. Ct. App. 2007) (reaffirming rule in *Cole*).

This is simply common sense. When the defendant knows when he enters the plea that he could get the sentence he ultimately gets, the defendant knowingly takes the risk that by pleading guilty or no contest he could get that very same sentence.

There is no sound reason to correct a defect in the information a defendant was provided about the maximum sentence by allowing him to withdraw his plea rather than by reducing his sentence to one he was informed and believed he could receive. Plea withdrawal in this situation is simply a windfall that is disproportionate to the problem.

Withdrawing a plea is not necessary to correct misinformation when the incorrect information is subsequently treated as though it was the correct information and the defendant is sentenced on the basis of the information he thought was correct.

"We told you what you could get and you are getting what we told you" equitably solves the problem for all concerned. By reducing his sentence to one the defendant was informed and believed he could receive the defendant is fully restored to the same position he believed he was in when he entered his plea.

Indeed, reduction of the sentence is a more generous remedy for a defendant who is misinformed that the maximum penalty is lower than it actually is than for a defendant, like Cross, who was misinformed that the maximum penalty was higher than it really was. A defendant who is misinformed that the maximum penalty is higher than it actually is has his sentence reduced to the actual maximum penalty. *Cross*, 326 Wis. 2d 492, ¶ 34. But a defendant who is misinformed that the maximum penalty is lower than it actually is has his sentence reduced to a term below the actual maximum.

If sentence reduction is a proper remedy when a misinformed defendant's sentence is reduced to the actual maximum penalty, it is certainly a proper remedy when a misinformed defendant's sentence is reduced to a term that is less than the actual maximum.

Another benefit of sentence reduction rather than plea withdrawal as a remedy is that it prevents a defendant from taking advantage of the misinformation to start over when the real problem is not his plea but the long sentence he received, even though he knew it could be imposed. *See Taylor*, 347 Wis. 2d 30, ¶ 49.

There is no fundamental flaw in the integrity of Finley's plea. There is no manifest injustice in holding Finley to his plea. There is no reason to allow him to withdraw it when the defect in taking that plea has been adequately remedied by reducing his sentence to the sentence he knew he could get and was willing to accept when he entered his plea.

In this case, the court of appeals erred by holding that the only remedy that can correct a manifest injustice caused when the defendant is misinformed that the maximum potential penalty is less than the statutory maximum is plea withdrawal. The problem is adequately corrected by reducing the defendant's sentence to the maximum he was informed and believed he could receive. This remedy serves the interests of both the defendant and the state in the unfortunate situation where the plea information is incorrect.

CONCLUSION

It is therefore respectfully submitted that the petition for review should be granted.

Dated: October 29, 2015.

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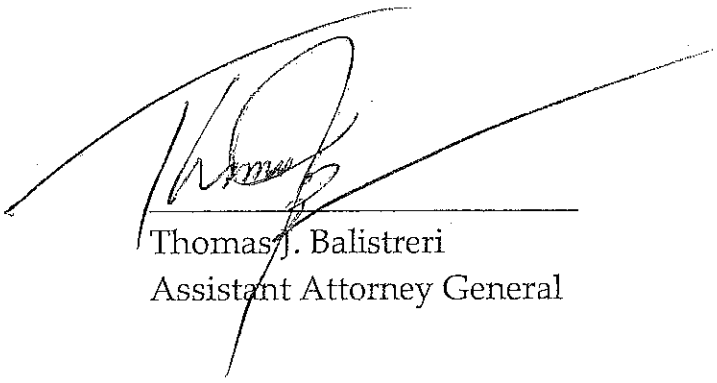
CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 3,644 words.

Dated this 29th day of October, 2015.



Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

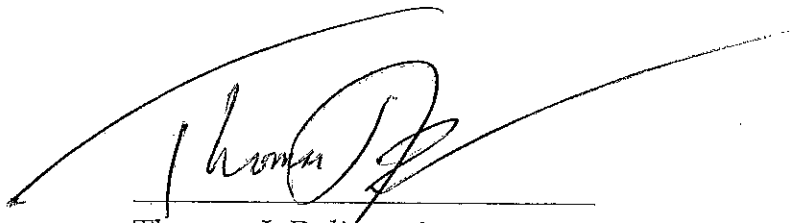
I have submitted an electronic copy of a petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 29th day of October, 2015.



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