STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP678, 2014AP679 and 2014AP680

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELISA VALADEZ,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT II, FOLLOWING APPEAL FROM AN ORDER DENYING A POSTCONVICTION MOTION FOR PLEA WITHDRAWAL, ENTERED IN WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did the circuit court properly deny Valadez's motions for plea withdrawal because she had not established that her pleas were "likely" to result in her deportation, exclusion from admission to the country, or denial of naturalization under federal law?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting certification of this case from the court of appeals, this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT VALADEZ WAS NOT ENTITLED TO WITHDRAW HER PLEAS.

A circuit court's decision to grant or deny a motion to withdraw a guilty plea will stand on appeal unless it represents an erroneous exercise of the court's discretion. *State v. Thomas*, 2000 WI 13, ¶ 13, 232 Wis. 2d 714, 605 N.W.2d 836. The circuit court's exercise of discretion will be affirmed if the record demonstrates that the court correctly applied legal standards to the facts and came to a reasoned conclusion. *State v. Nawrocke*, 193 Wis. 2d 373, 381, 534 N.W.2d 624 (Ct. App. 1995).

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in "manifest injustice." *Thomas*, 232 Wis. 2d 714, ¶ 16; *see also State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish "manifest injustice," a criminal defendant must show a "serious flaw in the fundamental integrity of the plea." *Nawrocke*, 193 Wis. 2d at 379.

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[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

On a challenge to the plea colloquy itself, the defendant bears the initial burden to make a prima facie showing that the circuit court accepted the plea without satisfying its duties under Wis. Stat. § 971.08 or other mandatory procedures. *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *see also State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14. Generally, when a defendant demonstrates a prima facie violation and alleges that she did not know or understand critical information that the court should have provided at the time of the plea, "the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." *Bangert*, 131 Wis. 2d at 274.

Given the applicable statutory language and related case law, the analysis is different when the claimed deficiency in the plea colloquy relates to the circuit court's failure to address the immigration consequences of a defendant's plea.

Wis. Stat. § 971.08(1)(c) provides:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> . . . .
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Wis. Stat. § 971.08(1)(c). In addition, however, subsection (2) states:

> If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion

> from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

Wis. Stat. § 971.08(2). This provision alters the standard plea withdrawal procedure and analysis under *Bangert* and eliminates the State's ability to assume the burden of proof and show that the defendant was otherwise aware of the immigration consequences of her plea. This court has made clear that if a defendant's motion for plea withdrawal demonstrates that the circuit court did not give the proper immigration warning and that the resulting plea is likely to result in the defendant's deportation, exclusion from admission to the country, or denial of naturalization, the defendant may withdraw her plea and enter a new one, irrespective of whether she was otherwise aware of such consequences. *State v. Douangmala*, 2002 WI 62, ¶¶ 22-25, 42, 253 Wis. 2d 173, 646 N.W.2d 1.

In this case, it is undisputed that the circuit court did not provide Valadez with the immigration warning pursuant to Wis. Stat. § 971.08(1)(c) at the time of her pleas. The plea transcripts show that it failed to do so (2014AP678:27; 2014AP679:25; 2014AP680:22).[2] The issue here is whether Valadez, who is not currently subject to any immigration proceedings, sufficiently established that her pleas are "*likely* to result in [her] deportation, exclusion from admission to this country or denial of naturalization[.]" Wis. Stat. § 971.08(2); *State v. Negrete*, 2012 WI 92, ¶¶ 26-27, 343 Wis. 2d 1, 819 N.W.2d 749. The circuit court correctly determined that she did not.

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[2] In the absence of the transcripts, the plea withdrawal analysis would fall under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), not *Bangert*. *State v. Negrete*, 2012 WI 92, ¶¶ 29-33, 343 Wis. 2d 1, 819 N.W.2d 749.

Virtually all of the materials that Valadez submitted to the circuit court discuss a variety of statutes and related procedures that the federal government generally follows when and if it pursues enforcement action against a non-citizen (*see* 2014AP680:14; 16; 17). Her reliance on those materials is misplaced. What would happen to Valadez if she were subject to an immigration enforcement action, says nothing about whether she is likely to be subject to such an action.

In *Negrete*, this court explained:

> The second allegation that a defendant must make when seeking to withdraw a guilty or no contest plea under Wis. Stat. § 971.08(2) is that the plea "is likely to result in the defendant's deportation, exclusion from admission to this country[,] or denial of naturalization." This requires that the defendant allege facts demonstrating a causal nexus between the entry of the guilty or no contest plea at issue and the federal government's likely institution of adverse immigration actions consistent with § 971.08(1)(c). **Bare allegations of possible deportation are insufficient**.
>
> . . . Accordingly, to satisfy Wis. Stat. § 971.08(2)'s "likelihood" of immigration consequences requirement, a defendant may allege that: (1) the defendant pleaded guilty or no contest to a crime for which immigration consequences are provided under federal law; and (2) because of his plea, the federal government has manifested its intent to institute one of the immigration consequences listed in § 971.08(2), as to the defendant. **As alternatives, a defendant may submit some written notification that the defendant has received from a federal agent that imports adverse immigration consequences because of the plea that was entered; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered.**

Negrete, 343 Wis. 2d 1, ¶¶ 26-27 (emphasis added) (footnote omitted).

The court added that in a motion for plea withdrawal pursuant to Wis. Stat. § 971.08(2):

> [A] defendant should allege that the federal government has conveyed its intent to impose one of the enumerated immigration consequences set out in Wis. Stat. § 971.08(2). This required nexus between the crime to which a plea was made and adverse immigration consequences can be demonstrated by alleging facts that show that, because of his plea, the defendant has become subject to deportation proceedings, has been excluded from admission to the country, or has been denied naturalization.

Negrete, 343 Wis. 2d 1, ¶ 27 n.8.

Despite the opportunity to do so, Valadez failed to satisfy this requirement. At a December 20, 2013 hearing on Valadez's motion to withdraw her pleas, the State cited *Negrete* and pointed out that:

> There's been nothing provided to this point showing that the federal government has in any way manifested its intent [to take action against Valadez]. There are attachments [to her motion] showing other cases where this has occurred, but not this case, not this defendant.
>
> As -- the court goes on to indicate that as alternatives, the defendant can, may submit some written notification that they have received from a federal agent, they may narrate verbal communications that they have had with a federal agent showing consequences, such as those that she was to be apprised of.
>
> . . . .
>
> . . . *Negrete* doesn't necessarily require a guarantee, but it does require some evidence that the federal government is going forward. Something. Anything. It goes so far as to say that a defendant can narrate verbal communications with a federal agent.

> Unfortunately, Attorney Christopher has provided none of that along with his motion. He is, in fact, making bare allegations of possible deportation. I am in no way saying that it's not possible that this defendant could be deported or face one of the other consequences she was to be warned of. But that's exactly what *Negrete* says; that is not enough.

(2014AP680:23:3-5). Following the prosecutor's comments, the circuit court addressed Valadez's attorney:

> I have had a case like this before. Mr. Necci argued it. And what we ended up doing was giving the defense counsel an opportunity to speak with a federal agent, and come back and indicate the context of that discussion. I know his concern was that by having the discussion it would, therefore, create an investigation and actually lead to the results which he was trying to avoid. But he indicated that he was going to give that an opportunity or give it a shot, I suppose.
>
> So we are talking about the level of likelihood or the standard for likelihood, and as it relates specifically to [Valadez].
>
> So can you tell me, has your client received any communication or notification from the federal government?
>
> MR. CHRISTOPHER: Um, no. No she hasn't, Your Honor.

(2014AP680:23:5). With the court's permission, Valadez's attorney then agreed to contact an immigration agent about her situation and submit additional information by affidavit or testimony (2014AP680:23:10, 14).

On February 19, 2014, Valadez's counsel, Marc Christopher, filed supplementary materials with the court (2014AP680:17).[3] Once again, most of the documents address certain processes of immigration enforcement actions, but

[3] The supplemental filing, applicable to all three cases subject to this appeal, only appears in the record for 2014AP680.

not the likelihood that Valadez would be subject to any of those processes because of her convictions. Attorney Christopher's only effort to show that Valadez is likely to face adverse immigration consequences is by way of an email exchange between himself and Special Agent Ian House from the Department of Homeland Security (2014AP680:17:3-8). Those emails fall far short of the mark.

In one email, Attorney Christopher sent what he labeled as a confirmation of a telephone conversation he had with Special Agent House:

> Agent House,
>
> Thank you for taking the time to speak with me yesterday regarding my immigration enforcement questions. I am sending this email as a confirmation of our conversation.
>
> As you recall, my questions centered around the "likelihood" of immigration consequences of certain drug crimes in circuit court. Specifically an LPR [Legal Permanent Resident] who has been convicted of criminal 1. Felony possession of marijuana 2. Misdemeanor possession of marijuana and 3. Possession of Cocaine. Keeping in mind that each case is different, and we were speaking in generalities, you indicated that under current federal law, these crimes are removable crimes. If that alien is not placed in jail, they may not come under your attention. However, when that alien would apply to renew a green card or apply for citizenship, they would be required to have their fingerprints taken and their criminal record obtained. The immigration official would review any of their convictions for removability grounds. Again, understanding that each case is different, under these general facts, it would be likely that they would be denied renewal of LPR status and denied citizenship. Also, just to clarify, under federal law possession of cocaine and repeated possession of marijuana would be basis for removal, and could likely be subject to removal proceedings.
>
> The second issue we spoke about is that if an alien, with the same convictions listed above, would leave the country and attempt to return. Upon re-entry a

> returning alien is governed by the law of "admissibility" which requires that an alien cannot [be] admitted with certain criminal offenses. Upon re-entry a returning alien would be asked by a Customs and Border Patrol agent if they have ever been arrested for any reason. The alien would be required to tell the truth (or face removal on basis of untruthfulness). If the person indicated that they did, their criminal background would be investigated. If they had inadmissible convictions, such as possession of marijuana, or possession of cocaine, they would likely be detained at the border and remain in custody until they would assert some form of relief (if they had any).
>
> If anything is incorrect, or misstated, please let me know.
>
> Again, thank you for your help. And, of course, if you ever[] need anything from me, please feel free to call any time.

(2014AP680:17:5). None of Attorney Christopher's representations can be attributed to Agent House, particularly given his response:

> Hi Marc,
>
> As I stated before, any administration action in immigration court proceedings would follow any criminal sentence imposed by any level criminal or circuit court in the country. A judge's decision at sentencing should not be affected by whether or not the sentence handed down would raise or lower the level of a conviction to a remov[able] offense. A judge, as you mentioned, may be required to advise the defendant that the crime may make them removable from the US if they have not obtained US citizenship, but this should not bind the judge to set a specific sentence, whether harsh or lenient, based on the possibility of the lawful permanent resident being removed from the US.
>
> One thing I should mention is that if someone who is in removal proceedings leaves the country prior to the completion of the proceedings, they may be removed by the immigration judge in absentia. Also, if they are attempting to enter the country as a lawful permanent

> resident who is in removal proceedings, they may be denied entry into the US.
>
> Please let me know if you have any further questions.

(2014AP680:17:4). In his reply, Special Agent House did not acknowledge any part of Attorney Christopher's email. More important, he did not indicate in any way that Valadez is likely to face any immigration enforcement action because of her convictions. Even Valadez's attorneys appear to agree on this point.

When they were filed with the circuit court, the emails were attached to a sworn affidavit from Attorney Christopher (2014AP680:17:3-8). In his affidavit, Attorney Christopher did no more than attest to the validity and accuracy of the email exchange itself; he did not offer any additional information regarding his communication with Special Agent House, and he did not state that House advised him that Valadez was likely to face adverse immigration consequences based on her convictions (2014AP680:17:3). In addition, Attorney Christopher did not even mention his communications with Special Agent House at the final hearing on Valadez's motion for plea withdrawal (2014AP680:24:8-11).

On appeal, Valadez's attorney also does not claim that any of the information from Special Agent House establishes that Valadez is likely to suffer adverse immigration consequences based on her criminal record. Instead, he argues that Valadez should not be subject to *Negrete's* "likelihood" prong because, unlike the defendant in that case, Valadez has provided more detailed information about how the immigration process may proceed once the federal government has taken action against a non-citizen defendant. In doing so, counsel misreads *Negrete*.

It was not the lack of specificity regarding how immigration enforcement actions proceed that led this court

to conclude that Negrete had not sufficiently alleged that he was likely to be subject to adverse immigration consequences. It was his failure to show that he was likely to be deported because of his plea/conviction:

> The second pleading requirement for motions under Wis. Stat. § 971.08(2) is that a defendant must allege that the plea at issue "is likely to result" in one of the enumerated immigration consequences. To this end, Negrete's motion states the offense for which he entered a plea ("second degree sexual assault of a child") and alleges that "Negrete is now the subject of deportation proceedings." These bare allegations are insufficient to demonstrate that Negrete's "plea is likely to result in [his] deportation."
>
> To comply with the *Bentley*-type pleading standard in the context of Wis. Stat. § 971.08(2), a defendant may set forth the crime of conviction, the applicable federal statutes establishing his potential deportability, and those facts admitted in his plea that bring his crime within the federal statutes. In so doing, a defendant may submit some written notification that the defendant has received from a federal agent that imports adverse immigration consequences because of the plea that was entered; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered. A defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for the requisite nexus.

Negrete, 343 Wis. 2d 1, ¶¶ 36-37 (citation omitted). The court then found that Negrete had "not satisfied the **two necessary requirements of Wis. Stat. § 971.08(2).**" *Id.* ¶ 38 (emphasis added).

Unlike Negrete, Valadez has satisfied the first requirement of Wis. Stat. § 971.08(2) by establishing that she "pleaded guilty or no contest to [crimes] for which immigration consequences are provided under federal law[.]" *Negrete*, 343 Wis. 2d 1, ¶ 27. Like Negrete, however, she has

not satisfied the second requirement by showing that she is likely to suffer adverse immigration consequences because of her pleas/convictions. *Id*. Contrary to Valadez's argument, the detail she supplied as to the first requirement does not obviate her obligation to fulfill the second. Based on her submissions, the circuit court properly concluded that Valadez failed to meet her burden under Wis. Stat. § 971.08(2) and *Negrete* (2014AP680:19; 24:11-12). This court should affirm that decision.

II. THERE IS NO RISK THAT DEFENDANTS MIGHT BE UNABLE TO SEEK RELIEF FOR VIOLATION OF WIS. STAT. § 971.08(2).

In its certification to this court, the court of appeals questioned whether a non-citizen defendant who did not receive a proper warning under Wis. Stat. § 971.08(2) might be barred from seeking plea withdrawal based on this court's decision in *State v. Romero-Georgana*, 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668. Specifically, the court of appeals referenced the following passage from that decision:

> In the present case, the notice that INS had started an investigation to determine whether Romero–Georgana was subject to deportation was dated March 20, 2007—four months before Attorney Hagopian filed the first postconviction motion. In addition, the petitioner's brief demonstrates that Romero–Georgana's Final Administrative Removal Order from the Department of Homeland Security was dated October 22, 2007, and he appears to have received it on November 5, 2007—almost a year and a half before he filed his second postconviction motion. When a defendant has notice that he [or she] is likely to be deported and subsequently brings postconviction claims unrelated to Wis. Stat. § 971.08(2), we think it would be unwise to allow him [or her] to bring his [or her] claim as a § 971.08(2) motion at a later time, although he [or she] may be able to bring his [or her] claim as a Wis. Stat. § 974.06 motion if he [or she] has a sufficient reason for the delay. Removing all time constraints on a Wis. Stat. § 971.08(2) motion would frustrate judicial efficiency by encouraging defendants to delay bringing those motions. In the absence of a time

> limit, if a defendant were indifferent to deportation or wanted to be deported, the defendant would have incentive to keep a § 971.08(2) motion in his [or her] back pocket while pursuing relief on other grounds. However, that issue is not before us. In this case, we need only address Romero-Georgana's motion under Wis. Stat. § 974.06 because that is the motion he brought.

Romero-Georgana, 360 Wis. 2d 522, ¶ 67 n.14.

Acknowledging that this court did not impose a time limit on § 971.08(2) motions for plea withdrawal, the court of appeals felt that the *Romero-Georgana* majority had strongly suggested that there should be one for all defendants with such claims. The above dicta, however, seems to be far more limited.

Romero-Georgana received notice of an immigration action against him four months before he filed the first of three successive postconviction motions. Nonetheless, he failed to bring his claim for plea withdrawal based on the circuit court's violation of Wis. Stat. § 971.08(2) until he filed his *third* postconviction motion, in which he raised the issue exclusively as a claim under Wis. Stat. § 974.06. The above discussion seems to represent the court's concern about a defendant who, with knowledge of a ripe claim based on violation of Wis. Stat. § 971.08(2), chooses to reserve that claim and instead pursue unrelated postconviction issues first. That situation not only seems unlikely, it certainly does not exist in this case.

Like many similar defendants, Valadez did not pursue additional postconviction relief beyond the motions underlying this consolidated appeal. Even if she had, however, her Wis. Stat. § 971.08(2) claims should not be barred later because they are not yet viable. As discussed above, Valadez was not able to present information sufficient to show that her pleas are, in fact, "*likely* to result in [her] deportation, exclusion from admission to this country or denial of naturalization[.]" Wis. Stat. § 971.08(2); *Negrete*, 343 Wis. 2d 1, ¶¶ 26-27. Absent the necessary proof, her

claim for relief is premature. So, if such proof only becomes available in the future, Valadez (and defendants like her) should be able to pursue Wis. Stat. § 971.08(2) claims at that time.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's decision denying Melisa Valadez's motions for plea withdrawal.

Dated this 25th day of August, 2015.

Respectfully submitted,

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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 3,816 words.

_____
Nancy A. Noet
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 25th day of August, 2015.

_____
Nancy A. Noet
Assistant Attorney General