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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP000741

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAVIEN CAJUJUAN PEGEESE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Written Order Denying the Postconviction Motion Entered in the Rock County Circuit Court, the Honorable John M. Wood, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Circuit Court Erred in Denying Mr. Pegeese's Postconviction Motion Without an Evidentiary Hearing Because the Circuit Court's Plea Colloquy Was Deficient and Mr. Pegeese Made a Prima Facie Case in his Postconviction Motion.

A. The plea colloquy was deficient because the circuit court failed to explain or ensure Mr. Pegeese understood his constitutional rights.

During a plea colloquy, a court must "[i]nform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands that he is giving up these rights." ***State v. Brown***, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906.

At his plea hearing, the court failed to establish that Mr. Pegeese understood his constitutional rights to: (1) remain silent or testify, (2) use subpoenas to require witnesses to testify, (3) have a jury trial where all 12 jurors have to agree on guilt, (4) confront and cross-examine people who testify against him, and (5) make the state prove him guilty beyond a reasonable doubt, and that he was giving them up by entering his plea.

In his postconviction motion, Mr. Pegeese presented the deficiencies in the colloquy and asserted that at a hearing he would testify that he did not understand his constitutional rights listed above at the time he entered his pleas. Mr. Pegeese thus met his prima facie burden under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and was entitled to an evidentiary hearing on his postconviction motion.

The state asserts that Mr. Pegeese was not entitled to an evidentiary hearing on his plea withdrawal motion because there was no deficiency in the plea colloquy. The state is mistaken.

At the plea hearing, the court did not advise Mr. Pegeese of his constitutional rights. The court asked Mr. Pegeese if he understood the constitutional rights he was giving up and if he had any questions about those rights. The court did not enumerate any of the constitutional rights nor did the court discuss the constitutional rights in the context of the plea questionnaire or point Mr. Pegeese to where they were listed on that form.

The state asserts this case is more similar to ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987), in which this court found the constitutional rights colloquy adequate, than it is to ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 754 N.W.2d 794, in which the Wisconsin Supreme Court found the colloquy deficient. Again, the state is mistaken. The facts of Mr. Pegeese's case are more similar to ***Hoppe*** than ***Moederndorfer***.

In ***Moederndorfer***, as part of the colloquy on constitutional rights, the court specifically referred to the plea questionnaire and asked: "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." ***Moederndorfer,*** 141 Wis. 2d at 828-829, n.1. The form had the defendant's initials next to the constitutional rights. ***Id.*** at 828, n.1. The circuit court asked the defendant whether his initials signified that he "read each of the paragraphs" and understood them before initialing them, and the defendant answered: "Yes, Your Honor, on each and every one." ***Id.***

This Court found the court's colloquy to be sufficient. ***Id.*** at 828-829.

In ***Hoppe***, the circuit court asked the defendant whether he had reviewed the plea questionnaire form and whether he was satisfied that he understood everything in the form. 317 Wis. 2d 161, ¶ 25. The defendant answered in the affirmative. ***Id***. The court did not specifically explain the constitutional rights to the defendant, nor did it reference where the constitutional rights were on the plea questionnaire form. ***Id***. The Wisconsin Supreme Court held the colloquy in ***Hoppe*** was deficient in contrast to the one in ***Moederndorfer*** because although the plea questionnaire form lessens the degree of colloquy otherwise required, it is "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein." ***Id***. at ¶ 42.

The colloquy in Mr. Pegeese's case was deficient like that in ***Hoppe***. The court did not enumerate any of the constitutional rights during the colloquy. Further, although the court asked Mr. Pegeese if he signed and understood the plea questionnaire earlier in the hearing, it failed to refer to the plea questionnaire form in asking about the constitutional rights like the court in ***Moederndorfer*** did. The only questions the court asked about the constitutional rights were: (1) "Do you understand the Constitutional Rights you give up when you enter a plea today? and (2) Any questions about those rights?" But without explaining or even naming the rights and without referring to their placement on the plea questionnaire, it was unclear what constitutional rights the court was referring to. Mr. Pegeese did not understand the rights he was giving up by entering his plea because the court did not tell him what they were and did not point him to a place in the record where they were set out. Mr. Pegeese also

did not individually initial the constitutional rights on the plea questionnaire form as Moederndorfer did.[1]

The state argues that Mr. Pegeese's case differs from ***Hoppe*** because Mr. Pegeese was asked if he knew the rights he was giving up and in ***Hoppe***, the court asked the defendant if he was entering his plea "with all [his] rights in mind." ***Hoppe***, 317 Wis. 2d 161, ¶ 25. But this is just a matter of different phrasing. In both ***Hoppe*** and in this case, the defendant said he signed and understood the plea questionnaire. In both cases, the court asked the defendant about understanding constitutional rights or having them in mind in entering the plea. But in both cases, the court failed to enumerate the constitutional rights or make specific reference to them on the plea questionnaire. If the colloquy in ***Hoppe*** was inadequate, the colloquy in Mr. Pegeese's case was inadequate as well.

The state makes much of the fact that the plea questionnaire lists the relevant constitutional rights and that the form was signed by Mr. Pegeese. (State's Br. at 4, 8). The state also focuses on the fact that when asked, Mr. Pegeese said he read and understood the statements in the plea questionnaire. (State's Br. at 8). But the same was true in ***Hoppe***. The plea questionnaire in that case included the same language on the constitutional rights and it was also signed by

[1] Mr. Pegeese cited to the unpublished decision in ***State v. Church***, No. 2015AP2513-CR, 2017 WL 950971 (Wis. Ct. App. March 9, 2017), in his brief-in-chief in further support of his argument that the colloquy was deficient. Mr. Pegeese discussed the case because it was relied on by the circuit court at the postconviction motion hearing (47:24-25) but the state is correct that it is a per curium decision and it was thus error to cite it because it cannot be considered for binding or persuasive authority according to Wis. Stat. § (Rule) 809.23(3).

the defendant. Further, Hoppe also told the court he reviewed the plea questionnaire and understood it. ***Id***. at ¶ 25. Despite these facts, the colloquy in ***Hoppe*** was found deficient. This is precisely because a plea questionnaire can be used as a tool during a plea colloquy but cannot take the place of an in-court colloquy. ***Id***. at ¶ 42. A plea colloquy cannot be reduced to determining whether the defendant read and filled out the plea questionnaire. ***Id***. at ¶ 32.

The state repeatedly says the court asked Mr. Pegeese about his constitutional rights immediately after asking him about the plea questionnaire implying that the court actually referenced the form in its discussion of the constitutional rights or made some connection between the form and the rights. (State's Br. at 8-9, 11-12). In reality, the questions about the constitutional rights came separate in time from the court's questions of Mr. Pegeese about the plea questionnaire and at no point did the court say to Mr. Pegeese that it was talking about rights listed on the form.

The state says that the circuit court had no obligation to take special care to make sure Mr. Pegeese, who was sixteen at the time he entered his plea, understood the plea hearing proceedings. (State's Br. at 12-13). But in both ***Brown***, 293 Wis. 2d 594, ¶¶ 9, 52, 76, and ***Bangert***, the Wisconsin Supreme Court stated the method a circuit court uses to ascertain the defendant's understanding of information during a plea hearing should depend upon "the circumstances of the particular case, including the level of education of the defendant." 131 Wis. 2d at 267-68. Thus, the less education or capacity the defendant has, the more the circuit court should do to make sure the defendant understands the constitutional rights he is waiving by entering his plea. The circuit court had an obligation to take special care with its colloquy in dealing with Mr. Pegeese because he was only

sixteen when he entered his plea, had limited education, had no high school diploma, and had never entered a plea in adult court before.

The state says Mr. Pegeese never presented any evidence to establish his lack of education but Mr. Pegeese did raise facts relevant to his education and understanding in his postconviciton motion and had the postconviction court held an evidentiary hearing on the motion, it would have heard Mr. Pegeese's testimony on those facts.

Further, much of the information was apparent to the circuit court from meeting Mr. Pegeese and from the record that existed when Mr. Pegeese entered his plea. The plea questionnaire stated that Mr. Pegeese was sixteen years old and the court no doubt would have known he was of a young age by looking at and interacting with him. (12). Additionally, the plea questionnaire stated Mr. Pegeese had no high school diploma and had only completed the 10th grade of school. (12). And, even the state admits it would be unusual for a sixteen year old to have completed high school. (State's Br. at 13). It was thus obvious to the circuit court that Mr. Pegeese was only sixteen and had no high school diploma and as such the court should have taken special care with Mr. Pegeese's plea colloquy.[2]

The state says nothing in the record indicated Mr. Pegeese was anything but a "cognitively-normal sixteen-year-old." (State's Br. at 13). But an adult court should take special care with a plea colloquy of any sixteen-year-old who has never entered a plea in adult court before, whether that

[2] Further evidence that the court knew Mr. Pegeese was young and inexperienced in court came later in the plea hearing when the circuit court acknowledged Mr. Pegeese's youth and that this was his first adult conviction. (45:10).

teen is "cognitively-normal" or not. Indeed, the United States Supreme Court has stated that it is common sense that children are less mature, lack experience and judgment and "possess only an incomplete ability to understand the world around them" and thus age is a relevant factor in some types of legal analyses. ***J.D.B. v. North Carolina***, 564 U.S. 261, 273 (2011) (internal quotation omitted) (holding a child's age informs the ***Miranda*** custody analysis if the age was known to the officer or would have been objectively apparent to a reasonable officer).

The state argues that that even though this was the first plea Mr. Pegeese ever entered in adult court, the record indicated he had an "extensive juvenile record" in Illinois so he presumably had some experience with the court system." (State's Br. at 13). But it is wrong to assume having a juvenile record in Illinois would translate to Mr. Pegeese understanding plea proceedings or constitutional rights in adult court in Wisconsin. Legal practice in Illinois and Wisconsin no doubt differs some. But even more importantly, the differences between juvenile and adult court are significant. There are differences in outcome – juvenile court generally results in a typically temporary juvenile court order whereas Mr. Pegeese's conviction here resulted in a permanent felony on his record. Further the process and rights afforded to the defendant are different. For one, in juvenile court there is generally no right to a jury trial. Additionally, there may be differences in the burdens of proof. It is unclear what Mr. Pegeese's juvenile infractions in Illinois were, but in Wisconsin, some juvenile delinquency actions require proof beyond a reasonable doubt while some only need to be proved by clear and convincing evidence. ***See*** Wis. Stat. § 938.31(1). These differences are directly relevant to the constitutional rights the court failed to go over with Mr. Pegeese. There is no reason to believe Mr. Pegeese had

ever seen a plea questionnaire form like the one in this case or had ever gone through similar constitutional rights in his juvenile cases in Illinois.

B. The postconviction motion satisfied Mr. Pegeese's prima facie burden under ***Bangert*** and he was thus entitled to an evidentiary hearing on his motion.

To show that a plea was not knowingly, voluntarily, and intelligently entered as required under ***Bangert***, the defendant must make a prima facie showing that: (1) a deficiency in the plea colloquy exists, and (2) the defendant did not "know or understand the information that should have been provided at the plea hearing." ***Hoppe***, 317 Wis. 2d 161, ¶ 4, n.5 (discussing the requirements of ***Bangert***).

If a defendant's post-conviction motion "establishes a prima facie violation of Wis. Stat. § 971.08 or other court-mandated duties and makes the requisite allegations, the court *must* hold a postconviction evidentiary hearing." ***Brown***, 293 Wis. 2d 594, ¶ 40 (emphasis added).

In his postconviction motion, Mr. Pegeese pointed out the deficiencies in the plea colloquy explained above and explained that, at a hearing he would testify that at the time he entered his plea, he did not understand his constitutional rights. (31:6).

Mr. Pegeese further stated in his motion that, at a hearing, he would testify that he does not have a high school diploma, GED or HSED and has only completed the 10th grade. He also stated he would testify that he was sixteen years old when he entered this plea and had never entered a plea in any adult court before he entered the plea in this case. (31:6).

Mr. Pegeese's post-conviction motion therefore satisfied his prima facie burden to establish: (1) a deficiency in the colloquy, and (2) that, at the time he entered his plea, he did not understand his constitutional rights. *See* Postconviction Motion (31); ***Hoppe***, 317 Wis. 2d 161, ¶ 4, n.5.

The state concedes that if this court finds there was a deficiency in the plea colloquy, Mr. Pegeese has made a prima face case entitling him to a ***Bangert*** hearing. (State's Br. at 13). Specifically, the state has said that Mr. Pegeese sufficiently asserted that he did not understand the constitutional rights he was waiving by entering his plea and conceded that no affidavit was required to establish that fact. (State's Br. at 13).

CONCLUSION

For the reasons stated in his brief-in-chief and above, Mr. Pegeese respectfully requests that this Court enter an order reversing the decision of the circuit court denying Mr. Pegeese's postconviction motion for plea withdrawal without an evidentiary and remanding for an evidentiary hearing on Mr. Pegeese's motion.

Dated this 25th day of October, 2017.

Respectfully submitted,

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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 2,560 words.

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 25th day of October, 2017.

Signed:

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