STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP000049-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RUSSELL L. WILSON,

Defendant-Appellant.

Appeal Of An Amended Judgment Of Conviction And
An Order Denying Postconviction Relief
Entered In Washburn County Circuit Court,
The Hon. Eugene Harrington Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether the defendant, Russell L. Wilson, was entitled to plea withdrawal under *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986), where the charging documents, the plea questionnaire, and the court at the plea hearing all incorrectly stated that Wilson's maximum sentence was life in prison without the possibility of extended supervision, and at the *Bangert* hearing the state introduced no evidence that Wilson knew the correct maximum sentence?

How the lower court ruled. The circuit court denied Wilson's plea withdrawal motion because, according to the court, the failure to correctly advise Wilson of the maximum penalties "did not affect [Wilson's] decision to accept the plea." (98:63; App. 163).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wilson requests neither oral argument nor publication, as the appeal involves the straightforward application of undisputed facts to well-established principles of law.

STATEMENT OF THE CASE

I. Introduction

The charging documents, the court, and Wilson's attorney all told Wilson, wrongly, that he was subject a sentence enhancer that would have increased the maximum sentence in his case from 25 years initial confinement and 15 years extended supervision to life imprisonment without the possibility or extended supervision. Wilson accordingly moved post-conviction to withdraw his plea under *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986) and *State v. Cross*, 2010 WI 70, ¶38, 326 Wis. 2d 492, 512, 786 N.W.2d 64, 74.

Both the state and the court agreed that Wilson had made his prima facie case that the colloquy was defective. The court scheduled a *Bangert* hearing where the state had the burden of proving "by clear and convincing evidence that [Wilson's] plea was knowing, voluntary, and intelligent despite the deficiencies in the plea hearing." *Cross*, 2010 WI 70, ¶20.

The state only called Wilson's trial counsel as a witness, and elicited no testimony that Wilson somehow knew that the sentence enhancer did not apply to him. The state thus failed to meet its burden of proof under *Bangert*. Nonetheless, the trial court denied Wilson's motion because the plea defects "did not affect [Wilson's] decision to accept the plea." (98:63; App. 163). The court's additional requirement

to the *Bangert* standard was clearly in error, and Wilson is entitled to withdraw his plea.

II. Statement of Facts

A. *Plea and sentencing*

On December 4, 2015, the Washburn County District Attorney's Office filed a complaint charging Wilson with repeated second-degree child sexual assault, Wis. Stat. § 948.025(1)(e), a class C felony that carried a maximum potential punishment of 40 years imprisonment, comprised of 25 years initial confinement and 15 years extended supervision. (99). The complaint does not charge Wilson with any sentence enhancer.

At the conclusion of a preliminary hearing held on December 14, 2015, the court found probable cause and bound Wilson over for trial. (92:7). The court then arraigned Wilson, using the Information filed by the state that day. (6). The court recounted that Wilson faced potential punishment of 40 years imprisonment, and then made the following statement:

> I think there's also a penalty enhancer here because of the -- if the state proves a repeater status, there's life imprisonment under 940.225(1), and I also think there's a minimum mandatory 25 years confinement. That's not reflected in the Information.

(92:8). Wilson then waived the reading of the Information and pleaded not guilty. (*Id.*)

The Information filed that day charged Wilson with violating Wis. Stat. § 948.025(1)(e), and correctly noted that the maximum potential punishment was 40 years imprisonment. (6; App. 167). The Information then states that under Wis. Stat. § 939.618(2)(b),

> because that (*sic*) the defendant was convicted of a previous violation of s. 940.225(1) or for a comparable crime under federal law or the law of any state, 1st Degree Sexual Assault of Child, which conviction remains of record and unreversed,, (*sic*) the maximum term of imprisonment for the violation of s. 940.225(1) is life imprisonment without the possibility of parole or extended supervision.

(6; App. 167).

On October 13, 2016, Wilson pleaded guilty as charged in the Information. (88). The plea questionnaire signed by Wilson and his attorney included a handwritten statement that the charge carried a "maximum of life w/o extended supervision via repeater." (29:1; App. 168). The court likewise advised Wilson twice during his plea colloquy that the maximum possible sentence was life without parole or extended supervision. (88:36, 39).

Wilson was sentenced on December 21, 2016. (86-87). The state noted at the outset that the plea bargain required the state to recommend no more than 15 years of initial confinement. (87:7). The court sentenced Wilson to 20 years initial confinement and 20 years extended supervision. (87:19).

The Department of Corrections subsequently sent the court a letter noting that the section 939.618(2)(b) enhancer does not apply to Wilson's conviction under section 948.025(1)(e), and that the maximum amount of extended supervision that could be imposed on Wilson was 15 years. (45). In response, the court commuted the excess extended supervision in an Amended Judgment of Conviction. (47; App. 170).

B. *Postconviction matters*

Wilson moved for postconviction relief, arguing that he was entitled to withdraw his plea under *Bangert* and *Cross*. (59). After reviewing Wilson's motion, the state agreed that Wilson was entitled to withdraw his plea, and the parties filed a stipulation to that effect on August 10, 2018. (64).

The court indicated to the parties in a telephonic conference that it would not sign the stipulation, and scheduled an oral ruling. (70). Wilson reiterated in a letter to the court prior to the oral ruling that he was seeking plea withdrawal under *Bangert* and *Cross*. (70).

At the oral ruling, the court agreed that Wilson was "entitled to a *Bangert* hearing" and that the "State must prove by clear and convincing evidence that [Wilson's] plea was knowing, voluntary, and intelligent." (97:3).

The state called Wilson's trial attorney, Christopher Gramstrup, as its only witness at the

subsequent hearing. (98:16-31; App. 116-31). The state focused on Wilson's decision to enter into the plea deal, and did not specifically ask Attorney Gramstrup whether he had any basis for believing that Wilson knew that the sentence enhancer did not apply. However, Attorney Gramstrup did testify that the possibility of serving life without extended supervision was a "significant factor" in Wilson's decision to enter the plea and not take the case to trial. (98:28; App. 128).

Nonetheless, the court denied the motion. According to the court, the failure to correctly advise Wilson of the maximum penalties "did not affect [Wilson's] decision to accept the plea." (98:63; App. 163).

This appeal follows.

ARGUMENT

The State Failed To Meet Its Burden Of Proving By Clear and Convincing Evidence That Wilson's Plea Was Knowing, Intelligent, And Voluntary.

A. *Plea Withdrawal Standards*

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice." *State v. Taylor*, 2013 WI 34, ¶24, 347 Wis. 2d 30, 44–45, 829 N.W.2d 482, 489 (citations and quotation marks omitted). A "manifest injustice"

may arise in a variety of circumstances. "One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily. A plea not entered knowingly, intelligently, and voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right." *Id*. At ¶¶24-25 (citations and quotation marks omitted).

To help ensure that pleas are knowing, intelligent, and voluntary, the legislature, in Wis. Stat. § 971.08, and the Wisconsin Supreme Court, in *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986) and its progeny, require plea judges to inform defendants of various consequences of their plea before accepting the plea. Relevant here is the duty to "[e]stablish the defendant's understanding of the … range of punishments [the charged crime] carries." *Bangert*, 131 Wis. 2d 246 at 261-262.

Bangert also sets out a specific process for determining whether a defendant may withdraw a plea due to the court's failure to fulfill its duties.

> If the circuit court fails at one of these duties (also called a "*Bangert* violation"), the defendant may be entitled to withdraw his plea. A defendant establishes that the circuit court failed at one of its duties by filing a motion (a "*Bangert* motion") that: (1) makes a prima facie showing of a violation of § 971.08(1) or other court-mandated duties; and (2) alleges that "the defendant did not know or understand the information that should have been provided at the plea hearing." A defendant attempting to make this prima facie showing must point to

> deficiencies in the plea hearing transcript; conclusory allegations are not sufficient.
>
> Upon making this showing, the defendant is entitled to an evidentiary hearing (known as a "*Bangert* hearing") at which the State must prove by clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent despite the deficiencies in the plea hearing. If the State cannot meet its burden, the defendant is entitled to withdraw his plea as a matter of right. .

State v. Cross, 2010 WI 70, ¶¶19-20, 326 Wis. 2d 492, 786 N.W.2d 64. (citations omitted).

B. *The state correctly conceded that Wilson was entitled to a Bangert hearing.*

Both the state and the court agreed that Wilson met both requirements for a prima facie *Bangert* claim, and that he was entitled to an evidentiary hearing. (64, 97:3). Specifically, Wilson was charged with the sentence enhancer found at Wis. Stat. § 939.618(2)(b), which imposes a maximum sentence of life without the possibility of extended supervision in prosecutions under 940.225(1). However, Wilson was charged with a violation of section 948.025(1)(e). Thus, the charged enhancer did not apply, and he did not face a maximum of life without the possibility of extended supervision.

The *Cross* court explained that when the defendant is misadvised that the maximum sentence is higher than the actual legal maximum, the defendant must show that the "sentence

communicated to the defendant is … substantially higher … that that authorized by law[.]" 2010 WI 70, ¶38. In *Cross*, the communicated maximum sentence – 25 years of initial confinement and 15 year of extended supervision—was not "substantially higher" than the actual maximum of 20 years of initial confinement and 10 years extended supervision. *Id.*, ¶41.

"Life without the possibility of parole or extended supervision" is "substantially higher" than 25 years of initial confinement. With a 25-year sentence, even the 49-year-old Wilson could serve his time with the hope that he would someday be free again. Indeed, Wilson would even be eligible for a sentence adjustment after serving 85% of his initial confinement. Wis. Stat. § 973.195. On the other hand, a sentence of "life without the possibility of parole or extended supervision" would guarantee that Wilson would die in prison.

State v. Dillard, 2014 WI 123, ¶6, 358 Wis. 2d 543, 550, 859 N.W.2d 44, 46, illustrates the significance of mistakenly informing the defendant that he faced life without the possibility of extended supervision. There, the charging documents alleged and the parties believed that the defendant was subject to a sentence enhancer resulting in a mandatory life sentence. *Id.*, ¶3. As part of a plea deal, the enhancer was dismissed. However, the enhancer never actually applied. *Id.*, ¶6. There was no defect with the plea colloquy, so the *Bangert* framework did not apply. Nonetheless, the defendant

was entitled to withdraw his plea under either of two legal theories: (1) under the totality of circumstances, his plea was not knowing, intelligent, and voluntary because it was based on the illusory benefit of dismissing an inapplicable sentence enhancer; and (2) his counsel's failure to advise him of the inapplicability of the sentence enhancer deprived him of his Sixth Amendment right to the effective assistance of counsel. Id., ¶¶70, 79, 81-82.

Wilson thus met the first requirement for a *Bangert* hearing, by demonstrating that being erroneously informed that he was subject to the "life without" sentencing enhancer constituted a defect in the plea colloquy. Wilson also met the second requirement for a prima facie *Bangert* claim, by alleging in his postconviction motion that he did not know that the sentence enhancer did not apply. (59:3). The state was correct to concede, and the circuit court was correct to hold, that Wilson was entitled to a *Bangert* hearing.

C. *The state failed to meet its burden of proving that Wilson actually understood the correct range of punishments.*

Because Wilson made his prima facie *Bangert* claim, the burden shifted to the state to "prove by clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent despite the deficiencies in the plea hearing." *Cross*, 2010 WI 70, ¶20.

When the defect is a failure to advise a defendant of the correct range of punishments, the state must prove that the defendant actually knew the correct range of punishments. The Wisconsin Supreme Court has spoken plainly on this point in similar circumstances:

> The circuit court misinformed Finley of the potential punishment he faced if convicted, information the circuit court was required to give the defendant; and the State failed to prove that when Finley entered his plea he knew the potential punishment he faced if convicted. The case law tells us that under these circumstances Finley was entitled to withdraw his plea.

State v. Finley, 2016 WI 63, ¶95, 370 Wis. 2d 402, 439, 882 N.W.2d 761, 780.

The state did not meet its burden. "The state may examine the defendant or defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea." *Bangert*, 131 Wis. 2d at 275. However, the state only called Wilson's attorney, and did not enquire into whether Wilson understood that he was not subject to the enhancer. Nor did the state call Wilson as a witness. There is simply no evidence that Wilson understood the true "range of punishments" he faced when he entered his plea. Indeed, the circuit court did not find that Wilson understood the range of punishments.

The court's rationale for denying Wilson's motion added a requirement that does not exist

under *Bangert*. According to the court, the failure to correctly advise Wilson of the maximum penalties "did not affect [Wilson's] decision to accept the plea." (98:63; App. 163). The court was ostensibly confusing Wilson's *Bangert* claim with a plea withdrawal claim under *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

Bentley claims are not based on any defect with the plea colloquy. Instead, they are based on a claim of ineffective assistance of counsel, such as counsel misinforming the defendant of a consequence of the plea. In *Bentley* claims, it is the violation of the defendant's Sixth Amendment right to the effective assistance of counsel that creates the "manifest injustice" that underpins plea withdrawal, not the defendant's due process right to enter a knowing, intelligent, and voluntary plea. 201 Wis. 2d at 311-312.

Because *Bentley* claims are based on the ineffective assistance of counsel, the defendant has to show prejudice in the form of "a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 201 Wis. 2d at 312 (citations and quotation marks omitted). Thus, *Bentley* claims require evidence, such as testimony from the defendant, establishing that the defendant would not have entered the plea if the defendant had known the correct information. In other words, if the defendant would still have entered the plea despite counsel's

error, then the defendant has not been denied his Sixth Amendment right to counsel.

However, there is no such requirement under *Bangert*. In *Bangert* claims, the "prejudice" is in entering a plea that is not knowing, intelligent, and voluntary for failure to understand the range of punishments. A plea that is not knowing, intelligent, and voluntary violates the defendant's right to due process. As *Finley* demonstrates, there is no need to prove that the defendant would have gone to trial if the defendant knew the correct information. 2016 WI 63, ¶95.

Bangert sets out a clear framework for plea withdrawal when there is a defect with a plea colloquy. Wilson has met the requirements under *Bangert*, and is entitled to withdraw his plea.

CONCLUSION

For the reasons stated above, Wilson is entitled to withdraw his plea.

Dated this 31st day of May, 2019.

Respectfully submitted,

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CERTIFICATIONS

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 2,588 words.

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.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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 31st day of May, 2019.

Signed:

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Assistant State Public Defender

APPENDIX

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