STATE OF WISCONSIN

COURT OF APPEALS DISTRICT II

Case No. 2017-AP-188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. WHITE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Whether the defendant-appellant's guilty plea complied with the requirements of *Bangert* and was entered, knowingly, voluntarily and intelligently.

STATEMENT ON PUBLICATION AND ORAL ARUGMENT

White does not request publication or oral argument. This case involves the application of well settled principles of law and the parties briefing will adequately address all issues.

STATEMENT OF THE CASE

While serving out a different sentence, Donald White was charged with one count of criminal damage to property, contrary to Wis. Stat. § 943.01(1) and one count of violating state or county penal institution laws (specifically Kenosha County Jail Rule 228) in Kenosha County case number 2013CM1803. (1:1.) Both charges included the habitual criminality enhancer pursuant to Wis. Stat. § 939.61(1)(a). (1:1.) Along with 2013CM1802, White was charged with Kenosha County case number 2013CF1306.

The criminal complaint in 2013CM1802 alleged that White "willfully damaged" a mattress and pad in his cell at the Kenosha County Jail on November 25, 2013. (1:2.) On June 22, 2015, White agreed to plead guilty to count 2 in 2013CM1802, violating state or county penal institution laws. (44:2.) In exchange for White's guilty plea, the State agreed to dismiss count 1 and dismiss the other pending case against White (2013-CF-1306). (44:2.) The State agreed to make no specific recommendation as to the sentence. (44:2.)

During the plea hearing, the Court addressed White after briefly conversing with both the ADA and White's attorney. (44:3). The Court first asked White if he understood what was being said at the hearing, to which White responded yes. (44:3.) The Court then replied that he understood White was going to plead guilty to count 2 of case number 13CM001802, violating county institution law, and that the district attorney would dismiss the remaining charges against

White in exchange for his plea. (44:3.) White responded that he understood. (44:3.) The Court repeated that in exchange for White's guilty plea, the district attorney would dismiss the remaining charges against White and would make no specific recommendation to which White responded that he understood. (44:3-4.)

The Court told White the penalties for the crime he would plead guilty for, that because he was a habitual offender he could be imprisoned for up to two years and fined up to $500, which White replied that he understood. (44:4.) The Court also asked White if anyone had promised him that the maximum penalties would not happen to him in this case, which White replied no. (44:4.) White affirmed that he signed a plea questionnaire and waiver of rights. (44:4.) The Court asked if White read the plea questionnaire and waiver of rights document and understood everything on it and White replied affirmatively. (44:4.) The Court also asked White where he was born and the date of his birth. (44:4.)

The Court then went through the charge against White and inquired into his understanding of the charge. (44:5.) White replied affirmatively. (44:5.) When the Court asked White how he would plead, White pled no contest. (44:5.) The Court asked White if he understood that by pleading no contest, he would be found guilty without a trial to which White responded yes. (44:5.) The Court asked if there was any reason the plea should not be accepted and White's counsel stated no. (44:5.)

White was found guilty and later sentenced on August 10, 2015 to one year imprisonment followed by one year of extended supervision to be served consecutively to any prior sentence. (36.)

White, through counsel, filed a postconviction motion requesting the circuit court withdraw his no-contest plea

based on *Bangert* violations and that he did not knowingly, voluntarily and intelligently enter the no-contest plea (27:1.)

In a one page order, the circuit court denied White's postconviction motion stating it did not contain an affidavit and that the court agreed with the State's response. (29:1.)

ARGUMENT

I. White did not knowingly, intelligently, and voluntarily enter his guilty plea. Therefore, under *Bangert*, White is entitled to an evidentiary hearing on his request to withdraw his guilty plea.

"When a defendant seeks to withdraw his guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" *State v. Brown*, 2006 WI 100, ¶18, 293 Wis.2d 594, 611(citing *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis.2d 714. The defendant can meet this burden by showing that his plea was not knowingly, intelligently, and voluntarily entered. *Id* (citations omitted). When a guilty plea is not entered knowingly, intelligently, and voluntarily a defendant can withdraw his guilty plea as a matter of right. *Id* at ¶ 19, *citing State v. Van Camp,* 213 Wis.2d 131, 139 (1997).

Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. *State v. Trochinski*, 2002 WI 56, ¶16, 253 Wis.2d 38, 644 N.W.2d 891 (1998). We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *Id.*

After sentencing, the defendant can motion to withdraw his guilty plea by filing a postconviction motion

alleging: (1) the plea violated § 971.08 or some other court-mandated duties; and (2) the defendant did not understand some portion of the plea hearing. *State v. Bangert*, 131 Wis.2d 246 (1986). As long as the above mentioned, allegations are made, the circuit court must hold an evidentiary hearing on the postconviction motion. *Brown*, 2006 WI 100, ¶ 40.

In this case, the defendant is alleging that the plea colloquy was deficient and that he did not enter his plea, knowingly, intelligently and voluntarily. The leading Wisconsin case on the plea colloquy is *State v. Bangert*, 131 Wis.2d 246 (1986). If the transcript of the plea hearing does not show that the trial court comported with the requirements of *Bangert*, an evidentiary hearing must be held to determine whether the defendant's plea was made knowingly, intelligently and voluntarily. *Brown*, 2006 WI 100, ¶ 25.

The defendant contends that the court did not conform to the *Bangert* plea requirements in several respects.

First, the court did not establish that the defendant understood the nature of the charges against him.

Under *Bangert*, the circuit court has three methods in which it may establish that the defendant understands the charge(s) to which he is pleading. First, the trial court may summarize the nature of the charge by reading the elements of the crime from the appropriate jury instructions. *Brown,* 2006 WI 100, ¶ 46. Second, the court may ask defense counsel whether he explained the charge to the defendant and request that defense counsel summarize the explanation and recite the elements of the charge at the plea hearing. *Id* at ¶ 47. "Third, the court may expressly refer to the record or other evidence of the defendant's knowledge of the nature of the charge established prior to the plea hearing." *Id* at ¶ 48.

In *Brown*, the defendant contended that he was entitled to an evidentiary hearing on his request to withdraw

his plea because, the defendant alleged, the trial court did not establish that he understood the nature of the charges to which he pleaded guilty. During Brown's plea hearing, the circuit court judge did not explain or discuss the elements of the crime to which Brown pleaded. The only discussion of the elements of the crime in *Brown* was that Brown's attorney stated that he had explained the nature of the charges to Brown. The Supreme Court held that the circuit court had violated its mandated *Bangert* plea colloquy methods and allowed the defendant to have an evidentiary hearing on his request to withdraw his plea.

The Supreme Court ruled in favor of Brown, despite the fact that during the plea hearing Brown's attorney stated that he had explained the nature of the charges to Brown. The Supreme Court held that this was not enough to satisfy *Bangert* because the circuit court did not ask Brown or his attorney to summarize the extent of the explanation or the elements of the crime on the record.

In this case, the court did not follow any of the three requirements in *Bangert* to ensure White understood the nature of the charges against him. The court did not read the elements of the crime to White, did not ask White's attorney whether he went over the elements with White and did not point to any other part of the record to indicate White knew the elements and nature of the charges.

Furthermore, the court did not inquire into whether White committed the crime he was charged with as required by Wisconsin Statute § 971.08(1)(b). The court did not ask White whether he had willfully damaged a mattress pad in his cell or asked him about his actions that brought him to court. There was no basis on the record for the Court to conclude that White had in fact committed the crime he was charged with besides his entered plea.

Moreover, the court must determine whether the defendant is capable of entering a knowing and intelligent plea by "[d]etermin[ing] 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." *Brown*, 2006 WI 100 at ¶34-5 (Wis. 2006). The Wisconsin Supreme Court established that "a plea will not be voluntary unless the defendant has a full understanding of the charges against him," *Id.* at 916, and he "must understand the nature of the crime at the time of the taking of the plea." *Bangert*, 389 N.W.2d at 24.

The court did not inquire about White's educational background, history or his general comprehension of the case's subject matter. The court did ask White if he understood what was being said at the hearing. While White did reply "yes," this is insufficient to assess White's capacity to understand the issues at the hearing. Thus, the court did not determine whether White was capable at the plea hearing of entering a knowing and intelligent plea.

The court must also explain the correct maximum punishment and ensure that the defendant understand the crime he is charged with and "the range of punishments to which he is subjecting himself by entering the plea." *Brown*, 716 N.W.2d at 917. The court must also explain that it is not bound by any plea agreement and could sentence up to the maximum during the plea colloquy. *Id*. Specifically, the court must advise the defendant personally on the record that the court is not bound by any plea agreement and ascertain whether the defendant understands the information. *State v. Hampton*, 2004 WI 107, ¶42, 274 Wis.2d 379, 683 N.W.2d 14.

The court did not state during the plea colloquy that it could sentence White up to the maximum sentence or that it was not bound by the plea agreement between White and the

State. Although the court asked White if anyone had promised him that the maximum penalties would not happen to him in this case, that is distinctly different than telling White that the court could sentence White up to the maximum penalty. In regard to the plea agreement between White and the State, the court simply restated the court's understanding of the plea agreement, but did not tell White that he was not bound by the plea agreement.

Further, the court did not explain or inquire whether White understood the constitutional rights he was giving up by pleading no contest.

The Wisconsin Supreme Court established that in order for a plea to be intelligently and voluntarily made, a defendant must know and understand that their constitutional rights are being waived by entering the plea. *Bangert*, 389 N.W.2d at 24. That same court also established that at plea hearings courts must specifically refer to some part of the record or some communication between the defendant and his counsel to show that the defendant has knowledge of the constitutional rights he is waiving by entering a plea. *Id.* at 25. The plea must be based on the defendant's "intentional relinquishment or abandonment" for a waiver of constitutional rights to be valid. *Id.* at 22. The court must also "[a]scertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea." *Brown,* 716 N.W.2d at 917.

Regarding the constitutional rights, the *Brown* case is instructive. In *Brown*, the trial court went paraphrased each of the necessary constitutional rights, asking the defendant if he gave each one up. *Brown*, 2006 WI 100, ¶ 71. The defendant said "yeah" or "yes" to each question. The court did not question the defendant further and other asked defense counsel if he had gone over the plea questionnaire form with the defendant. *Id* at ¶ 72. There was no meaningful

discussion of the constitutional rights between the court and the defendant or defense counsel. *Id* at ¶ 75. The Supreme Court found that the trial court should have done more to show that the defendant understood the rights he was giving up. The Supreme Court suggested that the trial court should not be satisfied with one word answers and should instead probe the defendant's knowledge of these rights. The Court also noted the fact that the defendant in Brown was poorly educated and this was a factor that the trial court was to consider when engaging in the plea colloquy.

Like the court in *Brown,* the circuit court did not adequately explain or inquire about the constitutional rights White was giving up. Although the court asked White if he had signed, read, and understood the plea questionnaire and wavier of rights document and White replied "yes" to each of these questions, the court did not inform White or even inquire whether White understood or knew of his constitutional rights that he would be waiving upon entering a guilty or no contest plea including: the right to remain silent, the right against self-incrimination, the right to confront and cross-examine the state's witnesses, the right to a jury trial, and the right to make the state prove each element beyond a reasonable doubt. The court did not determine that White understood his constitutional rights he would be waiving.

The court must also verify that no one had made threats or promises to coerce the defendant into entering the plea besides promises in the plea agreement. The court did not ask White this question.

The plea colloquy between White and the court was not sufficient for White to enter his plea knowingly, voluntarily, and intelligently for several reasons. First, the court did not assess whether White was capable of entering a knowing and voluntary plea. Second, the court did not discuss with White that the court would not be bound by the plea

agreement and could sentence up to the maximum penalty. Third, the court did not go through the constitutional rights that White would be waiving upon entering a plea and the record does not reflect that he understood the rights he was waiving. Fourth, the court did not inquire whether White had in fact committed the crime he was charged with. The court did not verify that no one had made any promises or threats to induce White into making a plea. White did not enter his plea knowingly, voluntarily, and intelligently.

Finally, White did allege in his postconviction motion that he did not fully understand the rights he was giving up during the plea hearing. (27:8.) White's motion is similar to the motion filed in *Brown*. One page eight of White's postconviction motion, White alleges, "[t]hird, the Court did not go through the constitutional rights that White would be waiving upon entering a plea and the record does not reflect that he *understood* the rights he was waiving." (27:8 emphasis added).

This motion is very similar to the language used in *Brown*. The circuit court should have ordered an evidentiary hearing in this case to allow White the opportunity to demonstrate that he did not fully understand the rights he was giving up by pleading guilty.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests the court reverse the circuit court's December 28, 2016 order and grant the defendant an evidentiary hearing on his motion to withdraw his guilty plea.

Dated this 11th day of April, 2017

Signed:

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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 2,714 words.

Dated this 11th day of April, 2017.

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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 11th day of April, 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 Court of Appeals; 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.

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