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DISTRICT II

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Case No. 2017-AP-188-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. WHITE,

Defendant-Appellant

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ON APPEAL FROM AN ORDER ENTERED BY THE HONORABLE  
BRUCE E. SCHROEDER, CIRCUIT COURT FOR KENOSHA COUNTY,  
PRESIDING

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PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

The State exercises its option not to present a statement of the issue under Wisconsin Statute 809.19(3)(2)(a).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request publication or oral argument. This case involves the application of settled principles of law, and a briefing by both parties will be sufficient to address all issues.

### STATEMENT OF CASE

The State exercises its option not to present a statement of the case under Wisconsin Statute 809.19(3)(2)(a). The relevant facts and procedural history will be discussed in the argument portion of this brief.

## ARGUMENT

I. DEFENDANT-APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED HIS PLEA DURING A PLEA COLLOQUY SUPPLEMENTED BY A PLEA QUESTIONNAIRE.

- a. Supplementation by a plea questionnaire and waiver of rights form served to establish defendant-appellant's education experiences, waiver of constitutional rights, and understanding of the charges and potential penalties facing him, among other understandings

Defendant-appellant Donald White's plea colloquy satisfies all constitutional requirements for two primary reasons: first, defendant-appellant completed and signed the standardized plea questionnaire and waiver of rights form as permitted by *State v. Bangert*, 131 Wis. 2d 246 (1986), and its progeny; and two, the Honorable Bruce E. Schroeder spoke sufficiently with the defendant to assess the defendant's mental capacity and ensure the defendant's understanding of the plea colloquy and questionnaire in accordance with the defendant's constitutional rights, distinguishing the present case from that found in *Brown*.

After sentencing, defendants are permitted to file post-conviction motions alleging that the plea violated Wis. Stat. § 971.08 or a court-mandated duty, and that the defendant did not understand an aspect of the plea hearing. *State v. Bangert*, 131 Wis. 2d 246 (1986). Defendant-appellant "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. Defendant-appellant fails to meet such a standard in this case.

In his brief, defendant-appellant alleges that "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." (App. Br., 5). This is an unfortunate misreading of *Bangert*, where the court clarifies its ruling by stating, "We first note that this list is not necessarily exhaustive of the methods which a trial judge may exercise in satisfying the antecedent step to its statutory obligation to personally determine the defendant's understanding." *State v. Bangert*, 131 Wis. 2d 246, 268 (1986).

Circuit courts are "given discretion to tailor the colloquy to its style and to the facts of the particular case provided that it demonstrates on the record that the defendant knowingly, voluntarily, and intelligently entered the plea." *State v. Brandt*, 226 Wis. 2d 610, 620, (1999). In fact, *Bangert* specifically granted courts the opportunity to use alternative evidence for the waiver of defendant's rights: "The defendant need not specifically waive each right, but the record or other evidence must show that he entered his plea voluntarily and

knowingly, with understanding of the rights he was waiving." *State v. Bangert*, 131 Wis. 2d 246, 270 (1986) (internal citation omitted).

In tailoring its style, a court may "use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties." *State v. Hoppe*, 2009 WI 41, ¶ 30, 317 Wis. 2d 161, 179. "The Plea Questionnaire/Waiver of Rights Form provides a defendant and counsel the opportunity to review together a written statement of the information a defendant should know before entering a guilty plea. A completed Form can therefore be a very useful instrument to help ensure a knowing, intelligent, and voluntary plea." *Id.* at ¶ 32.

In this case, reference to the standardized questionnaire is made during the conversation between the Honorable Judge Schroeder and defendant-appellant, indicating the defendant's completion and signature of the questionnaire and waiver of rights form:

THE COURT: The charge against you is - well, let me do this. There is a paper here entitled plea questionnaire and waiver of rights, which has the signature Donald White. Is that your signature?

THE DEFENDANT: Yes.

THE COURT: It states that you read the paper and that you understand everything that it says; is that true?

THE DEFENDANT: Yes.

(R. 44:7)

The referenced standardized questionnaire employed by the court and completed by defendant-appellant included the defendant-

appellant's educational background, as well as his knowledge of the rights waived in the Constitutional Rights section. The defendant-appellant informed the court that he had received 11 years of schooling and had a high school diploma or its equivalent; the defendant-appellant signaled his understanding of the English language, and stated that he had not recently ingested any drugs, medication, or alcohol. R. 15: 1.

Further, defendant-appellant White checked boxes indicating his understanding and waiver of his right to a trial, his right to remain silent and his right that such silence not be used against him in trial, his right to testify and present evidence at trial, his right to use subpoenas to require a witness' presence in court for a trial, his right to a jury trial, requiring all twelve jurors to agree in his guilt or innocence, his right to confront his accuser in court and cross-examine them, and his right to require the State to prove his guilt beyond a doubt. *Id.*

Furthermore, defendant-appellant's plea questionnaire indicated his understanding of the elements of the crime alleged, his knowledge that the court would not be bound by any plea agreement in determining a penalty, his knowledge of the laws requiring mandatory minimum sentences for certain crimes, the presumptive minimum

sentence, and the judge's potential use of lesser sentences if for an appropriate stated reason. R. 15: 1. Defendant-appellant's questionnaire detailed the rights that are withheld for those who have received a felony conviction, such as a removal of the right to vote before civil rights are restored, and the removal of the right to possess a firearm or body armor. R. 15: 2. These rights and the removal of rights are stated among many others detailed in the questionnaire.

Finally, the questionnaire incorporated a statement saying, "I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows: plea ct. 2, dismiss ct. 1 + 13CF1306. DA to make no specific recommendation," with the details of the plea agreement handwritten by defendant-appellant. R. 15: 2. His signature appeared below a statement indicating that he had read and reviewed the entire document, answered all questions truthfully, and either he or his attorney had checked all the boxes. R. 15: 2. The defendant signed the statement asking for the court to accept his plea and find him guilty. R. 15:2.

Because plea questionnaire and waiver of rights forms can be used by a circuit court “when discharging its plea colloquy duties,” *State v. Hoppe*, 2009 WI 41, ¶ 30, 317 Wis. 2d 161, 179, the information contained within the form established the defendant-appellant’s knowing, intelligent, and voluntary plea. Judge Schroeder’s verbal confirmation of defendant-appellant’s understanding and voluntary completion and signature of the form was sufficient to establish defendant-appellant’s knowledge and understanding of the details found inside the form. While verbal confirmation would have been sufficient, Judge Schroeder included a more detailed and informative conversation with defendant-appellant than required.

- b. Supplemented by the plea questionnaire, Judge Schroeder’s interview of defendant-appellant was sufficient to determine a knowing, willing, and voluntary plea.

Defendant-appellant’s argument rests upon the presumption that because the waiver of rights, details of the defendant’s education, and other required factors were not spoken aloud by the judge or the defendant-appellant, that the plea colloquy was unconstitutional, citing *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, as precedence. However, the present case and *Brown* are distinguished in several key ways.

First, the defendant in *Brown* could not read, nor was a satisfactory plea questionnaire completed and signed. The court cited as "the entire exchange between the circuit court and Brown concerning the nature of the charges" the following interaction in its decision:

THE COURT: But we need a signed Guilty Plea Questionnaire and Waiver of Rights form.

MR. EARLE: Okay.

THE COURT: If I have one, then you can-I mean do you feel comfortable with what you've said to him and gone over the provisions that are contained in that form, right?

MR. EARLE: I've gone over every word.

THE COURT: All right. Then he can sign the one that he's got.

MR. EARLE: I wasn't able to put all the elements of all three offenses on each one. I started to fill out one and decided I could do it orally with him. So I don't have three for him to sign, just this one. I would have to do three more.

THE COURT: But he understands those elements of the offenses?

MR. EARLE: Yes.

THE COURT: You've gone over those elements with him?

MR. EARLE: Yes.

THE COURT: Okay. Sir, do you understand what you're charged with, the charges against you? The first degree sexual assault while armed; is that correct?

THE DEFENDANT: Yeah.

THE COURT: And the armed robbery, party to a crime?

THE DEFENDANT: Yeah.

THE COURT: And the kidnapping, party to a crime?

THE DEFENDANT: Yeah.

THE COURT: You have read the Complaint or had it read to you?

THE DEFENDANT: Yeah.

THE COURT: So you understand it?

THE DEFENDANT: Yes.

...

THE COURT: You understand the charges to which you're pleading to?

THE DEFENDANT: Yeah.

...

THE COURT: And you've gone over the elements with your lawyer, right?

THE DEFENDANT: Yeah.

THE COURT: And, Counsel, you've gone over those elements specific with him as to each one of those counts?

MR. EARLE: Yes.

THE COURT: And he appeared to understand those elements the State would have to prove?  
MR. EARLE: Yes.

*State v. Brown*, 2006 WI 100, ¶ 12, 293 Wis. 2d 594, 607-09.

Due to the defendant's illiteracy, the Court in *Brown* found that the circuit court's plea colloquy was inadequate, stating, "The fact that there was no plea questionnaire at hand should have warned the court that special steps were imperative to ensure, on the record, that the defendant was fully apprised and understood the charges, the potential penalties, and the panoply of valuable rights he was surrendering by entering his plea." (emphasis added) *State v. Brown*, 2006 WI 100, ¶ 54, 293 Wis. 2d 594, 624. Furthermore, the Court stated, "The absence of the plea questionnaire and waiver of rights form prevented the court from using these documents to instruct the defendant, to assess the defendant's understanding, or to construct an invulnerable record." *Id.*

In the present case, a plea questionnaire and waiver of rights form is present, completed, and signed by the defendant. Further, the defendant is far from illiterate, and in fact has reached the equivalent of a completed high school level of education, ensuring that the plea questionnaire satisfies the circuit court's requirements under *Bangert*. An additional contrast between the current case and the situation in *Brown* can be found in the court's dialogue with defendant-appellant. In

the present case, the court ensured the defendant's awareness of the charges against him by detailing the charges in their entirety:

THE COURT: The charge against you is that on the 25th of November of last year - no, of 2013 at the City of Kenosha in this county, you intentionally violated a lawful rule made pursuant to state law governing penal institutions while you were confined in the Kenosha County Jail by violating Rule 228, which prohibits damage to any property of Kenosha County, and that you willfully damaged a mattress and pad in the cell. Do you understand the charge against you?

THE DEFENDANT: Yes.

(R. 44:5).

In *Brown*, the court merely asked the defendant if he understood the charges, and whether counsel had advised him of the charges, rather than reading the charges aloud, and in detail, as Judge Schroeder did in the present case.

Additionally, in the present case, the court made clear the maximum sentences that the defendant could receive from the allegations.

THE COURT: The offense for which you are pleading guilty is one for which you could be imprisoned for up to 30 days ordinarily and fined up to \$500. However, because it is alleged that you are an habitual offender, that penalty could increase to as long as two years imprisonment. Do you understand that?

THE DEFENDANT: Yes.

(R. 44:4).

As referenced and cited earlier, the court also ensured that defendant-appellant had fully understood the questionnaire and waiver of rights form he had completed and signed:

THE COURT: The charge against you is – well, let me do this. There is a paper here entitled plea questionnaire and waiver of rights, which has the signature Donald White. Is that your signature?

THE DEFENDANT: Yes.

THE COURT: It states that you read the paper and that you understand everything that it says; is that true?

THE DEFENDANT: Yes.

(R. 44:4).

In *Brown*, the court noted that there had been no questionnaire or waiver of rights form completed and signed, and that this added an extra burden to that court's responsibilities, stating, "The fact that there was no plea questionnaire at hand should have warned the court that special steps were imperative to ensure, on the record, that the defendant was fully apprised and understood the charges, the potential penalties, and the panoply of valuable rights he was surrendering by entering his plea." *State v. Brown*, 2006 WI 100, ¶ 54, 293 Wis. 2d 594, 624.

By relying on *State v. Brown*, a case clearly distinguished from the present case, and neglecting the proper use of plea questionnaire and waiver of rights forms in the present case, defendant-appellant has failed to meet the clear and convincing standard of proof to withdraw a plea after sentencing. More importantly, it is clear that defendant-appellant did knowingly, intelligently, and voluntarily make his plea to the court through the use of the plea questionnaire, and through his

conversations with the court detailing the charges against him and maximum penalties, as well as the court's verbal confirmation of defendant-appellant's plea questionnaire and waiver of rights form completion and signature.

### CONCLUSION

For the foregoing reasons, the plaintiff-respondent respectfully requests that the court affirm the circuit court's December 28, 2016 order denying an evidentiary hearing on defendant-appellant's motion to withdraw his guilty plea.

Dated at Kenosha, Wisconsin, on December June 14<sup>th</sup>, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thaddeus McGuire", written over a horizontal line.

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with Book Antiqua a proportional serif font. The length of this brief is 2,461 words and 14 pages.

Dated this 14<sup>th</sup> day of June, 2017.

A handwritten signature in dark ink, appearing to read 'Thaddeus McGuire', written over a horizontal line.

Thaddeus McGuire  
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE)  
809.19(12):

I hereby certify that I have submitted an electronic copy of this brief, 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 14<sup>th</sup> day of June, 2017.

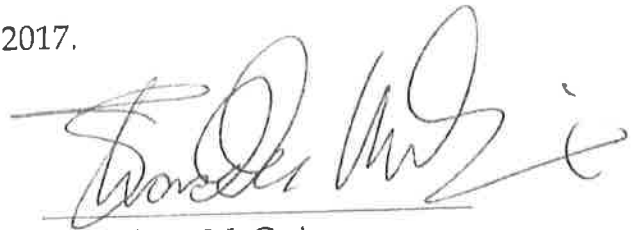
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE)  
809.80(3)(b) PURSUANT TO WIS. STAT. § (RULE) 809.80(4)

I hereby certify that on June 14, 2017, I correctly addressed a package containing 10 copies of the reply brief of the Plaintiff-Appellant and delivered it to a 3rd-party commercial carrier for delivery to and filing with the clerk of the Court of Appeals within 3 calendar days. I further certify that 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 14<sup>th</sup> day of June, 2017.

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