STATE OF WISCONSIN

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

DISTRICT III

Case No. 2016AP002258-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. FUGERE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief,
Both Entered in the Chippewa County Circuit Court,
The Honorable Roderick A. Cameron Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Mr. Fugere entered a not guilty by reason of mental disease or defect plea (NGI) and waived his right to a trial for both phases of the bifurcated proceedings. At his plea hearing, the court, the state and Mr. Fugere's attorney told Mr. Fugere he faced a 60-year commitment when he actually faced a 40-year commitment. Is Mr. Fugere entitled to plea withdrawal because his plea was not knowing, intelligent, and voluntary?

The circuit court concluded Mr. Fugere was not entitled to plea withdrawal.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Fugere would welcome oral argument if the court felt it would be beneficial but is not requesting it. This is a fact-specific case, requiring application of established legal principles to the facts of the case, therefore publication is not requested.

STATEMENT OF THE CASE AND FACTS

On April 22, 2015, Chippewa County filed a criminal complaint charging Corey R. Fugere with four counts of first degree sexual assault of a child under 12, contrary to Wis. Stat. § 948.02(1)(b). (1). On August 24, 2015, Mr. Fugere pled "guilty by reason of mental disease or defect" to one count of first degree sexual assault of a child. (84:6). The three remaining counts were dismissed and read in. The court explained the plea as follows:

> He's admitting to the charge and saying he is not guilty by reason of mental disease or defect, which is technically a guilty plea to the charge, and I am going to find that he committed the offense, but he is not guilty by reason of mental disease or defect for the reasons he wasn't on the charge in the 2011 file.

(84:20-21). The commitment order indicates the court found Mr. Fugere not guilty by reason of mental disease or defect (NGI). (23).

As part of the plea agreement, the state stipulated that there was no need for the second phase of trial because the state agreed Mr. Fugere suffered from "a mental disease or defect that makes him lack substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law." (84:19-20).

At the plea hearing, the court conducted a personal colloquy with Mr. Fugere, in which it explained that if Mr. Fugere was found guilty, the maximum term of imprisonment would be 60 years incarceration. (84:12-13; App. 102-103). However, the court also acknowledged that "[y]ou are not actually going to be found guilty of the charge today. You are going to be found [not] guilty by reason of mental disease or defect, which is a bit different." (84:12; App. 102).

Then, the court, the state and Mr. Fugere's attorney all misinformed Mr. Fugere as to the maximum term of commitment he faced if he was found NGI. Mr. Fugere was told he faced a maximum 60-year commitment. The court and parties explained the maximum commitment as follows:

> THE COURT: … [I]t means you could be placed on supervision for up to 30 years.
>
> [ADA] NEWELL: Sixty years is the maximum.

THE COURT:	Sixty years, but the recommendation is 30 years, do you understand that?
[MR. FUGERE]:	Yes.
….	
THE COURT:	Did you explain to [Mr. Fugere] the maximum penalty, which is actually sixty years here?
[ATTY.] MORIN:	Yes.
THE COURT:	And did you explain to him the elements of the offense?
[ATTY.] MORIN:	I did. And would like to make a brief record, if I could.
THE COURT:	Go ahead. Speak loudly. We have a lawnmower outside.
[ATTY.] MORIN:	Your Honor, this is pretty serious because it exposes Mr. Fugere to some 30 more years of supervision, could be possibly 60 years. If he was found not guilty of this, his supervision would end in 2017. Because he knows if he violates any rules of supervision, he could end up back at Mendota or Winnebago during the next 60 years, I think it's important to make a record here.

(83:12-14; App. 102-104). The state and defense requested a 30-year term of commitment (84:12; App. 102), which Mr. Fugere ultimately received (23: 84:21).

Mr. Fugere filed a postconviction motion alleging he was entitled to plea withdrawal pursuant to ***Bangert***[1] because the court misinformed Mr. Fugere about the maximum

[1] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

commitment he faced and Mr. Fugere did not otherwise know the maximum commitment. (61). The court, the state, and Mr. Fugere's attorney told Mr. Fugere he could be committed for 60 years, when he could only be committed for 40 years. The state filed a response to the motion arguing there was not a ***Bangert*** violation because the court told Mr. Fugere the correct maximum sentence if Mr. Fugere would have been convicted, rather than committed. (66).

The court denied Mr. Fugere's request for plea withdrawal at a hearing on November 9, 2016. (86). It explained:

> I think, given the fact that there's no requirement to provide a defendant the maximum amount of time for a confinement or commitment time on an NGI when he's told he's going to get a certain amount against that amount, I think that's distinguishable from the maximum amount of time partly because confinement is not a sentence and partly because he's getting exactly what he expected to get regardless of how much more time he could have gotten. So I believe under that analysis, the motion is to be denied.

(86:9; App. 107). Mr. Fugere now appeals.

ARGUMENT

I. Mr. Fugere's NGI Plea Was Not Knowing, Intelligent, or Voluntary Because the Court Told Mr. Fugere He Faced a 60-year Commitment When He Actually Faced a 40-year Commitment, and Mr. Fugere Did Not Otherwise Understand the Maximum Commitment, Thus He Is Entitled to Plea Withdrawal.

A. Introduction and Standard of Review.

Mr. Fugere entered an NGI plea. He waived his right to a trial and admitted to the guilt phase. The state stipulated to the NGI phase, and thus, Mr. Fugere waived all of his trial rights for both phases of the bifurcated proceeding. The direct consequence of Mr. Fugere's NGI plea, which had an automatic effect on the range of punishment,[2] was the possibility of a 40-year commitment.

Even though Mr. Fugere legally faced a 40-year commitment, at the time of his plea, the court, the state, and Mr. Fugere's attorney all informed Mr. Fugere that he faced a 60-year commitment. As will be explained below, the court was required to tell Mr. Fugere the correct maximum commitment because it is a direct consequence of his NGI plea. Since Mr. Fugere was told the wrong maximum commitment – by 20 years – and he did not otherwise know the maximum commitment, his plea was not knowing, intelligent, or voluntary. Therefore, he is entitled to plea withdrawal.

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[2] Had Mr. Fugere entered a guilty plea he would have faced a 60-year prison sentence. Wis. Stat. §§ 948.02(1)(b); 939.50(3)(b). However, since Mr. Fugere entered an NGI plea he faced a 40-year commitment. Wis. Stat. §§ 948.02(1)(b); 973.01(2)(b). Thus, the NGI plea had an automatic effect on the range of Mr. Fugere's punishment because it went from a potential 60-year prison sentence to a potential 40-year commitment.

The question whether a plea was knowingly and intelligently entered presents a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶ 13, 232 Wis. 2d 561, 605 N.W.2d 199. Although factual findings are not disturbed unless clearly erroneous, the appellate court reviews independently the question whether the plea satisfies the constitutional standard. ***Id***.

B. Maximum commitment.

According to Wis. Stat. § 971.17(1)(b),

> when a defendant is found not guilty by reason of mental disease or mental defect…the court shall commit the person to the department of health services for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony….

In this case, Mr. Fugere was convicted of a Class B Felony, which carries a maximum term of 40 years confinement in prison. Wis. Stat. §§ 948.02(1)(b); 973.01(2)(b). Thus, Mr. Fugere faced a maximum 40-year commitment to the department of health services after being found NGI.

Mr. Fugere was told by the court, the state, and his attorney that he faced a maximum 60-year commitment and Mr. Fugere had no reason to believe otherwise.[3] (83:12-14).

C. Mr. Fugere is entitled to plea withdrawal.

1. Plea must be knowing, intelligent, and voluntary.

A defendant can withdraw his or her plea after sentencing if the defendant proves by clear and convincing

[3] At the postconviction hearing, the court noted that Mr. Fugere was "not very smart" and "has some issues." (86:8).

evidence that plea withdrawal is necessary to correct a "manifest injustice." ***State v. Finley***, 2016 WI 63, ¶ 58, 370 Wis. 2d 402, 882 N.W.2d 761. "One way to show a manifest injustice is to show that the plea was not entered knowingly, intelligently, and voluntarily." ***Id.***; *see also* Wis. Stat. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 257, 274, 389 N.W.2d 12 (1986). A plea of guilty or no contest that is not knowingly, intelligently, and voluntarily entered violates fundamental due process and, therefore, "withdrawal of the plea is a matter of right." ***Id.*** at ¶ 95 (*citing* ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997)).

In ***Bangert***, the Wisconsin supreme court outlined the judge's duties at a plea hearing, "drawing on Wis. Stat. § 971.08, familiar case law, and Wis. JI-Criminal SM-32 (1985) Part V, Waiver of Constitutional rights." ***State v. Brown***, 2006 WI 100, ¶ 34, 293 Wis. 2d 594, 716 N.W.2d 906 (*citing* ***Bangert***, 131 Wis. 2d at 261-62, 270-71).

Both § 971.08, and the ***Bangert*** line of cases, require that circuit courts conduct a personal colloquy with the defendant to ensure the defendant's plea is knowingly, intelligently, and voluntarily entered. The court's duty to inform "is a logical outgrowth of the constitutional standard that a defendant's plea be knowingly, voluntarily, and intelligently entered." ***Bangert***, 131 Wis. 2d at 269-70.

In ***Brown***, the Wisconsin supreme court "restate[d] and supplement[ed]" the judge's duties at a plea hearing which were previously outlined in ***Bangert***. ***Brown***, 293 Wis. 2d 594, ¶ 34. Specifically, circuit courts are required to address the defendant personally during a plea hearing and:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;

(2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;

(3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;

(4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;

(5) Establish the defendant's understanding of the nature of the crime with which he is charged *and the range of punishments to which he is subjecting himself by entering a plea*;

(6) Ascertain personally whether a factual basis exists to support the plea;

(7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;

(8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;

(9) *Notify the defendant of the direct consequences of his plea*; and

(10) Advise the defendant that "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 (or offenses) with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

Brown, 293 Wis. 2d 594, ¶ 35 (footnotes omitted) (emphasis added). Here, the court did not establish that Mr. Fugere understood the correct range of punishment and it did not properly notify Mr. Fugere of the direct consequences of his plea.

2. ***Bangert*** procedures apply to NGI pleas.

Although § 971.08(1) does not apply to NGI pleas on its face, ***Bangert*** procedures still apply when the defendant enters an NGI plea and chooses not to contest the first phase of the bifurcated proceedings, as Mr. Fugere did here.

> On its face, sec. 971.08(1) does not apply to defendants entering pleas of not guilty by reason of mental disease or defect. As a function of our superintending and administrative authority over the circuit courts, see Wis. Const. art. VII, sec. 3, however, we hold that a court faced with a defendant entering a plea of not guilty by reason of mental disease or defect must address the defendant personally to determine whether the defendant is entering the plea voluntarily with an understanding of the nature of the charge. We further hold that the procedures delineated in ***Bangert*** shall apply in cases in which a defendant pleads not guilty by reason of mental disease or defect.

State v. Shegrud, 131 Wis. 2d 133, 137–38, 389 N.W.2d 7 (1986); *see also* ***State v. Duychak***, 133 Wis. 2d 307, 311, 395 N.W.2d 795 (Ct. App. 1986). Thus, ***Bangert*** procedures apply here.

Bangert established a two-step process to determine whether a defendant knowingly, intelligently, and voluntarily entered the plea. ***Van Camp***, 213 Wis. 2d at 140 (*citing* ***Bangert***, 131 Wis. 2d at 274). First, the defendant must make a prima facie showing that the plea was accepted without compliance with the procedures set out in ***Bangert***, its progeny, and § 971.08. ***State v. Cross***, 2010 WI 70, ¶ 19,

326 Wis. 2d 492, 786 N.W.2d 64. The defendant must also allege that he did not know or understand the information that should have been provided. ***Id.*** Second, if both prongs are met, the burden shifts to the state to show by clear and convincing evidence that the plea was otherwise knowingly, intelligently, and voluntarily made, despite the inadequate record at the plea hearing. ***Id.***, ¶ 20.

Here, the court told Mr. Fugere the wrong maximum commitment. Mr. Fugere was told he could receive a 60-year commitment when he could only receive a 40-year commitment. Both the state and defense counsel reiterated this misinformation. Thus, as alleged in Mr. Fugere's postconviction motion, Mr. Fugere did not know the correct maximum commitment.

However, at the postconviction hearing, the court concluded it was not required to inform Mr. Fugere of the correct maximum commitment, and thus denied Mr. Fugere's plea withdrawal motion. As will be explained below, the court is wrong. It is required to explain the maximum commitment when a defendant enters an NGI plea because it is a direct consequence of the plea with an automatic effect on the range of punishment.

3. The maximum commitment is a direct consequence of the plea with an automatic effect on the range of punishment.

When the defendant enters an NGI plea, and waives his right to a trial for both phases of the bifurcated proceedings, the court is required to inform the defendant about the maximum length of commitment because it is a direct consequence of the plea with an automatic effect on the range of punishment.

Although courts do not need to inform defendants about the collateral consequences of his or her plea, it is well-established that courts are required to inform defendants of the "direct consequences" of the plea. ***State ex. rel. Warren v. Schwarz***, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998) (*citing* ***Brady v. United States***, 397 U.S. 742, 755 (1970)). "An understanding of potential punishments or sentences includes knowledge of the direct consequences of the plea." ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999) (*citing* ***Warren***, 219 Wis. 2d at 637). A defendant entering a plea "must have sufficient awareness of the relevant circumstances and likely consequences that could follow." ***State v. Myers***, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996) (*citing* ***State v. James***, 176 Wis. 2d 230, 238, 500 N.W. 2d 345 (Ct. App. 1993)).

"A direct consequence of a plea has a definite, immediate, and largely automatic effect on the range of a defendant's punishment." ***Kosina***, 226 Wis. 2d at 486 (*citing* ***James***, 176 Wis. 2d at 238). On the other hand, a collateral consequence "does not automatically flow from the plea." ***Id.*** (*citing* ***Myers***, 199 Wis. 2d at 394). "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea." ***State v. Byrge***, 2000 WI 101, ¶ 61, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted).

In ***Byrge***, the Wisconsin supreme court concluded when a circuit court has statutory authority to fix the parole eligibility date, the circuit court is obligated to provide the defendant with parole eligibility information before accepting the plea. ***Byrge***, 237 Wis. 2d 197, ¶ 68. It is a direct consequence of the plea. ***Id.*** In coming to this conclusion, the court explained that the parole eligibility date "links

automatically to the period of incarceration, which in turn has a direct and automatic effect on the range of punishment." ***Id.*** at ¶ 67.

Like the parole eligibility date in ***Byrge***, the maximum commitment here has a direct and automatic effect on the range of punishment. Because Mr. Fugere entered an NGI plea, he could not be given a jail or prison sentence. Nor could he be placed on probation. Instead, upon accepting the plea, the court was required to enter a commitment order.[4] Wis. Stat. § 971.17(1)(b) ("the court shall commit the person to the department of health services for a specified period …").

Thus, Mr. Fugere's commitment is a "definite, immediate, and largely automatic" consequence of his plea. It has an automatic effect on the range of Mr. Fugere's punishment because it prohibits jail, prison or probation and requires commitment. Certainly, it is not unreasonable or impractical to require the circuit court to advise the defendant about the potential length of commitment associated with an NGI plea. After all, with an NGI plea the commitment is the primary consequence of the defendant's plea.

This is not like the situation in ***Myers*** where the court concluded a potential ch. 980 commitment was a collateral consequence. In ***Myers***, the defendant entered a guilty plea to first degree sexual assault of a child. ***Myers***, 199 Wis. 2d at 393. Myers argued he should be permitted to withdraw his plea because the court did not inform him that he could be subjected to a ch. 980 petition. ***Id.*** at 394. In concluding that a potential ch. 980 commitment was a collateral consequence, the court explained the commitment would not automatically flow from Myers' conviction. ***Id.*** The court noted that if a

[4] Under a commitment order, defendants could receive institutional care or be conditionally released. Wis. Stat. § 971.17(3)(a).

ch. 980 petition were filed, Myers would have the full benefit of ch. 980 procedures, due process, and an independent trial. ***Id.*** That is certainly not the case here where Mr. Fugere's commitment was an immediate consequence of his NGI plea.

Mr. Fugere's NGI commitment is also unlike collateral consequences related to probation revocations and presumptive mandatory release dates. ***James***, 176 Wis. 2d at 244; ***Yates***, 239 Wis. 2d 17, ¶ 11. In ***James***, the court of appeals concluded the circuit court did not need to specifically inform the defendant that if his probation is revoked he could be sentenced to a term greater than the probationary period. ***James***, 176 Wis. 2d at 233.

In ***Yates***, the court was not required to inform Yates that he was subject to a presumptive mandatory release date. ***Yates***, 239 Wis. 2d 17, ¶ 2. The consequences in both ***James*** and ***Yates*** depended on future conduct, thus there was no "definite, immediate, and automatic effect on the range of [] punishment." ***State v. Yates***, 239 Wis. 2d 17, ¶ 11, 619 N.W.2d 132, 2000 WI App 224. That is not the case here.

As explained earlier, when accepting a plea ***Brown*** requires courts to establish an understanding of "the range of punishments to which [the defendant] is subjecting himself by entering a plea" and "notify the defendant of the direct consequences of his plea." ***Brown***, 293 Wis. 2d 594, ¶ 35. The range of punishment available to the court upon accepting Mr. Fugere's NGI plea was a 40-year commitment. The court could not sentence him to jail or prison and the court could not place him on probation. Had Mr. Fugere been found guilty, the high end of the range would have been a 60-year prison sentence. However, the NGI plea changed the maximum sentence to a potential 40-year commitment, which is a direct consequence of the plea, as it is "a definite,

immediate, and largely automatic effect on the range of [Mr. Fugere's] punishment." ***Kosina***, 226 Wis. 2d at 486.

Therefore, the court was required to tell Mr. Fugere he faced a 40-year commitment. Since the court told Mr. Fugere he faced a 60-year commitment, which is 20 years higher than permitted, and Mr. Fugere did not otherwise know the maximum commitment, his plea was not knowing, intelligent, and voluntary. The difference between the 60-year maximum Mr. Fugere was told he faced and the 40-year maximum he actually faced is substantial. Mr. Fugere was told he faced a maximum commitment that is 150% greater than what he actually received. *Cf.* ***State v. Cross***, 2010 WI 70, ¶ 4, 326 Wis. 2d 492, 786 N.W.2d 64 (holding that "when a defendant is told that he faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law, the circuit court has not violated the plea colloquy requirement outlined in Wis. Stat. § 971.08 and [the] ***Bangert*** line of cases."). Here, the 20 year difference is substantial and Mr. Fugere's plea was not knowing, intelligent, or voluntary, therefore he is entitled to plea withdrawal.

CONCLUSION

For all of the reasons stated above, Mr. Fugere contends that the circuit court improperly denied his postconviction motion and he should be permitted to withdraw his pleas. Therefore, Mr. Fugere requests plea withdrawal.

Dated this 31st day of January, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,607 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 31st day of January, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 31st day of January, 2017.

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