

RECEIVED

03-24-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
District I
Appeal No. 2017AP000062-CR
Circuit Court No. 2015CM3015

State of Wisconsin,
Plaintiff-Respondent,

vs.

Santos L. Hernandez,
Defendant-Appellant.

On Appeal from a Judgment of Conviction and from an Order Denying a Motion for Postconviction Relief Entered in Milwaukee County Circuit Court Br. 15 and Br. 19, the Honorable J.D. Watt and the Honorable Dennis R. Cimpl, Presiding.

Brief and Appendix of the Defendant-Appellant

Gregory Bates
Attorney at Law, 1018846
PO Box 70
Kenosha, Wisconsin 53141-0070
(262) 657-3082

TABLE OF CONTENTS

Authority Cited 3

Issues Presented

 Is Santos Lee Hernandez entitled to withdraw his
 guilty pleas? 5

Statement on Oral Argument and Publication 5

Statement of Case 5

 Procedural History..... 5

 Statement of Facts 6

Argument 9

 Santos Lee Hernandez was entitled to withdraw his
 guilty pleas to prevent a manifest injustice 13

 A. Standard of Review 9

 B. Santo Lee Hernandez did not freely, knowingly
 and voluntarily enter his guilty pleas in this case 10

 C. The treatment of Santos Lee Hernandez by the
 Department of Corrections was a direct
 consequence of his guilty pleas 13

 D. Santos Lee Hernandez was entitled to a hearing
 on his postconviction motion 15

Conclusion 18

Appendix Appendix

AUTHORITY CITED

Cases

Libke v. State,
60 Wis. 2d 121, 208 N.W.2d 331 (1973) 10

Nelson v. State,
54 Wis. 2d 489, 195 N.W.2d 629 (1972) 16, 17

State ex rel. Warren v. Schwarz,
219 Wis.2d 615, 579 N.W.2d 698 (1998) 14

State v. Bentley,
201 Wis. 2d 303, 548 N.W.2d 50 (1996) 9, 16, 17

State v. Bollig,
2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199) 14

State v. Booth,
142 Wis. 2d 232, 418 N.W.2d 20 (Ct. App. 1987) 11

State v. Byrge,
2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477 14

State v. Cross,
2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64 10

State v. Dawson,
2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12 10

State v. Hunter,
2005 WI App 45, 261 Wis. 2d 633, 660 N.W.2d 12 9

State v. LeMere,
2016 WI 41, 368 Wis. 2d 624, 879 N.W.2d 580 15

State v. Woods,

173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992) 10, 11, 13

Statutes

Other Authority

ISSUES PRESENTED

1. Is Santo Hernandez entitled to withdraw his guilty pleas?

Trial Court Treatment: The trial court denied Santo Hernandez's postconviction motion in a decision and order dated December 16, 2016. (10:1-4) (Appendix)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Counsel does not believe that oral argument is necessary. The issues presented can be adequately addressed in the briefs submitted to the Court. Publication may be appropriate to provide guidance upon the issues presented here.

STATEMENT OF CASE

Procedural History

A criminal complaint was filed on September 21, 2015 charging Santos Lee Hernandez with two counts of Lewd and Lascivious Behavior, contrary to Wis. Stat. §944.20(1)(b). (Record, 1:1-3) On February 8, 2016, Mr. Hernandez entered pleas of guilty to the two counts pursuant to a plea agreement. (4:1-3; 14:16) His sentencing

hearing took place on April 16, 2016 where his sentence was withheld and he was placed on eighteen months of probation. (7:1-2) On December 16, 2016 Mr. Hernandez filed a postconviction motion and that motion was denied by a decision and order dated December 19, 2016. (9:1-4; 10:1-4; Appendix) Santos Lee Hernandez now brings this appeal. (11:1-2)

Statement of Facts

Santos Lee Hernandez was charged in a criminal complaint with two counts of lewd and lascivious behavior. (1:1-3) The criminal complaint described the two witnesses saw Mr. Hernandez walking in the 4500 block of West Greenfield Avenue with no pants on and his butt and genitals exposed. *Id.* The West Milwaukee police responded to the call and found Mr. Hernandez with no pants on and indicated that they could see Mr. Hernandez's genitalia. *Id.*

On February 8, 2016, Santos Hernandez entered guilty pleas to two misdemeanor charges after consulting with his attorney Ramon Valdez. (14:16) The Mr. Hernandez stated that the discussion with his attorney was focused on the fact that the Santo Hernandez is gay and cross dresses. (9:2) Attorney Valdez indicated to Santos Hernandez that if he did not enter a guilty plea that he

would likely be incarcerated and would have a difficult time in jail given his homosexuality and cross dressing tendencies. *Id.*

Santos Hernandez went through the plea questionnaire with Attorney Valdez on February 8, 2016, signed it and proceeded to enter his pleas after a colloquy with the court. (14:16) Santos Hernandez has a seventh grade education and some of the responses that Santos Hernandez gave to the court were inaccurate at the time that he responded to the court's questions. (9:2)

The plea questionnaire states that Santos Hernandez had not consumed any alcoholic beverages in the 24-hours preceding the plea hearing, but in fact, Santo Hernandez had consumed an excessive amount of alcohol just prior to coming to court to the point that he has limited recollection of the events that took place at the guilty-plea hearing. (9:2)

Santos Hernandez was asked by the court if he had read and understood the plea questionnaire and the discussions that were taking place in court. (14:16) He was asked if anyone had threatened, made promises or put pressure on him to plead guilty. (14:30-31) He was asked if he understood that he was waiving any defenses to the

charges by his pleas of guilty. (14:19; 14:22-23) Santos Hernandez in his postconviction motion stated that he did not in fact understand any of these matters when he entered his pleas. (9:2)

Prior to the entry of the guilty, Santos Hernandez stressed to his attorney that he did not believe that a factual basis existed for the charges against him. (9:2) This fact was not emphasized at the guilty-plea hearing. *Id.* It was not stated at the guilty-plea hearing, as was told to his attorney, that Santos Hernandez's genitalia was not exposed as stated in the Criminal Complaint in that he was wearing underwear that would have prevented the viewing of his genitalia. *Id.* At the sentencing hearing, Mr. Hernandez described the clothing that he was wearing as a dress and not pants as described in the complaint. (15:12) He also said that his behavior was not purposeful. *Id.*

The court sentenced Mr. Hernandez to eighteen month of probation. (7:1-2; 15:13) After being placed on probation and meeting with a probation agent, Santos Hernandez became aware that the charges to which he pled guilty were "sex crimes" and that the Department of Correction would treat him as a "sex offender." (9:2) He

also would be required to follow the Department's "sex offender" rules. *Id.*

Santos Hernandez filed a postconviction motion to be allow to withdraw his guilty pleas. (9:1) That motion was denied by the court without a hearing. (10:1-4) Santo Lee Hernandez now brings this appeal. (11:1)

ARGUMENT

Santos Lee Hernandez is entitled to withdraw his guilty pleas to prevent a manifest injustice.

A. Standard of Review

The basis of this appeal is the denial of Santos L. Hernandez's postconviction motion seeking plea withdrawal. In order to warrant relief on a plea withdraw claim, the alleged facts, if true, would need to establish the existence of a manifest injustice. *State v. Hunter*, 2005 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

A defendant seeking to withdraw a plea after sentencing bears the burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A manifest injustice occurs when

a defendant does not knowingly and voluntarily enter his plea. *State v. Woods*, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992).

Determining whether a plea meets the knowing, intelligent, and voluntary standard is a question of constitutional fact subject to independent review. *State v. Cross*, 2010 WI 70, ¶ 14, 326 Wis. 2d 492, 786 N.W.2d 64. Circuit court findings of historical fact are accepted by the reviewing court unless clearly erroneous. *Id.* A defendant meets the manifest injustice standard for plea withdrawal if he establishes that there are serious questions affecting the fundamental integrity of the plea. *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).” *State v. Dawson*, 2004 WI App 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12.

B. Santo Lee Hernandez did not freely, knowingly and voluntarily enter his guilty pleas in this case.

A plea not entered knowingly, voluntarily, and intelligently violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right. *State v. Cross*, 2010 WI 70, ¶ 14, 326 Wis. 2d 492, 786 N.W.2d 64. A defendant’s plea is not knowing and

voluntary when “it was, at the time of its entry, attributable to force, fraud, fear, ignorance, inadvertence or mistake.” *Woods*, 173 Wis. 2d at 140, quoting, *State v. Booth*, 142 Wis. 2d 232, 238, 418 N.W.2d 20 (Ct. App. 1987).

Many of the *Woods* factors are present in this case. On the date of the plea hearing, Santo Lee Hernandez, by his own statement, had consumed alcohol to the point of not being able to remember what was transpiring at the plea hearing. (9:2) He further stated that, by his own statement, he did answer the court differently when he was asked this same question at the plea hearing. *Id.* He told the court that he was not drinking when in fact had been drinking. *Id.* The question presumably was asked to determine his degree of understanding at the time of the plea entry. There however was very limited understanding by Mr. Hernandez.

There was a discussion about whether a factual basis existed for the charges in this case and Mr. Hernandez did agree that such a basis existed based on the facts in the criminal complaint. The answers that Mr. Hernandez gave to the court were based on fear of what could happen if he were to go to jail. *Id.*

Santos Hernandez went through the plea questionnaire with Attorney Valdez on February 8, 2016, signed it and proceeded to enter his pleas in a colloquy with the court. Santos Hernandez has a seventh grade education and some of the responses that Santos Hernandez gave to the court were inaccurate at the time that he responded to the court's questions. (9:2) Given his limited education and his consumption of alcohol, a more thorough discussion should have taken place.

The plea questionnaire states that Santos Hernandez had not consumed any alcoholic beverages in the 24-hours preceding the plea hearing, but Santo Hernandez had consumed an excessive amount of alcohol just prior to coming to court to the point that he has limited recollection of the events that took place at the guilty-plea hearing. (9:2) Mr. Hernandez gave inaccurate information to the court during the plea colloquy in this case.

Santos Hernandez was asked by the court if he had read and understood the plea questionnaire and the discussions that were taking place in court. (14:16) He also was asked if anyone had threatened, made promises or put pressure on him to plead guilty and that he was waiving any defenses to the charges by his pleas of guilty. (14:19-

23) Santos Hernandez did not understand any of these matters when he entered his pleas. (9:2)

Prior to the entry of the guilty, Santos Hernandez stressed to his attorney that he did not believe that a factual basis existed for the charges against him. (9:2) Santos Hernandez's stated that his genitalia was not exposed as stated in the Criminal Complaint in that he was wearing underwear that would have prevented the viewing of his genitalia. (9:2)

Under the *Woods* factors contributing to a knowing and voluntary plea, in this case, force, fraud, fear and ignorance are all present. The presence of these factors would dictate that Mr. Hernandez should be allowed to withdraw his guilty pleas.

C. The treatment of Santo Lee Hernandez by the Department of Correction was a direct consequence of his guilty pleas.

After being placed on probation and meeting with a probation agent, Santos Hernandez became aware that the charges to which he pled guilty were "sex crimes" and that the Department of Correction would treat him as a "sex offender" and would require him to follow the Department's onerous "sex offender" rules.

The basis for denying the withdrawal of the plea by the trial court was that the court determined that his treatment by the Department of Correction was merely a collateral consequence. Mr. Hernandez believes that this is more than simply a collateral consequence of his plea and his decision to enter guilty pleas.

Direct consequences are those that have a "definite, immediate, and largely automatic effect on the range of a defendant's punishment." *State v. Byrge*, 2000 WI 101, ¶ 60, 237 Wis.2d 197, 614 N.W.2d 477 (citing *State v. Bollig*, 2000 WI 6, ¶ 16, 232 Wis.2d 561, 605 N.W.2d 199); *see also State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 636, 579 N.W.2d 698 (1998). Collateral consequences, on the other hand, "are indirect and do not flow from the conviction"; rather, they "may be contingent on a future proceeding in which a defendant's subsequent behavior affects the determination" or may "rest not with the sentencing court, but instead with a different tribunal or government agency." *Byrge*, 237 Wis.2d 197, ¶ 61, 614 N.W.2d 477; *see also Warren*, 219 Wis.2d at 636, 579 N.W.2d 698.

Here, after the court placed Mr. Hernandez on probation, he was immediately treated by the Department of Corrections as a sex offender. (9:2) The offense to which he pled guilty is classified as a sex crime. There was

discussion at the time of the plea entry and at the sentencing as to whether or not Mr. Hernandez would be required to register as a sex offender. (14:15; 15:9) The court determined that it was within its discretion to not require registration and did not order Mr. Hernandez to register as a sex offender. (15:14) What the court had no control over was the classification of the crime of Lewd and Lascivious Behavior as being a sex crime. This classification as a sex offender was a direct consequence of the plea entry.

The classification of Mr. Hernandez, according to *Byrne*, flowed directly from the plea entry. It was not based upon any behavior exhibited after the entry of the plea or subject to action by a different state agency. The general rule as the trial court applied it here is that "no manifest injustice occurs when a defendant is not apprised of consequences that are collateral to the plea." See, *State v. LeMere*, 2016 WI 41, ¶20, 368 Wis. 2d 624, 879 N.W.2d 580. The consequences here were direct consequences and Mr. Hernandez was not properly apprised of the consequences of his plea entry to these sex crimes.

D. Santo Lee Hernandez was entitled to a hearing on his postconviction motion.

If a motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *State v. Allen*, 274 Wis. 2d 568, ¶9 (citing *Bentley*, 201 Wis. 2d at 310-11; *Nelson v. State*, 54 Wis. 2d 489, 497-8, 195 N.W.2d 629 (1972)). The appellate court will review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *Id.* "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *Bentley*, 201 Wis. 2d at 318.

With this in mind, the postconviction court here was required to hold an evidentiary hearing on Mr. Hernandez's motion before it determined whether he had entered his pleas in a knowing, intelligent, and voluntary fashion. It must be answered whether Mr. Hernandez's motion to withdraw his plea alleged facts which, if true, would entitle him to relief.

Under *Nelson-Bentley* the court has the discretion to grant or deny a hearing. The appellate court's review is

regarding the proper exercise of the discretion by the circuit court. *Bentley*, 201 Wis. 2d at 318.

The postconviction motion filed by Santos Hernandez satisfies the *Nelson-Bentley* standard in that it alleges the five "w's" and one "h"; that is, who, what, where, when, why, and how. See, *Allen*, 274 Wis. 2d 568, ¶22.

Mr. Hernandez alleged with sufficient specificity that 1) at the time of the plea entry that he was under the influence of alcohol and did not understand the pleas proceeding and what he was doing at that time. (9:2) He gave specificity when 2) he stated that there were not sufficient facts to have found that he committed the crimes of Lewd and Lascivious behavior. (9:2) Finally, he alleged sufficiently that 3) the direct consequence of the entry of his guilty pleas was not sufficiently explained in that the treatment as a sex offender was never mentioned or explained during the taking of the guilty pleas. (9:2)

Given the allegations contained in the postconviction motion, the court should have granted Santos Lee Hernandez a hearing on his postconviction motion to withdraw his guilty pleas.

CONCLUSION

The trial court erred when it denied Santos Lee Hernandez's postconviction motion for plea withdrawal. Thus, this matter should be remanded to the trial court for a hearing on his request for a plea withdrawal.

Dated: March 22, 2017
Respectfully Submitted:

Gregory Bates, 1018846
Attorney for Defendant-Appellant
PO Box 70
Kenosha, WI 53141
(262) 657-3082

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 3090 words.

Dated: March 22, 2017

Gregory Bates
Attorney at Law, 1018846

**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: March 22, 2017

Gregory Bates
Attorney at Law, 1018846