STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2326-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ORLANDO C. DAVIS,

Defendant-Appellant.

On Appeal From a Judgment of Conviction, the Honorable Jeffrey A. Kremers Presiding, and From an Order Denying Postconviction Relief, the Honorable Mary Kuhnmuench Presiding, Entered in the Milwaukee County Circuit Court.

REPLY BRIEF OF DEFENDANT-APPELLANT

PAMELA MOORSHEAD
Assistant State Public Defender
State Bar No. 1017490

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
moorsheadp@opd.wi.gov
Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. The circuit court failed to meet the requirements of *Bangert* for a valid plea.

The prosecutor conceded at the postconviction motion hearing that the circuit court had not satisfied the requirements of *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12, (1986), at the plea hearing and that the issue for the motion hearing was whether Mr. Davis nonetheless understood the elements of the offenses to which he pled. (50: 18-22). On appeal, the State now takes the contrary position. (Response Brief at 16-21). The State now glosses over its previous concession, admitting only that the prosecutor agreed the plea colloquy was "'thin' enough to grant the hearing." (Response Brief at 16). But the concession was clear. The postconviction judge certainly understood it to be a concession, and the judge initially agreed with that concession and ruled that the plea colloquy did not satisfy *Bangert*. 50: 17, 19, 21-22; App. 119, 121, 123-124). The State and the court were correct.

Then the postconviction court judge reversed course. It was far from clear why. The court's decision arose from its bizarre recitation of both the plea colloquy from this case and the one from *Bangert* into the record in their entirety, its comparison of the two, and its conclusion that the colloquy in this case was not as bad as the one in *Bangert*. ((50: 130-31, 141, 142 149, 154, 156; App. 140-141, 151, 152, 159, 164,

166). In its brief, the State has not explained the reversal of its position any better than the circuit court did.

The State, like the postconviction court, does not exactly say what the circuit court did during the plea colloquy that was sufficient to meet *Bangert's* requirement that the court "ascertain a defendant's understanding of the nature of the charge." 131 Wis. 2d at 266. The State recites the requirements of *Bangert* ad says that the colloquy in this case "fulfilled the law" without saying how. (Response Brief at 19).

Much like the postconviction court, the State lists everything the judge did during the plea colloquy, most of which has no bearing on the issue here. (Response Brief at 19-20). Then, without saying how, the State simply concludes "Judge Kremers did what was required under the law, and this record demonstrates that Mr. Davis, in fact, did understand what he was doing." (Response Brief at 20). Like the postconviction court, the State believes it is significant that the colloquy here was not as bad as "the shaky colloquy in *Bangert*." (Response Brief at 21). Both the postconviction court and the State have missed the point. If the colloquy was deficient *under Bangert*, it makes absolutely no difference that it was not *as deficient* as the colloquy *in Bangert*.

The only facts the State points to that are in any way pertinent to the issue here are the fact that the judge asked Mr. Davis whether he understood the

charges against him, and Mr. Davis said he did, and the fact that the judge asked Mr. Davis whether he understood the elements the State would have to prove, and he said he did. (Response Brief at 19,20; 49: 4,6).

But that was not sufficient. In *Bangert* The Court made it "mandatory upon the trial judge" to use one or a combination of the following methods to establish the defendant's understanding of the nature of the charge at the plea hearing:

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute. Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing. Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing. For example, when a criminal complaint has been read to the defendant at a preliminary hearing, the trial judge may inquire whether the defendant understands the nature of the charge based on that reading. A trial judge may also specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge.

Id., at 268 (citations omitted). And while the Court in *Bangert* allowed that the above list was not exhaustive, the Court declared:

> But it is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant that he understands the nature of the offense, without an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the requirement of Section 971.08, Stats.

Id. It was not sufficient for the court to ask Mr. Davis whether he understood the elements without reciting them or having him or his attorney recite them, or referring to some document in the record that Mr. Davis had reviewed that recited them so that it was clear *what* he understood.

The State also suggests that to the extent that the colloquy was "thin," Attorney Gaertner's testimony "filled in the gaps." (Response Brief at 21). This reveals a fundamental misunderstanding of the *Bangert* standard. If there were "gaps" in the colloquy that require testimony to "fill" them, then the plea colloquy was deficient, and what remains is the question whether the State can show by clear and convincing evidence that the plea was nonetheless voluntary. *Bangert*, 131 Wis. 2d at 274.

The plea colloquy was deficient. That is clear, and at least at one time it was a point upon which everyone agreed. Nothing about the postconviction court's recitation of the plea colloquies and long passages from *Bangert* into the record changes that fact. The State's argument to the contrary borders on frivolous.

II. The postconviction court based its ruling that Mr. Davis was not entitled to plea withdrawal on clearly erroneous factual findings and a misapplication of the law.

Once Mr. Davis established that the plea colloquy was deficient, the burden shifted to the state to prove by clear and convincing evidence that the plea was nonetheless knowing and voluntary. *Bangert*, 131 Wis. 2d at 274. Although the State insists that there was no deficiency in the plea colloquy, the State also insists that the postconviction court understood that the State had the burden to show that Mr. Davis' plea was voluntary and correctly applied that burden. (Response Brief at 24). The State concludes that the court understood and correctly applied the burden because the burden — and the fact that the State bore it — was mentioned several times throughout the day. (Response Brief at 21-24).

No matter how many times the parties told the postconviction court that the State had the burden, and no matter how many times the court acknowledged that fact, at the end of the day, the

postconviction court very clearly held *Mr. Davis* to the burden of showing that his plea was *not* voluntary by clear and convincing evidence. The court said:

> I don't believe that he [Mr. Davis] has come close to the clear and convincing evidence that is required to allow him to withdraw his plea post-sentencing. His motion is denied.

(50: 159; App. 169).

In the end, the court did not hold the State to any burden at all. It may be that this was because the court did not understand the burden. It seems more likely that it was because the court believed that the burden never shifted to the State because the court wrongly concluded that Mr. Davis had failed to establish that there was any deficiency in the plea colloquy. It does not matter why the court did not correctly allocate the burden. The incorrect allocation of the burden to Mr. Davis tainted all of the court's factual findings — those that were not already clearly erroneous on their face. See, *State v. Whiteman*, 196 Wis. 472, 220 N.W.2d 929, 945 (1928) (holding that when fact-finding insurance commissioner assigned the burden of proof to the wrong party, this "put the presumption on the wrong side of the question, and it is impossible to say what the commissioner would have found from the evidence unaided by the presumption.").

The State continues to insist that Mr. Davis can be presumed to have understood the elements of

the offense when he pled because at the plea hearing the court established that he had read the criminal complaint. (Response Brief at 25). The State cites the motion hearing transcript, which in turn refers to the plea hearing transcript. (50: 48; 49: 6). At the plea hearing, the judge never asked Mr. Davis whether he had read the complaint in its entirety. What the judge asked Mr. Davis was "have you read the complaint *where it says what happened*?" (49: 6, emphasis added). Mr. Davis agreed that he had and that it was accurate. Therefore, the judge found a factual basis for the plea. (49: 6-7). The requirement that the judge establish a factual basis is separate from the requirement that he establish the defendant's understanding of the elements. Wis. Stat. §971.08; *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 605 N.W.2d 836.

The language described (inaccurately) by the State did nothing to establish Mr. Davis' understanding of the elements. The judge established only that Mr. Davis read the factual portion of the complaint "where it sa[id] what happened." The court did not inquire whether he had read the charging portion of the complaint, let alone establish that he understood the elements from that reading.

The State takes even greater liberties with the testimony at the postconviction motion hearing when it asserts that Mr. Davis "even admitted to going through the jury instructions which indicated the elements the State must prove." (Response Brief at 26, citing 50:54). The portion of the record cited by

the State reflects that the prosecutor at the motion hearing gave one of the jury instructions to Mr. Davis to examine and asked him what it was. He was not sure. The prosecutor asked "Is it under what you just read? Does it say 'criminal trespass to dwelling?'" He responded, "yes." The prosecutor asked "and you briefly read through that document? Mr. Davis again responded, "yes." The prosecutor was clearly asking, and Mr. Davis was clearly affirming, that he had just then read the document at the hearing. The prosecutor then went on to ask Mr. Davis whether he recalled discussing the elements listed in that jury instruction with his lawyer, and he said he did not. The prosecutor then repeated the exercise with regard to another jury instruction with the same result. (49: 54-55). But the State now relies on this testimony to claim that Mr. Davis admitted to having read all of the jury instructions before pleading.

Finally, the State argues that the circuit court was essentially entitled to disbelieve Mr. Davis' assertion that he did not understand the elements of the offenses out of hand because those assertions conflicted with his statements at the plea hearing. (State's Brief at 26-27). The State makes the same argument that was rejected by this Court in *State v. Basley*, 2006 WI App 253, 298 Wis. 2d 232, 726 N.W.2d 671.

In that case, the defendant argued in a postconviction motion that his attorney coerced him into pleading no contest by threatening to withdraw, causing lengthy delays, if he insisted on a trial. In

denying the motion without a hearing, the circuit court noted that it had asked Basley during the plea colloquy whether he had been threatened, and he responded that he had not. Further, the court noted that Basley told the court he was entering his plea freely, voluntarily and intelligently. The court insisted (echoing the policy argument in the State's response here) that it must be allowed to rely on the representations made at the plea hearing in the interest of finality. *Id.*, at ¶ 13, 298 Wis. 2d at 241, 726 N.W.2d at 676.

The State in *Basley* took up this theme, arguing that because the defendant had an opportunity to present his complaints about coercion at the plea hearing, he should not be entitled to a postconviction hearing at which he would testify in contradiction to the responses he gave during the plea colloquy. *Id.* This Court soundly rejected that argument and remanded the case for an evidentiary hearing. The Court noted that when a plea colloquy complies with the requirements of *Bangert*, the plea is "clothed with a presumption of its validity." But the Court added:

> Compliance with the *Bangert* requirements does not, however, permit a circuit court to rely on a defendant's plea colloquy responses to deny the defendant an evidentiary hearing on a properly pled postconviction motion that asserts a non-*Bangert* reason why the plea was not knowing or voluntary. Put another way, when a defendant convicted on a guilty or no contest plea asserts, as Basley has in this case, that the responses given during a plea colloquy were false and the

> defendant provides non-conclusory information that plausibly explains why the answers were false, the defendant must be given an evidentiary hearing on his or her plea withdrawal motion.

Id., at ¶ 18. The postconviction court was not entitled to, as the State suggests, reject Mr. Davis' testimony out of hand simply because it conflicted with his statement during the plea colloquy that he understood the elements. Besides, the postconviction court never said that. Instead, it attributed statements to Mr. Davis that he never made[1], relied on clearly erroneous factual findings, and concluded that Mr. Davis had not met a burden that he did not have.

---

[1] For example, the court said that Judge Kremers asked Mr. Davis if he had read the complaint and gone over it with his lawyer, and Mr. Davis said "yes." (50: 159; App. 169). Judge Kremers never asked that question, and Mr. Davis never gave that answer. The postconviction court claimed that it knew Mr. Davis made his claims "in hindsight after a sentence he wasn't expecting and didn't want." The court said, "We know that because Ms. Lewand asked him today and he said "Yeah. I was not happy with the sentence." (50: 143; App. 153). Actually, that never happened. Mr. Davis specifically denied that the sentence was the basis for the motion. (50: 63). The court also repeatedly accused Mr. Davis of testifying that he had not been competent when he entered the plea, although he never said anything like that. (50: 142, 143, 158; App. 152, 153, 168). Then the court accused Mr. Davis of falsely claiming that his attorney *never* went over the complaint with him. (50: 159; App. 169). He did not that either.

CONCLUSION

Mr. Davis asks that this Court reverse the circuit court's decision denying his postconviction motion and enter an order allowing him to withdraw his pleas. Failing that, he asks that the Court remand the case for a new postconviction motion hearing.

Dated this 28th day of May, 2019.

Respectfully submitted,

PAMELA MOORSHEAD
Assistant State Public Defender
State Bar No. 1017490

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
moorsheadp@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,543 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 28th day of May, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender