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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP741–CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAVIEN CAJUJUAN PEGEESE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING A MOTION FOR POSTCONVICTION
RELIEF, ENTERED IN THE CIRCUIT COURT FOR ROCK
COUNTY, THE HONORABLE RICHARD T. WERNER
AND THE HONORABLE JOHN M. WOOD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was the circuit court's reliance on a plea questionnaire and its colloquy with Defendant-Appellant Javien Cajujuan Pegeese sufficient to ensure that Pegeese understood the constitutional rights he was waiving when he pleaded guilty?

The circuit court answered yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully address the issue presented, which can be resolved by applying well-established precedent.

INTRODUCTION

When accepting a defendant's guilty plea, a circuit court must ensure that the defendant understands the constitutional rights he is waiving. The circuit court can rely on a plea questionnaire and waiver of rights form when discharging this duty, though not exclusively. The court must also engage in a colloquy with the defendant to make sure he understands his rights. If the court fails to comply with this duty, the defendant is entitled to an evidentiary hearing at which the State has the burden of proving that he validly waived his rights despite the court's failure.

Pegeese sought to withdraw his guilty plea to robbery, claiming that the circuit court failed to ensure that he was properly waiving his constitutional rights. At the plea hearing, the circuit court relied on a standard plea questionnaire and waiver of rights form that Pegeese and his attorney completed. It also relied on Pegeese's assurances

that he understood the form and the rights he was waiving. This satisfied the court's duty to ensure Pegeese was validly waiving his rights. The circuit court thus properly denied Pegeese's motion to withdraw his plea without holding an evidentiary hearing. This Court should affirm.

STATEMENT OF THE CASE

Pegeese and two others ordered pizzas and robbed the delivery driver at gunpoint. (R. 1.) He reached an agreement with the State to plead guilty to robbery by threat of force as a party to the crime. (R. 45:2.) The parties also agreed to jointly recommend three years of probation. (R. 45:2.)

Before accepting Pegeese's plea, the circuit court conducted a colloquy with him and his attorney. (R. 45:3–9.)¹ The transcript of the colloquy states, in part:

THE COURT: Have you had enough time to talk to Mr. Hoag [defense counsel] about your cases?

THE DEFENDANT: Yes, sir.

THE COURT: Has he answered all the questions you've had?

THE DEFENDANT: Yes, sir.

THE COURT: Do you need more time to talk with him today?

THE DEFENDANT: No, sir.

THE COURT: Are you satisfied with his representation?

THE DEFENDANT: Yes, sir.

¹ The Honorable Richard T. Werner accepted Pegeese's guilty plea. (R. 45.) The Honorable John M. Wood decided Pegeese's postconviction motion. (R. 47.)

THE COURT: You have provided me today with a Plea Agreement and Waiver of Rights document; correct?

THE DEFENDANT: Yes, sir.

THE COURT: That's your signature on the back side?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read that document before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand all the statements made in that document?

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about anything in that document?

THE DEFENDANT: No, sir.

THE COURT: Mr. Hoag, you reviewed the Plea Questionnaire with him?

MR. HOAG: I read it to him, Your Honor.

THE COURT: Do you believe he understands it?

MR. HOAG: I do.

THE COURT: Mr. Pegeese, do you understand the Constitutional Rights you give up when you enter a plea today?

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about those rights?

THE DEFENDANT: No, sir.

(R. 45:3–4.)

The plea questionnaire and waiver of rights form that Peguese completed is the standard, court-approved form, CR-227. (R. 12.) In the waiver of rights section, the form states, “I understand that by entering this plea, I give up the following constitutional rights.” (R. 12:1.) It then lists the rights the defendant is giving up. (R. 12:1.) These are the rights: (1) to trial, (2) to remain silent, (3) to testify and present evidence at trial, (4) to subpoena witnesses for trial, (5) to a jury trial and a unanimous verdict, (6) to confront and cross-examine the State’s witnesses, and (7) to make the State prove guilt beyond a reasonable doubt. (R. 12:1.) There is a check box next to each right, and all are checked. (R. 12:1.) The form also states, “I understand the rights that have been checked and give them up of my own free will.” (R. 12:1.) Peguese signed the questionnaire, which verified that he truthfully answered all questions on it and that either he or his counsel checked the form’s boxes. (R. 12:2.)

The court accepted Peguese’s plea and placed him on probation for three years. (R. 14; 45:9–11.)

Peguese then filed a motion to withdraw his plea. (R. 31.) In it, he argued that the circuit court violated its duty under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d. 12 (1986), to ensure that he understood the constitutional rights that he was waiving by pleading guilty. (R. 31:4–6.) Peguese noted that the court never went over the rights with him in person, and although he signed a plea questionnaire, the court did not specifically ask him if he understood the rights on it. (R. 31:5.) The existence of the questionnaire itself, he argued, was not enough to show that he validly waived his rights.

The court denied the motion. (R. 39; 47:22–29.) It concluded that the record of the plea hearing did not show that it violated *Bangert* regarding Pegeese’s constitutional rights. (R. 47:22–29.) The court noted that it had ensured that Pegeese understood the contents of the plea questionnaire and then asked him if he understood his constitutional rights. (R. 47:26.) The court concluded that this was sufficient to comply with *Bangert* because “I don’t think . . . that there is a need to refer back to [the plea questionnaire] at every question.” (R. 47:26.) Rather, the court explained:

The Plea Questionnaire, Waiver of Rights form is not -- you’re correct, it is not a substitute for [a] sufficient and adequate plea colloquy. It is a tool to be used to ascertain whether or not the defendant understands what he is doing by entering a plea. And I believe that’s exactly what Judge Werner did in this particular case. He used that plea colloquy [sic] as a tool to have this conversation on the record with the defendant. Judge Werner asked, Did you have any questions about those Constitutional Rights? And the defendant said, No, he had no questions.

(R. 47:26–27.)

STANDARD OF REVIEW

Whether a plea withdrawal motion points to deficiencies in the plea colloquy that show a violation of Wis. Stat. § 971.08 or other mandatory procedures is a question of law this Court reviews de novo. *State v. Brown*, 2006 WI 100, ¶ 21, 293 Wis. 2d 594, 716 N.W.2d 906.

ARGUMENT

- I. **The record of the plea colloquy demonstrates that the circuit court complied with its duty to ensure that Pegese validly waived his constitutional rights.**

- A. **Applicable law**

1. **A court can rely on a plea questionnaire when complying with its mandatory duties at a plea colloquy.**

Wisconsin Stat. § 971.08, *Bangert*, and subsequent cases require that courts accepting pleas follow certain procedures to ensure that defendants knowingly, voluntarily, and intelligently enter their pleas. *See State v. Taylor*, 2013 WI 34, ¶ 27, 347 Wis. 2d 30, 829 N.W.2d 482; *Bangert*, 131 Wis. 2d at 274. One of these duties is ensuring that the defendant is knowingly, voluntarily, and intelligently waiving the constitutional rights he is giving up by pleading guilty. *State v. Hoppe*, 2009 WI 41, ¶ 18, 317 Wis. 2d 161, 765 N.W.2d 794.

A circuit court may use a plea questionnaire when discharging this duty. *Hoppe*, 317 Wis. 2d 161, ¶ 30; *State v. Moederndorfer*, 141 Wis. 2d 823, 828–29, 416 N.W.2d 627 (Ct. App. 1987). The court may not rely exclusively on the questionnaire, though. *Hoppe*, 317 Wis. 2d 161, ¶ 31. The court must also engage in a substantive in-court colloquy with the defendant about the waiver of his rights. *Id.*

2. If a court fails to comply with its mandatory duties at a plea hearing, the defendant may move to withdraw his plea.

To withdraw a plea after sentencing, a defendant must establish by clear and convincing evidence that refusal to allow withdrawal would result in a manifest injustice. A plea that is not knowingly, voluntarily or intelligently entered creates a manifest injustice. *See Taylor*, 347 Wis. 2d 30, ¶¶ 24–25.

A defendant may move to withdraw his plea if the court fails to comply with Wis. Stat. § 971.08 or other mandated procedures at the plea colloquy. *State v. Howell*, 2007 WI 75, ¶ 27, 301 Wis. 2d 350, 734 N.W.2d 48. When alleging a violation of required procedures at the plea colloquy, the defendant bears the initial burden of: (1) making an initial showing of a violation; and (2) alleging that the defendant did not, in fact, know or understand the information that the court should have provided. *Taylor*, 347 Wis. 2d 30, ¶ 32 (citing *Bangert*, 131 Wis. 2d at 274).

If the defendant meets this burden, the defendant is entitled to an evidentiary hearing where the State has the burden of proving the plea was knowing, voluntary, and intelligent despite the error during the colloquy. *Taylor*, 347 Wis. 2d 30, ¶ 32.

B. Pegese was not entitled to a *Bangert* hearing because the record demonstrated that the circuit court properly relied on the plea questionnaire and its colloquy with Pegese to ensure that he was knowingly waiving his rights.

This Court should affirm the circuit court’s decision denying Pegese’s plea withdrawal motion without a hearing. Pegese’s motion did not demonstrate that the court

violated its obligation to ensure that Pegeese knowingly waived his constitutional rights at the plea hearing.

The circuit court relied in part on the plea questionnaire when determining that Pegeese understood his constitutional rights. The plea questionnaire was the standard, court-approved questionnaire. (R. 12.) It lists all the rights that Pegeese now claims he did not understand when he pleaded guilty. (Pegeese's Br. 2–3, 8; R. 12:1; 31:5–6.) The form states, "I understand that by entering this plea, I give up the following constitutional rights." (R. 12:1.) There is a check box next to each right, and each one is checked. (R. 12:1.) Below the rights and checked boxes, the form states, "I understand the rights that have been checked and give them up of my own free will." (R. 12:1.) By signing the form, Pegeese acknowledged that he answered everything on the form truthfully. (R. 12:2.)

The court also conducted a colloquy to ensure that Pegeese understood his rights. When it accepted Pegeese's plea, the court asked him if he had read the plea questionnaire and signed it. (R. 45:3–4.) Pegeese said he had and that he understood all the statements in it. (R. 45:3–4.) He also said he had no questions about the form. (R. 45:4.) And his attorney told the court that he had read the form to Pegeese and believed he understood it. (R. 45:4.) The court then immediately asked Pegeese if he understood the rights he was giving up by his plea. (*Id.*) Pegeese said yes. (*Id.*)

This was sufficient to ensure that Pegeese was knowingly waiving his constitutional rights. As explained, a court can use a plea questionnaire to help ensure the defendant understands his rights. *Moederndorfer*, 141 Wis. 2d at 828–29. "People can learn as much from reading as listening, and often more." *Id.* at 828. "In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral

colloquy in a supercharged courtroom setting.” *Id.* The court here properly relied on the questionnaire, in part, to determine that Pegeese understood his rights.

In addition, the court’s confirming with Pegeese that he understood the plea questionnaire and the rights he was waiving satisfied the substantive in-court colloquy requirement. *Hoppe*, 317 Wis. 2d 161, ¶ 31. Immediately after receiving Pegeese’s assurance that he read and understood everything on the form, the court confirmed with Pegeese that he understood the rights he was waiving. This, in connection with the form, was sufficient for the court to discharge its duty to ensure Pegeese’s valid waiver of his constitutional rights. The use of the form lessens “the extent and degree of the colloquy otherwise required between the trial court and the defendant.” *State v. Hansen*, 168 Wis. 2d 749, 755–56, 485 N.W.2d 74 (Ct. App. 1992). This Court should conclude that the circuit court complied with its duty to ensure Pegeese validly waived his constitutional rights.

C. Pegeese has not demonstrated that the circuit court erred by concluding that the plea colloquy was sufficient.

Pegeese argues that the court’s colloquy was insufficient because it did not specifically connect its question about the rights he was waiving to the questionnaire. (Pegeese’s Br. 11.) He asserts that the court’s colloquy compares unfavorably to the one in *Moederndorfer*, where this Court approved of the use of a plea questionnaire when accepting a defendant’s plea. Instead, Pegeese contends that his case is like the supreme court’s decision in *Hoppe*, where the court concluded that a plea colloquy using a questionnaire fell short of being sufficient under

Moederndorfer. (Pegeese’s Br. 10–14.)² But a review of both decisions shows that this case is more similar to—and complies with—*Moederndorfer*.

In *Moederndorfer*, the circuit court explained to the defendant at the plea hearing, “By entering that plea of guilty, Mr. Moederndorfer, you give up rights, and these rights have been detailed in this three-page waiver of rights form. Your attorney has filed this on your behalf. Have you read this three-page form?” *Moederndorfer*, 141 Wis. 2d at 828 n.1. Moederndorfer said he read the form, understood its contents, signed it, and did not have any questions about it. *Id.* He also confirmed that he had initialed next to each of the rights listed on a plea questionnaire and that this indicated he understood the rights. *Id.* at 829 n.1 This Court determined that the circuit court had complied with its duty to ensure Moederndorfer understood the rights he was waiving. *Id.* at 828–29.

In *Hoppe*, the circuit court asked Hoppe if he had gone over the plea questionnaire with counsel and whether he understood everything in it. *Hoppe*, 317 Wis. 2d 161, ¶ 25. Hoppe said he did. *Id.* The court then asked him, “In your opinion are you going to be freely, knowingly, and voluntarily entering your pleas pursuant to agreement with all your rights in mind?” *Id.* Hoppe answered yes. *Id.*

The supreme court concluded that this did not satisfy the court’s obligation to ensure a knowing waiver of rights. *Hoppe*, 371 Wis. 2d 161, ¶¶ 26–42. The court held that the circuit court “did little more than incorporate the Plea

² Pageese also cites an unpublished per curiam decision of this Court in his brief. (Pegeese’s Br. 12–13.) This violates Wis. Stat. § (Rule) 809.23(3). The State does not believe it can respond to Pageese’s argument about the case without violating the rules of appellate procedure.

Questionnaire/Waiver of Rights form into the plea colloquy.” *Id.* ¶ 26. A circuit court cannot rely entirely on the form to discharge its duties. *Id.* ¶ 31. Instead, the record must show that the court engaged in a substantive colloquy with the defendant about his rights. *Id.* The colloquy cannot “be reduced to determining whether the defendant has read and filled out the form.” *Id.* ¶ 32.

The supreme court distinguished *Moederndorfer*. It concluded that there, the circuit court engaged in a substantive colloquy with Moederndorfer about the rights he was waiving when it asked him about the questionnaire. *Hoppe*, 317 Wis. 2d 161, ¶¶ 39–42. The court specifically noted the language quoted from *Moederndorfer* above; presumably this is the language that the court held was a substantive colloquy. *Id.* ¶ 40.

The facts in this case are more like those in *Moederndorfer* than *Hoppe*. The circuit court in *Hoppe* never asked the defendant if he knew that he was waiving his rights. Instead, it asked him if he thought he was entering his plea “with all your rights in mind.” *Hoppe*, 317 Wis. 2d 161, ¶ 25. The court thus did not engage in a colloquy with the defendant about waiving his rights. In contrast, here the court specifically asked Pegeese if he knew the constitutional rights he was giving up by pleading guilty. Pegeese said he did. And the court asked him this immediately after ensuring Pegeese read and understood everything on the plea questionnaire, which detailed the rights he was waiving. This was sufficient for the court to comply with its obligation.

Pegeese argues that his case is closer to *Hoppe*. (Pegeese’s Br. 11–14.) He notes, first, that the court did not specifically mention the plea questionnaire when it asked him if he understood that he was waiving his rights. (*Id.* at 11.) Pegeese claims that this was insufficient to demonstrate that he knew what rights he was actually waiving. (*Id.*) He

also argues that the court's reference to the questionnaire "earlier in the hearing" was not enough to make a connection between the court's question about waiving his rights and the questionnaire. (*Id.*)

This Court should reject these arguments. They ignore that when the court asked Pegese if he knew he was waiving his rights, it had just ensured through several questions that he understood everything on the plea questionnaire. These questions were not merely "earlier in the proceeding"; they were immediately before the court asked Pegese about his rights. The only reasonable way to understand the court's question about the rights Pegese was waiving is as a reference to the rights listed on the form that the court and Pegese had just discussed.

Pegese also attempts to distinguish *Moederndorfer* because there, the defendant initialed next to each right on the form and said that this meant he understood his rights. (Pegese's Br. 12.) This does not mean the circuit court failed in its duty here. Again, Pegese told the court that he understood everything on the form and the rights he was waiving. The form indicates that by pleading guilty, Pegese was giving up the rights listed. It also says that by checking the boxes next to the rights, Pegese understood these rights and was giving them up. Pegese, by signing the form, indicated that either he or his attorney checked the boxes. And counsel told the court that he went over the form with Pegese. Under these facts, the court did not need to specifically ask Pegese if the checked boxes meant he understood his rights.

In addition, Pegese suggests that the court needed to take special care when accepting his plea because of his personal characteristics. He notes that some younger and less-educated defendants have language deficits that make it difficult for them to comprehend legal concepts like rights and waiver. (Pegese Br. 11.) But Pegese has never

presented any evidence that he has these deficits. He points to nothing to suggest that he was, at the time of his plea, anything other than a cognitively-normal sixteen-year-old. And his lack of a high school diploma and his having completed school through only the tenth grade are explainable because that describes most people his age. (Pegeese's Br. 15.) Finally, while Pegeese notes that this was his first case in adult court, the record indicates that he had an "extensive juvenile record" in Illinois. (R. 41:3.) Presumably, then, Pegeese had at least some experience with the court system. (R. 41:3.) The circuit court was entitled to treat Pegeese like any other defendant who was pleading guilty.

This Court should conclude that the circuit court complied with *Bangert* and properly denied Pegeese's motion without a hearing.

II. If the circuit court violated its obligation to ensure that Pegeese was validly waiving his rights, it should remand for a *Bangert* hearing.

If this Court concludes that Pegeese has established that the circuit court failed to properly ensure that he understood his rights, it should remand for an evidentiary hearing. The State concedes that Pegeese's motion sufficiently asserted that he did not understand the rights he was waiving by pleading guilty. (R. 31:6.) No affidavit was required. *See Brown*, 293 Wis. 2d 594, ¶ 62. And a conclusory allegation of a lack of understanding is sufficient to make the prima facie showing to obtain a hearing under *Bangert*. *See State v. Hampton*, 2004 WI 107, ¶ 57, 274 Wis. 2d 379, 683 N.W.2d 14.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction and order denying Pegeese's motion for postconviction relief.

Dated October 10, 2017.

Respectfully submitted,

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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 3,840 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 10th day of October, 2017.

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