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OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS DISTRICT II

Case No. 2017AP188-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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. White is entitled to an evidentiary hearing on his request to withdraw his guilty plea.

In its response brief, the State claims that White knowingly, intelligently and voluntarily entered his guilty plea. The State gives two reasons for its claim: (1) the plea questionnaire and waiver of rights form signed by White (2) The circuit court's interview with White during the plea hearing (Res. Br. pp. 4,12).

The State's arguments fail.

First, the State's brief is only tailored to argue that White did knowingly, voluntarily and intelligently enter his guilty plea. The State's brief completely ignores the larger and more important part of the analysis which is whether White is entitled to an evidentiary hearing on his motion to withdraw his guilty plea.

At this point in the postconviction proceedings, White is not required to conclusively demonstrate that the plea was not knowing, voluntary and intelligent. The only thing White is required to do is *allege* that the plea was not knowing, voluntary and intelligent.

White is requesting this court grant him an evidentiary hearing on his motion to withdraw his guilty plea. In order to get an evidentiary hearing, White only needs to allege: (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. *State v. Brown*, 2006 WI 100, ¶ 40, 293 Wis.2d 594, 716 N.W.2d 906.

Brown, *Bangert*, and Wis. Stat. 971.08(1) establish requirements for a circuit court during a plea hearing. One of those requirements is that the circuit court must personally address the defendant and determine whether the defendant

understands the nature of the charge he is pleading to. *Wis Stat.* 971.08(1).

Bangert outlined three methods in which the circuit court 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 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.

The State cites *State v. Hoppe*, 2009 WI 41, 317 Wis.2d 161, 765 N.W.2d 794, for the proposition that the plea questionnaire, by itself, demonstrates a defendant’s knowing, voluntary and intelligent plea. (Res. Brief 9.)

Hoppe supports White’s request for an evidentiary hearing. In *Hoppe*, the defendant was granted an evidentiary hearing. *Hoppe*, 2009 WI 41 at ¶ 2. Only after holding the evidentiary hearing did the circuit court deny the defendant’s request to withdraw his guilty plea. *Id*. Moreover, the

Supreme Court held that *Hoppe* was entitled to an evidentiary hearing on his motion to withdraw his guilty plea. *Id.* at ¶ 7.

Moreover, the Court in *Hoppe* explicitly stated that a “circuit court may not rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy.” The State is arguing that the circuit court’s failure to engage in a proper plea colloquy is somehow remedied automatically by the plea questionnaire/waiver of rights form. *Hoppe* clearly demonstrates that the State is wrong.

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 28th day of June, 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 788 words.

Dated this 28th day of June, 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 28th day of June, 2017.

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