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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2012AP1855-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW ALLEN LILEK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION MOTION FOR PLEA WITHDRAWAL AND RESENTENCING, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

ARGUMENT 2

I. THE CIRCUIT COURT PROPERLY DENIED LILEK'S POST-SENTENCING MOTION TO WITHDRAW HIS PLEA WITHOUT AN EVIDENTIARY HEARING. 2

A. Relevant legal principles and standards of review. 2

1. Manifest injustice standard for post-sentencing plea withdrawal motions. 2

2. Postconviction procedure. 3

3. Standards of review. 4

B. Lilek has failed to meet his *prima facie* burden under *Bangert* in showing that the plea colloquy was defective. 5

1. The court adequately explained the elements of the offense and the nature of the charges. 5

2. The court adequately explained the rights Lilek was waiving. 11

Page

3. The court adequately explained the range of punishments for both crimes. 13

4. The court adequately explained the nature of the plea agreement, and personally informed Lilek that it was not bound by it. 15

5. The court adequately explained the likely consequences of Lilek's plea. 17

C. Under *Bentley*, the circuit court properly denied Lilek's motion without an evidentiary hearing, because Lilek's allegations in his post-conviction motion were insufficient to warrant a hearing. 19

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN IMPOSING LILEK'S SENTENCE. 23

A. Relevant legal principles and standard of review. 23

B. The record fully supports the sentence imposed. 24

C. The circuit court considered Lilek's disabilities, but properly found the protection of the public to be more important. 29

Page

D. The circuit court properly exercised its discretion in ordering prison for Lilek, rather than protective placement. 31

III. BY PLEADING NO-CONTEST, LILEK WAIVED HIS CLAIM THAT THE CIRCUIT COURT VIOLATED THE STATUTORY TIME LIMITS FOR THE COMPETENCY EXAMINATIONS; AND THE COMPETENCY STATUTES FORECLOSE HIS CLAIM ON THE MERITS. 34

A. Lilek waived his claim when he pled no-contest to the charges. 35

B. The competency statutes foreclose Lilek's claim on the merits. 35

CONCLUSION 41

CASES CITED

State v. Bangert,
131 Wis. 2d 246,
389 N.W.2d 12 (1986) ..... 2, passim

State v. Bedolla,
2006 WI App 154, 295 Wis. 2d 410,
720 N.W.2d 158 18

State v. Bentley,
201 Wis. 2d 303,
548 N.W.2d 50 (1996) 2, 4, 19, 22

Page

State v. Black,
2001 WI 31, 242 Wis. 2d 126,
624 N.W.2d 363 .... 2, 3, 30

State v. Brandt,
226 Wis. 2d 610,
594 N.W.2d 759 (1999) 6, 8, 11, 13

State v. Brown,
2004 WI App 179, 276 Wis. 2d 559,
687 N.W.2d 543 18

State v. Brown,
2006 WI 100, 293 Wis. 2d 594,
716 N.W.2d 906 .... 3, passim

State v. Byrge,
2000 WI 101, 237 Wis. 2d 197,
614 N.W.2d 477 20

State v. Carey,
2004 WI App 83, 272 Wis. 2d 697,
679 N.W.2d 910 .... 39, 40, 41

State v. Devore,
2004 WI App 87, 272 Wis. 2d 383,
679 N.W.2d 890 34

State v. Douangmala,
2002 WI 62, 253 Wis. 2d 173,
646 N.W.2d 1 18

State v. Echols,
175 Wis. 2d 653,
499 N.W.2d 631 (1993) 24

State v. Farrell,
226 Wis. 2d 447,
595 N.W.2d 64 (Ct. App. 1999) 20

Page

State v. Gallion,
2004 WI 42, 270 Wis. 2d 535,
678 N.W.2d 197 .... 23, 34

State v. Hampton,
2004 WI 107, 274 Wis. 2d 379,
683 N.W.2d 14 17

State v. Howell,
2007 WI 75, 301 Wis. 2d 350,
734 N.W.2d 48 .... 19, 22

State v. Klubertanz,
2006 WI App 71, 291 Wis. 2d 751,
713 N.W.2d 116 23

State v. Lechner,
217 Wis. 2d 392,
576 N.W.2d 912 (1998) 23

State v. Oakley,
2001 WI 103, 245 Wis. 2d 447,
629 N.W.2d 200 35

State v. Roou,
2007 WI App 193, 305 Wis. 2d 164,
738 N.W.2d 17 3

State v. Smith,
207 Wis. 2d 258,
558 N.W.2d 379 (1997) 24

State v. Spears,
227 Wis. 2d 495,
596 N.W.2d 375 (1999) 23, 24

State v. Stenzel,
2004 WI App 181, 276 Wis. 2d 224,
688 N.W.2d 20 .... 24, 30, 31

Page

State v. Sutton,
2006 WI App 118, 294 Wis. 2d 330,
718 N.W.2d 146 17

State v. Szulczewski,
216 Wis. 2d 495,
574 N.W.2d 660 (1998) 31, 32, 33

State v. Trochinski,
2002 WI 56, 253 Wis. 2d 38,
644 N.W.2d 891 .... 3, 7, 11, 13

State v. Wood,
2010 WI 17, 323 Wis. 2d 321,
780 N.W.2d 63 33

STATUTES CITED

Wis. Stat. § 51.37(5) 34

Wis. Stat. § 51.75(9)(a) 34

Wis. Stat. § 940.19(6) 8

Wis. Stat. § 940.225(2)(a) 6

Wis. Stat. § 940.225(5)(b) 6

Wis. Stat. § 971.08 .... 2, 4

Wis. Stat. § 971.08(1) 3

Wis. Stat. § 971.14 34

Wis. Stat. § 971.14(1r) 35, 38

Wis. Stat. § 971.14(2) 37

Wis. Stat. § 971.14(2)(a) 35, 36, 38

Page

Wis. Stat. § 971.14(2)(am)....................................36

Wis. Stat. § 971.14(2)(c)....................................36, 40

Wis. Stat. § 971.14(2)(g) 35, 36, 38, 40

Wis. Stat. § 971.14(3) 37, 40

Wis. Stat. § 971.14(4) 37, 40

Wis. Stat. § 971.14(6)(d) 39

Wis. Stat. § 971.17(1) 31

Wis. Stat. § 973.15....................................31

Wis. Stat. § 973.15(8)(a)....................................32

STATE OF WISCONSIN

C O U R T   O F   A P P E A L S

DISTRICT I

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent State of Wisconsin ("the State") agrees with defendant-appellant Matthew Allen Lilek ("Lilek") that oral argument is not warranted. The briefs filed by the parties will adequately develop the facts and legal arguments necessary for decision. The State, however, disagrees with Lilek that publication is warranted. Publication is not warranted, because this case

may be resolved by applying well-established legal principles to the facts.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED LILEK'S POST-SENTENCING MOTION TO WITHDRAW HIS PLEA WITHOUT AN EVIDENTIARY HEARING.

Lilek first argues the circuit court erred when it denied his postconviction motion to withdraw his plea under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), without an evidentiary hearing, because his postconviction motion alleged a *prima facie* case (Lilek's brief at 11-28).

As discussed below, however, the circuit court complied with all of its obligations under Wis. Stat. § 971.08 and *Bangert*, such that the plea colloquy was not defective in any respect. Moreover, Lilek did not meet his higher pleading requirements under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), to be entitled to an evidentiary hearing.

A. Relevant legal principles and standards of review.

1. Manifest injustice standard for post-sentencing plea with-drawal motions.

A defendant who seeks to withdraw a guilty or no-contest plea after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal his plea is necessary to correct a "manifest

injustice." *State v. Black*, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363.

Post-sentencing, the defendant must meet this higher "manifest injustice" burden of proof before being allowed to withdraw his plea, because the presumption of innocence no longer applies once the plea is accepted and finalized, and the State's interest in the finality of the criminal conviction is at its greatest after the defendant waives his constitutional rights and decides to enter a plea. *Id.*

Therefore, in order to prove a manifest injustice and be entitled to plea withdrawal, the defendant must show there was a serious flaw in the fundamental integrity of the plea. *State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891; *State v. Roou,* 2007 WI App 193, ¶15, 305 Wis. 2d 164, 738 N.W.2d 17.

One way for the defendant to show manifest injustice is to show he did not enter his plea knowingly, intelligently, and voluntarily. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

2. Postconviction procedure.

Under *Bangert*, however, where a defendant seeks to withdraw a plea after sentencing and alleges the plea colloquy is defective in some respect, the defendant must first make a *prima facie* showing that the circuit court violated Wis. Stat. § 971.08(1) or other plea requirements set forth by case law. *Brown*, 293 Wis. 2d 594, ¶¶36-40; *Trochinski*, 253 Wis. 2d 38, ¶17. In addition, the defendant must also allege he did not know or understand the information the court should have provided. *Id.*

Once the defendant has made this *prima facie* showing, the burden shifts to the State to show at a postconviction hearing, by clear and convincing evidence,

that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the plea hearing. *Brown*, 293 Wis. 2d 594, ¶40.

3. Standards of review.

Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact which this court reviews independently; but this court should accept the circuit court's findings of fact unless they are clearly erroneous. *Brown*, 293 Wis. 2d 594, ¶19.

Like in *Brown*, however, the issue presented here does not require this court to determine whether Lilek's plea was knowing, intelligent, and voluntary. *Id.* ¶20. Rather, this court's task is to determine whether Lilek has raised sufficient concerns about whether his plea was knowing, intelligent, and voluntary to entitle him to an evidentiary hearing on his motion. *Id.*

In other words, where the postconviction motion concerns alleged deficiencies in the plea colloquy, this court must determine whether the defendant has pointed to deficiencies in the plea colloquy establishing a violation of Wis. Stat. § 971.08 or other mandatory duties at the plea hearing—a question of law reviewed independently by this court. *Brown*, 293 Wis. 2d 594, ¶21.

Likewise, whether the defendant has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing is a question of law, reviewed independently by this court. *Id.* (citing *Bentley*, 201 Wis. 2d at 310).

B. Lilek has failed to meet his *prima facie* burden under *Bangert* in showing that the plea colloquy was defective.

Lilek argues he met his *prima facie* burden under *Bangert* for an evidentiary hearing (Lilek's brief at 13-28). Specifically, Lilek asserts the court did not adequately ensure he understood the nature of the charges, the elements of the offenses, the nature of the plea agreement, the likely consequences of his plea, what rights he was giving up, and the range of punishments for the crime (*id.* at 14, 20-21, 26-28).

As discussed below, however, none of Lilek's assertions are supported by the record, such that Lilek has failed to meet his *prima facie* burden under *Bangert* that the plea colloquy was defective. The circuit court, therefore, properly denied Lilek's postconviction motion without an evidentiary hearing. *Brown*, 293 Wis. 2d 594, ¶¶21, 39-40.

1. The court adequately explained the elements of the offense and the nature of the charges.

At the very beginning of the plea colloquy, the court told Lilek he would be entering two no contest pleas to charges of second-degree sexual assault and aggravated battery; and Lilek said he understood (121:4). The court told Lilek it would be asking him "a bunch of questions" to "make sure that you understand everything that is going on" (*id.*), and Lilek replied, "That's cool" (*id.*).

The court then engaged in an extended colloquy and ascertained that Lilek understood all the elements of the offenses (121:11-15). First, the court went over the elements of second-degree sexual assault:

- he had sexual contact with the victim;
- she did not consent to the sexual contact; and
- he had sexual contact with her by use or threat of force or violence.

(121:11).

The court then delved into the specifics of sexual contact:

> THE COURT: And do you understand that sexual contact … is an intentional touching?
>
> THE DEFENDANT: I was told exactly that by my attorney.
>
> THE COURT: And in this case it's a touching of what, Ms. [prosecutor]?
>
> [THE PROSECUTOR]: Well, her breast was touched and her vagina was touched.
>
> THE COURT: All right. So it's an intentional touching of the breast and vagina of Helen by you, and the touching could be directly or through the clothing?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And you understand it requires that you acted with the intent to become sexually arouse[d] or gratified?
>
> THE DEFENDANT: Yes, Your Honor.

(121:11-12).

This colloquy was sufficient to ascertain Lilek's understanding of the elements of second-degree sexual assault, because it directly tracked the statutory elements of the crime. *See* Wis. Stat. §§ 940.225(2)(a) and 940.225(5)(b) (elements of second-degree sexual assault and definition of sexual contact). *See also State v. Brandt*, 226 Wis. 2d 610, 619, 594 N.W.2d 759 (1999) (under *Bangert*, court has discretion to summarize elements of

crime charged by reading appropriate jury instructions or from applicable statute); *Trochinski*, 253 Wis. 2d 38, ¶¶20-21 (*Bangert* does not require that circuit court thoroughly explain or define every element of offense; but merely that circuit court establishes defendant's understanding of nature of charge).

Next, the court established that Lilek understood all the elements of the offense of aggravated battery:

- he caused bodily harm to the victim;
- he intended to cause her bodily harm, which meant physical pain or injury, illness or impairment of physical condition; and
- his conduct created a substantial risk of bodily harm.

(121:12-13).

Although the court first asked if Lilek understood that his conduct created a "substantial risk of bodily harm" (121:13), the court quickly corrected itself by stating "I'm sorry, substantial risk of *great* bodily harm" (121:13) (emphasis added). Lilek replied he understood (121:13).

Because of this inadvertent, brief reference to bodily harm instead of great bodily harm, the court then ascertained that Lilek had talked with his attorney about the meaning of great bodily harm, and further explained it to Lilek:

> [T]hat is injury which creates a substantial risk of death or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury[.]

(121:13).

This colloquy was sufficient to ascertain Lilek's understanding of the elements of aggravated battery,

because it directly tracked the statutory elements of the crime. *See* Wis. Stat. § 940.19(6) (elements of aggravated battery); *Brandt*, 226 Wis. 2d at 619.

Lilek argues his "yes" answer to the court's inadvertent reference to the incorrect type of harm meant he did not enter his plea knowingly (Lilek's brief at 19-20). But the record belies this claim, because the court corrected itself and ensured that Lilek understood the correct element of great bodily harm (121:13).

Moreover, in discussing the factual basis for the plea, Lilek's defense counsel also explained he had talked with Lilek about the injuries the victim actually sustained, and Lilek came to understand his conduct in physically forcing her into the bathtub caused her to sustain injuries rising to the level of aggravated battery, even though he did not hit her (121:21-22). As counsel explained:

> [Lilek's] recollection was that he never actually hit her. And when I discussed with him the injuries that she had, he agreed with me that he forced, he had ripped off her clothing and had then physically forced her from her outer chamber into the bathroom area, and then physically forced her into the bathtub and agreed with me that the injuries that she had were from his conduct in doing that, that battery does not necessarily have to be hitting somebody with a fist[,] I explained to him, but that by using whatever force he used on Helen R. to forcibly move her into the bathroom and then into the bathtub, those were injuries that rise to the level of the battery. And that *because of the injuries she had, that fulfills the elements of aggravated battery, or bodily harm as caused by conduct that creates substantial risk of great bodily harm*.
>
> *So we went through what the legal elements were, but I believe that that is the factual basis for the battery*.

(121:22) (emphasis added).

Later in the plea colloquy, the court again referenced the correct type of harm—substantial risk of great bodily harm—and again, Lilek indicated he understood (121:24). Thus, the record clearly belies Lilek's claim that he did not understand the element of great bodily harm.

Lilek also told the court he understood all the elements of the crimes (121:13-14). In addition, Lilek acknowledged his counsel went over the plea questionnaire with him (121:7-8), and his counsel had read the complaint to him aloud, because Lilek was visually impaired and could not read it himself (121:10-11).

Moreover, Lilek's counsel also explained he spent a great deal of time going over the plea questionnaire and waiver of rights forms with Lilek (121:15-16). He and his legal intern met with Lilek for two to three hours the previous week, in addition to meeting with Lilek for two to three hours the week prior to that (121:15-16). During the first two-to-three-hour discussion, they had Lilek "go through with us his recollection of the events as they occurred" and based upon those recollections, counsel knew there was a factual basis for the pleas (121:16). Importantly, counsel also noted that Lilek "understands and admits that he did commit acts which fit all of the elements of those two counts" (121:16).

During the second two-to-three-hour discussion, they again went over the factual basis, but they also:

> *went through the criminal complaint. We went through the jury instructions. I went through the plea form with him, and we broke down each and every line of the plea form to make sure that he understood the words, to make sure that he understood and could visualize what we were talking about*. Much of what we spoke about was as far as what goes on in the courtroom, and what his rights are, were discussed in terms of the television series Matlock of which Mr. Lilek, he is a great fan and has seen many, if not all of those episodes ….

....

> … So that we could relate with him to what he saw on television, many of the things that were discussed and done in that television show.

(121:16-17) (emphasis added).

Lilek argues his responses to "leading" yes or no questions meant his plea was unknowing (Lilek's brief at 17-18). But again, the record belies this claim, and Lilek's counsel anticipated and rebutted this argument during the plea hearing:

> I think it's important to make that record [of Lilek's understanding of the plea] because certainly in the future if were [*sic*] some doctor or lawyer to take a look at this record and then look at [Lilek's] mental health history, an argument could be made that he was simply saying yes to everything and in response to your questions. *But I believe based on the in-depth discussions we have had that he truly does understand the very basic rights that he is giving up, and he understands what those are.*
>
> *As far as the elements of the offense, we again broke those down and did the same thing with them.* And I advised him that there are many lawyers and many other individuals who have a lot of schooling who have a difficult time actually describing what reasonable doubt is and some of those other things, but we used examples and in that matter he understands the basic, legal principles that are necessary for him to do this plea.

(121:17-18) (emphasis added).

The court concluded it was satisfied that Lilek was entering his pleas freely, voluntarily, and intelligently (121:19). The procedures the court used—including personal colloquies, explanations of elements which directly tracked the relevant statutory provisions, and consultation with defense counsel—adequately ensured Lilek's plea was knowing, because the elements of the offense and the nature of the charges were explained many

different ways to Lilek, thereby ensuring his understanding. *Brandt*, 226 Wis. 2d at 619 (under *Bangert*, court has discretion for ways to satisfy statutory obligation of ensuring defendant's understanding of elements and nature of crime, including reading from statute, asking defendant's counsel, and referring to record and signed documents).

In sum, Lilek has not shown the plea colloquy was defective in any way vis-à-vis his understanding of the elements of the offenses and the nature of the charges. Accordingly, this court should affirm the circuit court's denial of Lilek's motion without an evidentiary hearing. *Brown*, 293 Wis. 2d 594, ¶¶20-21; *Trochinski*, 253 Wis. 2d 38, ¶¶29-30.

2. The court adequately explained the rights Lilek was waiving.

The court first asked Lilek if he talked with his attorney about the plea questionnaire forms and understood them, and Lilek said he had and did (121:7-8). The court also asked Lilek if he understood that by pleading guilty, he was giving up certain rights, and Lilek said he understood (121:8-9).

The court then discussed the rights Lilek was giving up, and Lilek said he understood he was giving up the following rights:

- to a jury trial;
- to remain silent and not incriminate himself;
- to see and cross-examine the witnesses the State would call;
- to have his own witnesses come to court and tell what happened;
- to have his case decided by a jury of 12 people who would all have to agree before they reached their verdict; and

- to make the State prove him guilty by evidence beyond a reasonable doubt that he committed both of these crimes.

(121:8-9).

Lilek further indicated he understood he was giving up the right to raise any kind of motions or defenses he had to the crimes (121:9), and no one had made any threats or promises to get him to plead guilty (121:9).

Lilek argues his lack of understanding of his waiver of rights was exemplified by counsel's failure to check the box on the plea questionnaire box relating to the State's burden of proof beyond a reasonable doubt at trial (Lilek's brief at 20). But counsel's oversight cannot be considered a failure in the court's colloquy entitling him to an evidentiary hearing under *Bangert*. There was no judicial mistake here, and Lilek cannot be allowed to game the system because of counsel's mistake. *See Brown*, 293 Wis. 2d 594, ¶37.

Moreover, defense counsel told the court he went over all the basic rights Lilek was giving up by entering the plea, and Lilek understood those rights; he noted, "I believe based on the in-depth discussions we have had that he truly does understand the very basic rights that he is giving up, and he understands what those are" (121:17-18). In particular, defense counsel ensured Lilek actually understood the principle of reasonable doubt, and ensured Lilek understood he was waiving that particular right (121:17-18).

Most importantly, whatever misunderstanding may have occurred by counsel's oversight, it was cured by the court's discussion of that right during the plea colloquy (121:8-9). In other words, the court did not rely on the plea questionnaire in determining whether Lilek understood the rights he was waiving. Rather, the court relied on its personal colloquy with Lilek, which ensured

Lilek's understanding that he was waiving those rights (121:8-9).

Therefore, Lilek has not met his *prima facie* burden in showing the plea colloquy was defective vis-à-vis his understanding of his waiver of rights. *Trochinski*, 253 Wis. 2d 38, ¶27 (defective plea questionnaire does not equal deficient plea colloquy when court does not rely on plea questionnaire to ascertain defendant's understanding) *Brandt*, 226 Wis. 2d at 621-22 (where court ignores plea questionnaire in colloquy, adequacy of colloquy rises or falls on court's discussion in colloquy, and adequacy of plea questionnaire is not at issue because it does not constitute basis on which plea is accepted).

3. The court adequately explained the range of punishments for both crimes.

The court explained to Lilek that Lilek would be sentenced for the second-degree sexual assault, and Lilek indicated he understood (121:4). The following exchange then occurred:

> THE COURT: And do you understand that the maximum possible penalty that you face is a fine of not more than $100,000 and imprisonment for not more than 40 years or both; do you understand?
>
> THE DEFENDANT: Actually what I was told originally was that it was $5,000.
>
> THE COURT: Okay. Well, it's $100,000 is a maximum fine and 40 years imprisonment or both; do you understand?
>
> THE DEFENDANT: Yes, but it was told originally. I'm just telling you what I was told.

(121:4-5).

Lilek argues it was highly unlikely he was told the maximum fine was $5,000, and his response "would seem to indicate confusion on his part, not understanding" (Lilek's brief at 27). This argument fails for two reasons.

First, it does not matter what Lilek was told or understood prior to the plea. The salient inquiry is what Lilek understood at the time of his plea. *Bangert*, 131 Wis. 2d at 269 (if court satisfactorily shows that defendant understands nature of crime and its potential punishment at time of taking of plea, no error will result).

Second, Lilek fails to include the rest of the court's colloquy about the range of penalties, which clearly shows the court met its duty in clarifying the information for Lilek, and also shows Lilek understood the correct information at the time he entered his plea.

For example, the court asked Lilek's counsel if they had gone over the maximum penalties, and Lilek's counsel replied they had spent "approximately three hours on Tuesday night going through that," after which Lilek's counsel wrote down the maximum penalties on the plea questionnaire (121:5). The court then had the following exchange with Lilek:

> THE COURT: Okay. So now, Mr. Lilek, if you used to think that it might have been $5,000, do you understand now before you actually enter your plea that the maximum fine you face is $100,000 and maximum time you could spend in prison for the sexual assault is 40 years; do you understand?
>
> THE DEFENDANT: Yes, Your Honor. It's just what I was told before I was told. Now I am told different. Now I understand.
>
> THE COURT: And you understand that of the 40 years, I could give you 25 years that you would initially serve in prison, and I could give you a maximum of 15 years after that for supervision; do you understand?

THE DEFENDANT: Yes, but I spent 20 months here also.

THE COURT: Okay. That is good to know.

(121:5-6).

That Lilek may have had a different understanding of the penalties before his plea does not signify his lack of understanding at the time he entered his plea. The plea colloquy in its entirety shows the court corrected Lilek's misunderstanding and ensured that Lilek now understood the maximum ranges for the penalties on the sexual assault charge (121:4-5).[1]

Finally, the aggregate sentence Lilek received—35 years total, with 20 years of initial confinement and 15 years of extended supervision (64 [A-Ap. 7-8])—did not come near the maximum sentence for the crimes. Nor did the court actually impose any fines, on either count (*id.*). Thus, any perceived error in the plea colloquy was harmless, because the actual penalties imposed were less than the actual maximums for the crimes. *Brown*, 293 Wis. 2d 594, ¶78.

4. The court adequately explained the nature of the plea agreement, and personally informed Lilek that it was not bound by it.

The court first obtained an explanation from the parties about the terms of the plea agreement—namely, that the State would dismiss, but not formally read-in, the third charge of burglary, in exchange for Lilek's no contest plea to the charges of second-degree sexual assault and aggravated battery (121:2-3). The State would also

[1]Moreover, the plea colloquy clearly establishes that the court explained the maximum penalties for the aggravated battery conviction, and that Lilek understood those penalties (121:6).

recommend a prison sentence for the offenses, but would leave the length of the sentence up to the court (*id.*). Defense counsel also noted he would be making an alternative recommendation during sentencing related to Lilek's civil placement (121:3).

The court then explained to Lilek the nature of the parties' plea agreement—and the fact that the court was not bound by it—and ensured Lilek's understanding of the nature of the plea agreement:

> THE COURT: Okay. Do you understand that the State is going to make a recommendation at sentencing?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And they're going to be recommending a prison term up to the court?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And you understand your attorney will make a recommendation?
>
> THE DEFENDANT: Yes again, Your Honor.
>
> THE COURT: And I will hear from people that want to tell me what they want to tell me?
>
> THE DEFENDANT: Yes.
>
> THE COURT: *And in the end, I will have to decide what to sentence you to*?
>
> THE DEFENDANT: *Yes, Your Honor*.
>
> THE COURT: *And do you understand I could give you the maximum penalties on both of these charges*?
>
> THE DEFENDANT: *Yes, I do, Your Honor*.

(121:6-7) (emphasis added).

Further, the court adequately explained to Lilek that it was not bound by the plea agreement (121:6-7). *State v. Hampton*, 2004 WI 107, ¶32, 274 Wis. 2d 379, 683 N.W.2d 14 (court must personally advise defendant that recommendations of prosecuting attorney are not binding on the court).

Accordingly, Lilek has not met his *prima facie* burden under *Bangert* in showing he is entitled to an evidentiary hearing. *Hampton*, 274 Wis. 2d 379, ¶¶48-49 (in order to obtain relief, defendant must make *prima facie* case by alleging in his postconviction motion not only that court failed to personally deliver a *Hampton* warning, but also that he did not know court was not bound by plea agreement).[2]

5. The court adequately explained the likely consequences of Lilek's plea.

As discussed above, the court delved into a lengthy colloquy about the direct consequences of his plea—namely, the range of punishments Lilek faced. *State v. Sutton*, 2006 WI App 118, ¶¶11-14, 294 Wis. 2d 330, 718 N.W.2d 146. The court also explained that Lilek's no contest plea would have the same effect as a guilty plea, and Lilek indicated he understood (121:19-20).

Further, although the court had no obligation to tell Lilek every conceivable collateral consequence of his plea, *see Sutton*, 294 Wis. 2d 330, ¶11, the court <u>did</u> explain various likely collateral consequences of Lilek's pleas, such as:

- the potential for deportation if Lilek was not a citizen (121:14);

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[2]Indeed, Lilek's *Bangert* motion does not even <u>allege</u> a *Hampton* violation (84:3-10).

- the inability of Lilek to possess guns as a felon (121:14); and
- the requirement that Lilek register as a sex offender (121:14-15).

Lilek told the court he understood all of these potential consequences (121:14-15), and Lilek's counsel also acknowledged they had discussed them (121:19-20). Lilek further explained to the court he could not possess a firearm anyway because of his vision (121:14). Finally, Lilek also told the court he was a citizen, but knew he could be deported if he were not (121:14).

Lilek argues the court's colloquy about collateral consequences shows he may not have understood the meaning of deportation (Lilek's brief at 28), but this argument is a red herring. The court's colloquy was adequate because the court ensured Lilek was a citizen, and told him the potential consequences if he were not (121:14).

Accordingly, Lilek has not met his *prima facie* case of an inadequate plea colloquy vis-à-vis the deportation warnings, because he has failed to show his plea is likely to result in his being deported. *State v. Douangmala*, 2002 WI 62, ¶23, 253 Wis. 2d 173, 646 N.W.2d 1; *State v. Bedolla*, 2006 WI App 154, ¶¶6-11, 295 Wis. 2d 410, 720 N.W.2d 158 (defendant only entitled to plea withdrawal if he shows his plea is likely to result in his being deported, by proving he is a non-citizen and has pled to a deportable offense).[3]

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[3]Lilek concedes he is a citizen (Lilek's brief at 28); but even if he is not, his own mistaken belief—at the time of the plea hearing—that he was a citizen does not serve as a basis for plea withdrawal now. *State v. Brown*, 2004 WI App 179, ¶¶11-12, 276 Wis. 2d 559, 687 N.W.2d 543.

C. Under *Bentley*, the circuit court properly denied Lilek's motion without an evidentiary hearing, because Lilek's allegations in his post-conviction motion were insufficient to warrant a hearing.

As discussed above, Lilek argues the plea colloquy was deficient on its face (Lilek's brief at 13-28); but the State construes Lilek's main argument to be that the circuit court did not engage in a meaningful enough plea colloquy with him to ensure his plea was knowing, intelligent, and voluntary, given his disabilities which were documented at various competency hearings and in his postconviction motion (*id.*).

In other words, Lilek's argument is not so much that the plea colloquy was defective; but rather, that factors extrinsic to the plea colloquy—his disabilities—rendered the otherwise proper plea infirm. *State v. Howell*, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. This "dual purpose" argument raises both *Bangert* and *Bentley* claims in a single motion. *Id.*

As discussed above, however, the record conclusively disproves Lilek's *Bangert* claims, because the circuit court's colloquies with Lilek are unassailable. Therefore, all that remains are Lilek's *Bentley* claims, which carry higher pleading standards. *Howell*, 301 Wis. 2d 350, ¶75. Lilek has failed to meet his pleading burdens in showing he is entitled to an evidentiary hearing on his *Bentley* claims.

For example, Lilek argues he could not, at later points in time, answer various questions about his plea, because of his disabilities and mental illness (Lilek's brief at 20-21, 28-30). As discussed above, however, the crucial inquiry is whether he understood his plea at the

time he entered it, not at an earlier or later point in time. *Bangert*, 131 Wis. 2d at 269.

Moreover, even assuming, *arguendo*, Lilek did not understand the plea at a later point in time, his conclusory allegations are not sufficient to overturn the court's findings that he understood the plea at the plea hearing, earlier in time. *State v. Farrell*, 226 Wis. 2d 447, 454-55, 595 N.W.2d 64 (Ct. App. 1999) (allegations of later incompetency insufficient to overturn finding that defendant was competent at some earlier point in time). *See also State v. Byrge*, 2000 WI 101, ¶¶28-31, 48-49, 237 Wis. 2d 197, 614 N.W.2d 477 (allegations of previous periods of incompetency may be relevant to competency determination, but do not necessarily prove defendant was not competent at time of plea).

Similar to a competency determination—which takes into account the defendant's ability to understand, as well as the capacity to assist counsel—Lilek's ability to understand what was transpiring at the time of the plea did not depend on his psychiatric diagnoses or his history of disordered thinking. *Byrge*, 237 Wis. 2d 197, ¶31 (although defendant may have history of psychiatric illness, medical condition does not necessarily render defendant incompetent).

As *Byrge* makes clear, the determination of the defendant's ability to understand the proceedings constitutes a judicial inquiry, not a medical determination. *Id*. Although the defendant may have a history of psychiatric illness, a medical condition does not necessarily render a defendant incompetent—and by extension, does not necessarily mean the defendant lacks the present mental capacity to understand and assist at the time of the proceedings. *Id.* ¶¶31, 48-49 (elaborate psychiatric evaluations sometimes introduce clinical diagnoses which may not speak to competency).

Lilek points to an exchange with the court about his medications in arguing he did not understand the

proceedings (Lilek's brief at 22-25). But again, the record belies his claims, because Lilek told the court in no uncertain terms that his medication did not interfere with his ability to understand what was going on, and he understood everything that was going on (121:9-10).

As the circuit court further explained in its order denying Lilek's postconviction motion:

> The court was fully aware of the defendant's history of competency issues before entering into a colloquy with him, and it finds that the defendant knowingly, intelligently, and voluntarily entered his pleas on January 14, 2010. The court held a very long plea colloquy with the defendant to ensure that he understood everything that he needed to know. The court sufficiently informed him of the nature of the charges, which he gave every indication of understanding; the constitutional rights he was waiving, all of which he said he understood; the nature of the plea agreement; and the likely consequences of his plea. The defendant answered all of the court's questions appropriately and indicated that if he didn't understand something, he would ask [his attorney] about it. … *There is no indication at the plea hearing that the defendant was confused or did not understand what the court said to him. The court inquired about the medications the defendant was taking and asked him if they interfered with his ability to understand the proceedings. In response, the defendant indicated that he understood everything that was going on and that they were not that type of medication.*

(94:3 [A-Ap. 3]) (emphasis added; internal footnotes and citations omitted; bracketing supplied).

Finally, to the extent Lilek argues the court's questioning of his attorney should not have been construed as evidence that he understood the proceedings because his counsel could not give an "unqualified endorsement" of his ability to understand (Lilek's brief at 25-26), this argument has no basis in fact or law.

As a matter of fact, Lilek's attorney made clear that, although he had questioned Lilek's competency previously, he was sure Lilek had competency to enter his plea, based upon the experts' opinions (121:18). Moreover, Lilek's attorney said he was satisfied that Lilek's plea was knowing, intelligent, and voluntary (121:19), and there was a factual basis for both charges (121:20-24).

As a matter of law, *Bangert* makes clear that, in determining the defendant's understanding of the plea, the court may ask defendant's counsel whether he explained the nature of the charge to the defendant, and can ask counsel to summarize the extent of the explanation. *Bangert*, 131 Wis. 2d at 268.

Nevertheless, here, the court did not rely solely on Lilek's counsel's—or counsel's intern's—representations of what Lilek understood. Rather, the court engaged in a personal, extensive colloquy with Lilek regarding the elements of the crimes, the nature of the charges, the range of punishments, the rights Lilek was waiving, the nature of the plea agreement, and the consequences of his plea.

In short, Lilek has failed to point to anything outside of the record (or even on the record) which would defeat the circuit court's determination that Lilek understood everything at the plea colloquy. Accordingly, Lilek has not met his burden of proof under *Bentley* that he was entitled to an evidentiary hearing, and the circuit court properly denied Lilek's claims without a hearing. *Howell*, 301 Wis. 2d 350, ¶¶74-75 (under higher *Bentley* standard, defendant must show factors extrinsic to plea colloquy rendered infirm an otherwise proper and constitutionally sufficient plea).

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN IMPOSING LILEK'S SENTENCE.

Next, Lilek argues the circuit court erroneously exercised its discretion in imposing his sentence (Lilek's brief at 30-40). As will be discussed below, however, the circuit court properly exercised its discretion.

A. Relevant legal principles and standard of review.

Sentencing is reviewed only for an erroneous exercise of circuit court discretion. *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a "'strong public policy against interference with the sentencing discretion of the trial court[,] and sentences are afforded the presumption that the trial court acted reasonably.'" *Id.* at 506 (citation omitted).

This court must therefore begin with the presumption that the circuit court acted reasonably in imposing sentence, and the challenger has the burden to show that the sentencing court relied on some unreasonable or unjustifiable basis in imposing sentence. *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The appellate court cannot interfere with the circuit court's sentencing decision unless the appellant proves the circuit court erroneously exercised its discretion. *Id.* at 418-19. *See also State v. Klubertanz*, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116 (erroneous exercise of discretion standard of review).

In other words, this court presumes that the circuit court acted reasonably, because the circuit court is in the best position to assess the relevant factors and the defendant's demeanor. *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197.

The primary factors the circuit court must consider at sentencing are the gravity of the offense, the character

of the offender, and the need for protection of the public. *State v. Smith*, 207 Wis. 2d 258, 281-82 n.14, 558 N.W.2d 379 (1997). Other factors can be considered; but the circuit court is not required to consider each and every factor on the record. *Id.*; *State v. Echols,* 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

The circuit court can base a sentence on any of the three primary factors after considering all relevant factors. *Spears*, 227 Wis. 2d at 507-08. Moreover, the circuit court has wide discretion to attach varying weight to each relevant factor. *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

B. The record fully supports the sentence imposed.

The sentencing court properly considered all three primary sentencing factors before imposing Lilek's sentence. *Spears*, 227 Wis. 2d at 507 (primary factors).

First, the court properly considered the gravity of the offenses, including the crimes' impact on the victim. The court characterized the offense as "very serious," taking into account the sexual assault case sentencing guidelines, while also recognizing they were not binding (123:117). The court found it aggravating that the victim was "very vulnerable," because she was very old, "blind," and "mostly deaf," conditions which left her fairly disabled, despite her "outgoing" nature and intact "mental faculties" (123:117).

The court found very compelling that Lilek specifically targeted the victim because of those vulnerabilities, which was "really what makes this such a serious crime" (123:118). All the materials cited—the statements Lilek made to police, to the PSI writer, and to other inmates—made "very clear that Mr. Lilek specifically targeted [the victim] because she is blind and

because she is hard of hearing … because he knew that, and … she wouldn't be able to see him" (123:118).

Thus, the court found it aggravating and put "a lot of weight" on the fact that Lilek planned the offense so he would not get caught, choosing a victim who could not see him, making it "easier for him to commit the crime" (123:118). The court also found aggravating that the victim's injuries were severe, given her elderly age and frailness (123:118). To have that kind of force "thrust on her" caused her a lot of injury physically, even if Lilek did not intend those injuries (123:119).

Finally, the court found aggravating the way in which Lilek perpetrated the crimes, disguising himself to pretend to be the victim's son in order to gain access into the victim's apartment (123:119). The court likened Lilek's *modus operandi* to a disguise, "not the same as … putting something over your face, but he didn't need to do that here" because of the victim's blindness and near deafness (123:119). The court also called Lilek's method "a form of trickery," taking advantage of this vulnerable victim (123:119).

Although the court did not think the crimes were "a grand criminal conspiracy hatched by Mr. Lilek"—because he was probably not capable of that, given his mental illness and capacity—the court also could not place Lilek amongst offenders "who can't plan and execute" crimes (123:120). Lilek's crimes were, instead, "very serious, terrible offense[s]," somewhere in the middle of those two extremes (123:120).

Second, the record is clear that the court properly considered Lilek's character—both positive and negative aspects—before sentencing. The court found Lilek's "mental health issues" to be "an important part of this case" and spent a "great deal of time" throughout the case, "trying to get a handle on who Mr. Lilek is, what [e]ffect his abilities have on him as a person, what [e]ffect his mental capacity and his mental illness and seizure disorder

all have on him as a person" (123:120). Although it was "hard to know specifically how to put all of that together," the court found it important to look at those aspects of Lilek's character (123:120).

The court, however, also noted that Lilek acted "differently when not being observed," bringing up the possibility of malingering, even though no one disputed Lilek's many true disabilities (123:123-124). The court fully considered Lilek's many diagnoses—including a seizure disorder, mental health disorders, brain injury, blindness, and mild mental retardation—but was still concerned that Lilek could make up or exaggerate things, "when need be" (123:124).

Based on the court's own review of Lilek's prison phone conversations with his mother, the court agreed with Dr. Jurek's opinion that Lilek could be "extremely lucid" and "supremely on task" (123:124). The court also shared Dr. Jurek's opinion that Lilek's speech could, at times, be much more "fluid and spontaneous" than with Dr. Jurek, and Lilek did not make the kinds of "digressive or off-topic statements" to his mother as he did when being examined for competency (123:125).

From these taped conversations, the court concluded that Lilek was "capable of the ability to reason and the ability to plan, an ability to have memory of details and direct his own behavior"—character aspects which the court considered "significant given this type of offense" (123:125).

Further, the court noted that, although Lilek lacked a prior criminal record *per se*, Lilek had engaged in this type of behavior before, and those prior instances resulted in police reports (123:125-126). The court reasoned that, even if several incidents of bumping into women's breasts were not on purpose, the court could still consider the "serious" incident where Lilek went into a woman's apartment, pushed against her body, lifted up her shirt, and fondled her breasts (123:126).

In the PSI, Lilek had admitted to some of this prior behavior, even if he did not admit to a different incident in which a woman reported that Lilek had tried to touch her breasts and vagina (123:127). Indeed, when pressed by the PSI writer, Lilek said "the police don't know their butt from a hole in the ground" and refused to answer any more questions (123:127).

The court found these incidents to be troubling and concerning aspects of Lilek's character, even if Lilek's underlying reason for the assaultive behavior was to "get a sexual experience" (123:127-128). Even though Lilek's mental health issues may have contributed to the behaviors, he still knew the behaviors were wrong (123:127-128). Yet, those same mental health issues likely precluded Lilek from being able to fully appreciate "how very wrong this is"—making the case even more "aggravating" and "disturbing" to the court, because Lilek may not ever be able to stop doing those behaviors, given his mental health issues (123:128).

Finally, the court properly considered the need for the protection of the public. The court acknowledged this factor carried "more weight" than the others, to ensure that "something like this never happens again," because Lilek had demonstrated he was dangerous by his "planning ability" in these crimes (123:120-121).

Although some statements from fellow inmates may have been motivated by ulterior motives, four different people still came forward to tell of Lilek's bragging about the current offense—all providing details of the crimes which were not provided to the press (123:121). For example, the inmates provided details like: Lilek's crime was interrupted by the victim's brother ringing the doorbell; Lilek wanted to put the victim into the bathtub in an effort to wash off her DNA; the victim screamed she was blind; and Lilek called his mother the "boss" to the police (123:122-123).

These details all lent credibility to the inmates' accounts of Lilek's bragging, because they were consistent with details that Lilek himself provided to the police (123:123). The court was therefore concerned about Lilek's dangerousness: Lilek had told others he had planned it; specifically targeted a blind person; decided to do it; and then attempted to cover it up—all of which was "disconcerting" to the court (123:123).

Moreover, the court further discussed how Lilek's mental health issues contributed to Lilek's dangerousness and recidivism risk (123:128). Although the court noted it did not need to consider protective placement for sentencing, it had considered the defense's proposal as an "aspect of really considering every part of the case" (123:128). Nevertheless, the court concluded the protection of the public was paramount, because it was "obvious" Lilek was unable to "check his own behavior" (123:129).

As the court summarized, Lilek was dangerous to the community because:

> he has the ability to plan an attack like this on a vulnerable victim and has shown the willingness to carry it out and to be stopped only by the ringing of a doorbell. I don't know what would have happened, no one knows had that doorbell not been rung that day.
>
> But he was able to carry out this plan and really only stop when he thought he was going to get caught. So I have to take that into consideration, even aside from all of his limitations as part of Mr. Lilek, that he is a man who is able and willing to carry out sexual assaults on a very vulnerable victim, chosen because she was vulnerable and wouldn't report it.

(123:129-130).

The court also explained how it must ensure this crime did not happen again—thereby rejecting protective placement because "there is absolutely no guarantee in

any protective placement that he will remain at that level of security for any period of time" (123:130). In protective placement, Lilek would likely be placed in "the least restrictive setting," which was not protective enough of public safety (123:130).

Indeed, the court likened Lilek's prior living arrangement to a protective placement of sorts, living amongst other people in his apartment and near his mother—who "certainly did everything she could to make sure that he was taken care of"—yet he was still a danger to those people, as demonstrated by his current crimes (123:130). Thus, the court concluded protective placement was not appropriate: in protective placement, Lilek would still be dangerous to others, because the level of security provided there would be insufficient to ensure Lilek would not recidivate (123:130-131).

Accordingly, the court found it had "no choice" and "no alternative" but to put Lilek in prison, because probation would unduly depreciate the seriousness of the offenses, and protective placement could not "possibly protect the community" (123:131). The court did, however, note that it trusted the Department of Corrections to ensure Lilek received appropriate medications and was "treated in a humane way" (123:131).

C. The circuit court considered Lilek's disabilities, but properly found the protection of the public to be more important.

Lilek argues the circuit court erroneously exercised its discretion by placing too much weight on the protection of the public in the face of contravening considerations, demonstrating an "inflexibility, which 'bespeaks a made-up mind'" (Lilek's brief at 32-33, 36-37). Similarly, Lilek argues his disability was not fully

considered by the circuit court; but to the extent it was, it should have been considered a mitigating circumstance, not an aggravating one (*id.* at 33-36).

As just discussed, however, the record belies Lilek's claims. The circuit court considered all relevant sentencing factors before imposing sentence, including Lilek's disabilities and mental health issues. The court did consider the defense's recommendations, but simply chose to reject them.

The law is also clear that once the sentencing court considers relevant sentencing factors, it has wide discretion to attach varying weight to each of those factors and may base its sentence on any of the relevant factors. *Stenzel*, 276 Wis. 2d 224, ¶9.

Although the court here may have placed more weight on the protection of the public than it did on Lilek's disability, assigning this relative weight to these factors does not mean the court erroneously exercised its discretion; it simply means the court found certain factors to be more compelling than others. *Id.*

Moreover, the court was not required to consider Lilek's disability as a mitigating factor merely because Lilek thinks his disability is mitigating. *Stenzel*, 276 Wis. 2d 224, ¶¶12-16 (court appropriately exercised discretion when it did not give defendant's advanced age the "overriding and mitigating significance" defendant would have preferred).

Indeed, positive attributes or other factors which seem to be mitigating may, in fact, be considered aggravating in the court's discretion, because they can signify the defendant's conduct is especially egregious in light of his otherwise laudable or positive character. *Id.* ¶16 n.5 (citing The Bible for proposition that "to whom much is given, much is expected").

Here, the circuit court appropriately exercised its discretion when it did not give Lilek's disabilities the "overriding and mitigating significance" he would have preferred, and instead considered that factor less important than others, or even aggravating. *Stenzel*, 276 Wis. 2d 224, ¶¶12-16.

D. The circuit court properly exercised its discretion in ordering prison for Lilek, rather than protective placement.

Lilek similarly asserts his disability rendered him unable to appreciate the wrongfulness of his conduct and unable to check his behavior—factors which were "exculpatory" and should have called for commitment for treatment in protective placement, rather than punishment in prison (Lilek's brief at 36).

Lilek cites *State v. Szulczewski*, 216 Wis. 2d 495, 504, 574 N.W.2d 660 (1998), but *Szulczewski* is inapposite and has no application here. As Lilek concedes (Lilek's brief at 9, 36), Lilek was not found not guilty by reason of mental disease or defect ("NGI"). Rather, an NGI plea was deemed inappropriate by two different doctors (45; 46).

In *Szulczewski*, the defendant was committed to DHS under Wis. Stat. § 971.17(1) for "custody, care and treatment" after he was found NGI. *Szulczewski*, 216 Wis. 2d at 498-99. While at Mendota Mental Health Institute, however, he assaulted another patient, a crime for which he received a five-year prison sentence. *Id*. at 498. On appeal, this court held Wis. Stat. § 973.15, required that the defendant's prison sentence commence immediately. *Id.* at 498-99. But the Wisconsin Supreme Court reversed, holding an NGI commitment was sufficient "legal cause" to stay the prison sentence, in the court's discretion under

Wis. Stat. § 973.15(8)(a), until the NGI commitment had been completed. *Id.* at 501, 507-08.

Therefore, *Szulczewski* has no application here, because unlike that defendant, Lilek was not found NGI and finds himself in a completely different procedural posture.

To the extent *Szulczewski* has any application, however, it helps the State, not Lilek. The *Szulczewski* court identified the NGI statute's purpose to be two-fold: to treat the NGI acquittee's mental illness, and to protect the acquittee and society from the acquittee's potential dangerousness. *Szulczewski*, 216 Wis. 2d at 504. Based upon those purposes, the court determined it was:

> reasonable to conclude that the legislature intended NGI acquittees to experience the consequences set forth in the criminal code. It is also reasonable to conclude that the legislature intended to effectuate the goals of the NGI statutes, including treatment of an NGI acquittee's mental illness and behavioral disorders, even when an acquittee commits a subsequent criminal offense.

Szulczewski, 216 Wis. 2d at 505.

Szulczewski also recognized, however, that the criminal statutes and the resulting judgment of conviction and sentence are designed to accomplish the objectives or goals of "retribution, rehabilitation, deterrence and segregation." *Id.* at 507. In other words, *Szulczewski* recognized that, even in the case of NGI acquittees/committed-persons, the circuit court retains the discretion to punish the defendant in prison, "similar to the discretion a circuit court exercises when making any sentence decision." *Id.*

Thus, for example, the court might determine the purposes of both the criminal and NGI statutes are best served by allowing the defendant to remain in a mental health institution pursuant to the NGI acquittal, such as when the crime was "less serious" or when the defendant

had "serious mental illness or special treatment needs." *Id.*

On the other hand, in other cases, the court might determine the "goals of retribution, rehabilitation, deterrence and segregation are best served by committing the defendant to the custody of the DOC upon sentencing," such as when the crime requires "severe punishment"; when deterrence is necessary; or when the defendant needs to be segregated from the general NGI population. *Id.*

In Lilek's case, the sentencing court determined the need to protect the public was greater than Lilek's need for mental health treatment or protective placement. But such a determination is consistent with the discretion allowed all sentencing courts, and was not an erroneous exercise of discretion. *Id.* at 507.

Lilek also takes issue with the sentencing court's refusal to grant a continuance to allow the civil protective placement process to be finalized (Lilek's brief at 37-39). Lilek similarly asserts the circuit court should have considered placement options at mental health facilities, such as Mendota and Winnebago, where he could be properly monitored and still protect the public (*id.* at 38-40 (citing *State v. Wood*, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63)).

As just discussed, however, the record belies Lilek's claim, because the court considered—yet nevertheless rejected—protective placement (123:128-131). Moreover, like his *Szulczewski* argument, Lilek's *Wood* argument suffers from the same flaw—namely, Lilek was not an NGI committed-person. Thus, the court's determination of dangerousness does not necessarily mandate protective placement. *Wood*, 323 Wis. 2d 321, ¶¶1-2, 35-38.

Wood's holding, therefore, has no bearing on the circuit court's sentencing decision here, because Lilek was

not adjudged NGI. Indeed, under the relevant criminal commitment statutes, the circuit court lacked authority in the first instance to order the kind of protective placement that Lilek seeks: ordering such commitments appears to be within the sole province of the Department of Corrections, not the court. *See* Wis. Stat. § 51.37(5).[4]

The circuit court properly exercised its discretion in imposing Lilek's sentence to prison, and this court should affirm Lilek's sentence in its entirety. *Gallion*, 270 Wis. 2d 535, ¶18.

III. BY PLEADING NO-CONTEST, LILEK WAIVED HIS CLAIM THAT THE CIRCUIT COURT VIOLATED THE STATUTORY TIME LIMITS FOR THE COMPETENCY EXAMINATIONS; AND THE COMPETENCY STATUTES FORECLOSE HIS CLAIM ON THE MERITS.

Finally, Lilek argues the circuit court engaged in improper procedures and/or violated the "strict time limits" or statutory deadlines set forth in Wis. Stat. § 971.14 when it ordered "serial competency evaluations" after Dr. Knudson had found him to be incompetent in August of 2008 (Lilek's brief at 40-50).

Not only has Lilek waived any and all claims of alleged statutory or procedural violations by pleading no-contest; but Lilek's claims are foreclosed by the competency statutes themselves.

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[4]Moreover, under Wis. Stat. § 51.75(9)(a), the circuit court may not order civil commitment placements for individuals found NGI. *State v. Devore*, 2004 WI App 87, ¶9, 272 Wis. 2d 383, 679 N.W.2d 890 (interstate compact on mental health does not apply to NGI individuals; they are people whose institutionalization is due to "commission of an offense for which, in the absence of mental illness or mental deficiency" would be "subject to incarceration in a penal or correctional institution").

A. Lilek waived his claim when he pled no-contest to the charges.

Lilek sets forth a detailed chronology of the competency proceedings, and argues the protracted nature of the various competency examinations violated the 15-day statutory deadline for inpatient examinations (Lilek's brief at 40-49). This court, however, need not address the merits of Lilek's claim, because Lilek's no-contest plea waived any and all non-jurisdictional claims and defects, including his current claim about the alleged statutory time-limit violations. *State v. Oakley*, 2001 WI 103, ¶¶22-23, 245 Wis. 2d 447, 629 N.W.2d 200 (guilty plea waives all non-jurisdictional claims; waiver claims are questions of law which this court reviews independently).

Nonetheless, the State recognizes that Lilek is also arguing his plea was <u>not</u> knowing; and this court also can choose to review Lilek's claim on the merits, notwithstanding his waiver. Accordingly, the State will address the claim on the merits.

B. The competency statutes foreclose Lilek's claim on the merits.

Lilek argues, in essence, that the State was "doctor shopping" when it asked Dr. Jurek to examine him, after Dr. Knudson had already found Lilek incompetent in August of 2008 (Lilek's brief at 40-49). But the competency statutes specifically state the court "shall appoint *one or more*" examiners to examine the defendant "whenever there is reason to doubt" the defendant's competency. *See* Wis. Stat. §§ 971.14(1r) and (2)(a). Another provision specifically permits the State, along with the defendant, to hire experts for the purpose of examining the defendant to determine his competency. *See* Wis. Stat. § 971.14(2)(g).

Thus, the statutes themselves foreclose Lilek's claim, because they allow one or more examinations to take place, by one or more experts—including the State's expert—to assist the court in providing relevant information and reports before the competency hearing takes place. *See* Wis. Stat. §§ 971.14(2)(a) and (g).

The facts of the case also foreclose Lilek's claim. As Lilek concedes (Lilek's brief at 6, 45-46), Dr. Knudson's inpatient examination—generating his first report from August 13, 2008 (8)—fell within the 15-day statutory time limit for inpatient examinations. *See* Wis. Stat. §§ 971.14(2)(am) and (c) (inpatient examinations must be held within 15 days of arrival at inpatient facility).[5]

But as Lilek also concedes (Lilek's brief at 46), Dr. Knudson needed more information from Lilek's own physician before rendering his final opinion, thereby constituting good cause for an extension of the 15-day time limit under the statute. *See* Wis. Stat. § 971.14(2)(c) (court may allow one 15-day extension of inpatient examination period, for good cause, if facility or examiner appointed by court cannot complete examination within first 15-day period and requests an extension). Within the second 15-day time period, on August 28, 2008, Dr. Knudson filed his second report finding Lilek incompetent and not likely to become competent (12).

Lilek seems to think that Dr. Knudson's second report from August 28, 2008 (12) is the end of the story, and any further examinations were prohibited. But the statutes expressly allow the State to hire its own expert, and proffer its own report, before the competency hearing takes place. *See* Wis. Stat. § 971.14(2)(g). Only after <u>all</u>

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[5]Competency was first raised by Lilek's attorney on July 11, 2008 (100); and Dr. Smail recommended an inpatient examination (6), even though the court's order (5) did not specify inpatient or outpatient (Lilek's brief at 6, 45). Lilek arrived at Mendota on July 31, 2008 (8:1). Therefore, Dr. Knudson's first report, dated August 13, 2008 (8), fell within the 15-day statutory time limit.

the reports are generated can the competency hearing take place. *See* Wis. Stat. §§ 971.14(3) and (4) (requiring examiner(s) to submit written report(s) to court before competency hearing takes place).

Moreover, notwithstanding Dr. Knudson's conclusion in his second report that Lilek was permanently incompetent, the court had not yet found Lilek competent or incompetent. Indeed, the court had not even held a competency hearing at that point. After Dr. Knudson's second report, the court set the matter over until September 16, 2008, for a competency hearing—but at that proceeding, Lilek refused to go to court, and the court appropriately determined it could not proceed (102:2-3, 16-18), as Lilek concedes (Lilek's brief at 6-8). The court, therefore, ordered another examination to take place before the next proceeding (20).

At the September 25, 2008 competency hearing, Lilek wanted to proceed on Dr. Knudson's two reports already submitted (103:11). Pursuant to Wis. Stat. § 971.14(2) and the court's earlier order, however, the State properly requested another examination of Lilek, this time by its own expert, Dr. Jurek (103:24). When Lilek refused to stipulate to Dr. Jurek's qualifications (103:25), however, the court's adjournment became unavoidable, as Lilek concedes (Lilek's brief at 7, 46-47).

On October 15, 2008, Dr. Jurek filed his first report, concluding Lilek should be re-assessed for competency after treatment (28:13). The court then ordered that Lilek be re-examined, both by Dr. Knudson (Lilek's expert) and by Dr. Jurek (the State's expert), in order to reconcile the conflicting reports (105:19). Dr. Jurek found Lilek competent to proceed (106:11-12). More importantly, however, Dr. Knudson changed his previous position, and found Lilek competent to proceed (36), apparently based on Lilek's own behavior (Lilek's brief at 8).

Lilek then challenged both of those reports (107:3-5), and the court adjourned yet again (Lilek's brief at 8). At the next hearing, Lilek had an "outburst" and, after an adjournment to the afternoon, was later found "standing on a table asking for chips and a candy bar" (Lilek's brief at 9), again causing another adjournment (110:2). Lilek later hired another expert, Dr. Taylor, who filed two reports stating Lilek was not competent and not likely to become competent (39; 40).

After all the reports had been filed, the court held a 3-day competency hearing in May of 2009 (111-115). At the end of the proceedings, the court found Lilek competent to proceed (115:89-93).[6]

Thus, the record is clear that no statutory violations occurred here, because the court had authority to order one or more examination(s) at any point when Lilek's competency came into question. *See* Wis. Stat. §§ 971.14(1r) and (2)(a). Back in 2008, the State also had authority to request an examination from its expert, Dr. Jurek, even after Lilek had already been examined by his own expert, Dr. Knudson. *See* Wis. Stat. § 971.14(2)(g).

Contrary to Lilek's position that Dr. Knudson's report should have been final, the court had authority to order examinations thereafter, not only to resolve the differences in the two experts' conclusions before the competency hearing itself, but also to re-examine Lilek when new information came to light from Lilek's own expert.

Importantly, the court here never found Lilek incompetent; rather, only a few reports from Lilek's experts found him incompetent. After considering all the information, however, the court actually found Lilek competent. Nevertheless, Lilek's case is analogous to this

[6]Lilek's later NGI pleas (117) were also found unsustainable (45; 46), such that Lilek entered his no-contest pleas (121).

court's decision in *State v. Carey*, 2004 WI App 83, 272 Wis. 2d 697, 679 N.W.2d 910, a decision related to re-examinations.

In *Carey*, the defendant was actually found incompetent, but the State sought to re-examine him after the defendant was discharged from his civil commitment. *Carey*, 272 Wis. 2d 697, ¶¶1-6, 10-12. Similar to Lilek's position here that the circuit court lacked authority to order more examinations after the initial 15-day time period had expired, the circuit court in *Carey* had reasoned it lacked authority to order another examination to re-evaluate the defendant's competency to stand trial after his civil commitment for his incompetency had ended. *Id.* ¶¶6-7.

But this court reversed, holding that, under Wis. Stat. § 971.14(6)(d), the legislature had expressly given the courts the authority to order re-examination of defendants after discharge from civil commitment. *Id.* ¶12. Such statutory authority "accommodate[d] the constitutional protections against perpetual, unjustified confinement on the one hand and the interests of the public in prosecuting criminal defendants on the other hand." *Id.* ¶14.

Thus, once the defendant regains competency, the circuit court retained jurisdiction over the defendant, who could then be prosecuted—thereby ensuring both that a competent defendant does not escape the consequences of his criminal behavior, while also protecting the public from a potentially dangerous competent individual. *Id.*

In *Carey*, therefore, this court rejected the same claim Lilek advances here:

> Carey's reading of the statute, taken to its logical conclusion, would mean that the criminal proceedings for a person who is found incompetent and unlikely to become competent in the foreseeable future, but who also does not meet the standards for involuntary commitment or protective placement

> under WIS. STAT. chs. 51 and 55, will always remain suspended and open. The defendant will be released into the community and the court will never have the authority to order a reevaluation of the defendant's competency to stand trial. This is so regardless of whether there is evidence demonstrating the defendant's competence. Given that the purpose of the statute, in part, is to protect the interest of the public in prosecuting criminal defendants, Carey's restrictive reading of the statute is not only highly unreasonable, it also runs contrary to the statute's purposes.

Id. ¶15.

So too here, Lilek's strained and restrictive reading of the statutory time limitations are highly unreasonable and run contrary to the statute's purposes. The court is not required to suspend the defendant's criminal prosecution forever, leaving it open for all eternity, merely because one expert has found the defendant incompetent at one point. *Id.* Rather, the court retains the authority to order examinations and re-examinations, and retains jurisdiction over the defendant who can then be prosecuted later, once he is found competent. *Id.* ¶¶14-15.

In summary, the statutes do not require the court to <u>conclude</u> its investigation into the defendant's competency within 15 days; the statutes only require the <u>first</u> initial inpatient competency exam to take place within 15 days of the defendant's admission to the institution—and even then, those time limits can be extended 15 more days. *See* Wis. Stat. § 971.14(2)(c). Thereafter, however, the court retains the authority to order more examinations—and the statute allows the State to request its own experts in doing so—before the court can even hold its competency hearing. *See* Wis. Stat. §§ 971.14(2)(g), (3), and (4).

Thus, the statutory scheme contemplates and permits exactly what happened here: the court compiled

all of the necessary yet conflicting reports—albeit over the course of 10 months—but then, after the competency hearing, the court ultimately concluded Lilek was competent to stand trial.

Lilek should not be allowed to escape criminal prosecution forever simply because one expert found him incompetent in 2008. *Carey*, 272 Wis. 2d 697, ¶¶14-15. The court properly continued the competency hearing until all the relevant information had been compiled, and ultimately found him competent—thereby balancing Lilek's "constitutional protections against perpetual, unjustified confinement on the one hand and the interests of the public in prosecuting criminal defendants on the other hand." *Id.* ¶14.

There were no statutory violations here, and this court should affirm Lilek's conviction.

CONCLUSION

For the reasons set forth, the State respectfully requests that this court AFFIRM the judgment of

conviction, and the circuit court's order denying Lilek's postconviction motion for relief.

Dated this 23rd day of July, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,840 words.

Dated this 23rd day of July, 2013.

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SARAH K. LARSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated this 23rd day of July, 2013.

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SARAH K. LARSON
Assistant Attorney General