

RECEIVED

06-08-2017

**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.

REPLY BRIEF

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

ARGUMENT

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

A. Standard of Review

The State in its Response Brief suggests that the correct standard of review is one of deference to the trial court. This however is not correct. As stated the Brief of the Appellant, the correct standard of review here is:

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.

The State in its Response Brief at page 3 argues that the trial court properly denied the postconviction motion for plea withdraw here because the motion does not raise facts sufficient to entitle Mr. Hernandez to relief.

Mr. Hernandez emphasizes that 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).

One difference in this case in examining the postconviction motion is that the judge for the postconviction motion is different from the judge who examined Mr. Hernandez when he entered his guilty plea. Judge Watt had a colloquy with Mr. Hernandez – Judge Crimpl, as the postconviction judge, did not.

It is agreed that the appellate courts give deference to the findings of the trial court when the judge makes finding regarding a witness's credibility. Here the witness is Mr. Hernandez. The determiner of fact decides credibility issues, weighs the evidence, and resolves conflicts in the testimony.

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). As to the postconviction motion, Judge Crimpl never had the opportunity to hear the testimony or statement of Santos Hernandez to assess his credibility as to the stated reasons for seeking a plea withdraw. The postconviction court is in no better position than the appellate court to assess the credibility of Mr. Hernandez and should not give deference to its findings.

Many of the *Woods* factors are present in this case – particularly fraud, ignorance and mistake. 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 and his statement to the court were fraudulent.

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. This can be viewed as his ignorance.

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) Mr. Hernandez did ultimately agree to the factual basis in the criminal complaint, but this was a mistake on his part.

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.

The State argues in its Response Brief at p. 5 that Santos Hernandez did not preserve the argument that his treatment as a sex offender was a direct consequence of his guilty plea. His is unusual in that the postconviction court ruled directly on this matter. The court in its decision said that “this is a collateral consequence of the defendant’s pleas and is not sufficient grounds for plea withdrawal.” So clearly the postconviction court believed that it was raised and thus preserved.

This case can be analogized to *State v. Brown*, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, where in that case, the defendant was misadvised as to the consequences of his pleas and the need to register as a sex offender. Like sex offender probationary rules, sex offender registration is also administered by the Department of Corrections as correctly stated in the Respondent’s Brief at page 7.

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. This is not what he expected and not what the court explained to him when it accepted his plea. This can be characterized as a direct consequence of his plea and as such he should have been advised prior to the plea entry by the court. See, *State v. Brown*, supra.

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

Contrary to the claim in the Response Brief, the postconviction court should have held 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 pleas alleged facts which, if true, would entitle him to relief.

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: June 6, 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 1621 words.

Dated: June 6, 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: June 6, 2017

Gregory Bates
Attorney at Law, 1018846