STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2022AP000199 – CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KASEY ANN GOMOLLA,

Defendant-Appellant.

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On appeal from a judgment of conviction
and decision denying postconviction relief,
both entered in the Brown County Circuit Court,
the Honorable John P. Zakowski, presiding.

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# BRIEF OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED

Kasey Gomolla was charged with conspiracy to deliver methamphetamine as a second or subsequent offense. She agreed to plead no contest, and the State agreed to drop the second-or-subsequent enhancer. But, in advising Ms. Gomolla about the possible penalties she would face, trial counsel overlooked the dropped enhancer. As a result, she misadvised Ms. Gomolla of the maximum term of imprisonment she faced.

The plea colloquy did not correct trial counsel's error, as the circuit court failed to address the applicable penalties at all. And while the circuit court confirmed that Ms. Gomolla had reviewed the plea questionnaire, that document reflected trial counsel's oversight and thus set forth the wrong maximum.

Postconviction, trial counsel acknowledged that she got the maximum penalty wrong, and Ms. Gomolla testified that she never knew the true penalty she faced.

1. **Did the circuit court's failure to address the maximum penalty render the plea colloquy deficient?**

   The circuit court answered "no."

2. **If the plea colloquy was deficient, did the State prove by clear and convincing evidence that Ms. Gomolla's plea was knowing, intelligent, and voluntary?**

   The circuit court answered "yes."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Gomolla does not request oral argument or publication.

## STATEMENT OF THE CASE AND FACTS

This case stems from drug trafficking activity that went far beyond Ms. Gomolla. (*See* 1:2-17). Because her case resolved with a plea deal (*see* 92:2; App. 54), and because the complaint's probable cause statement is unusually convoluted (*see* 1:2-17), some details regarding her role in the trafficking scheme remain elusive. For purposes of appeal, however, those details are irrelevant. What matters is this: before entering her no-contest plea, Ms. Gomolla did not understand the maximum penalty she faced. Her lawyer misadvised her, and the circuit court failed to advise her at all.

Ms. Gomolla was charged with two drug crimes, both with second-or-subsequent offense enhancers attached. (1:1-2). Nearly three years later, the parties reached a deal under which Ms. Gomolla pleaded no contest to Count 1 (conspiracy to delivery more than 50 grams of methamphetamine). (*See* 78; App. 59-60).

Confusion about the remaining terms of the agreement pervaded this case through sentencing. Early on, the State provided the defense with an offer memo. (*See* 163). The memo says, among other things, that the State would drop the enhancer. (163:1). The plea questionnaire, on the other hand, says Ms. Gomolla would plead no contest to Count 1 with the enhancer

intact. (78:1; App. 59). It lists the maximum prison sentence as 46 years: 40 because Count 1 is a Class C felony, and an extra six based on the enhancer. (78:1; App. 59). *See also* Wis. Stat. §§ 939.50(3)(c), 961.48(1)(a).

At the plea hearing, all agreed that Ms. Gomolla would be pleading no contest to Count 1, but there was still confusion regarding the enhancer. When the circuit court announced that it would accept Ms. Gomolla's plea to Count 1 with the enhancer attached, the State interjected, saying it believed the enhancer "was going to be dismissed." (92:5; App. 57). Defense counsel agreed, so the circuit court dismissed it. (92:5-6; App. 57-58).

As for the maximum penalty Ms. Gomolla faced, the circuit court commented that the applicable penalties were "attached" to the plea questionnaire and that Ms. Gomolla "had enough time to go over this plea form." (92:4-5; App. 56-57). It did not set forth the maximum penalty on the record or inquire whether Ms. Gomolla understood it.

After accepting Ms. Gomolla's no-contest plea, the circuit court ordered a pre-sentence investigation (PSI). (92:9). The PSI writer wrongly believed that Ms. Gomolla entered a plea to Count 1 with the enhancer in place, and thus that she faced a maximum penalty of 46 years of imprisonment. (82:33-34).

The circuit court sentenced Ms. Gomolla to 27 years of imprisonment: 12 years of confinement and 15 years of supervision. (102:1). Postconviction, she moved for resentencing, or, if the circuit court denied that relief, plea withdrawal. (*See* 151:1). This appeal pertains only to her request for plea withdrawal.

Ms. Gomolla's postconviction motion alleged that the circuit court failed to advise her of the maximum penalty she faced before it accepted her plea, and that she did not otherwise know or understand that information. (151:7). The circuit court held an evidentiary hearing so the State could try to disprove these allegations. (*See* 166:2). Both trial counsel and Ms. Gomolla testified. (*See* 166:2). Trial counsel said she believed Ms. Gomolla understood the plea questionnaire's contents but conceded that she mistakenly "included the enhancer" when writing down the applicable penalties. (166:22, 30; App. 33, 41). Ms. Gomolla testified that trial counsel hurried through the questionnaire and never "properly" reviewed it with her. (166:33; App. 44). She also said she was unaware of the maximum penalty she faced. (166:34-35; App. 45-46).

The circuit court denied relief in a written decision. (167; App. 3-17). It acknowledged trial counsel's error in the plea questionnaire. (167:7; App. 9). And it did not dispute that it had failed to address the maximum penalty during Ms. Gomolla's plea colloquy. Still, it held its colloquy "satisfactory" to show the plea was knowing, intelligent, and voluntary. (167:11; App. 13). It further held that, "if one would find that the plea colloquy was defective," then the State had met its burden of proving the plea knowing, intelligent, and voluntary. (167:11; App. 13).

Ms. Gomolla appeals.

## ARGUMENT

**The circuit court's failure to advise Ms. Gomolla of the maximum penalty she faced constitutes a plea colloquy defect. And because she was unaware of that maximum penalty, her plea was not knowing, intelligent, and voluntary.**

The circuit court did not advise Ms. Gomolla of the maximum penalty she faced before it accepted her no-contest plea. It referenced the "penalties … attached" to the plea questionnaire, but the plea questionnaire set forth the *wrong* maximum penalty. Given this colloquy defect, the State had the postconviction burden to prove Ms. Gomolla's plea knowing, intelligent, and voluntary. I did not meet that burden: the evidence it introduced merely underscored that Ms. Gomolla was never correctly informed of the direct consequences of her plea and did not understand them. As a result, Ms. Gomolla is entitled to plea withdrawal.

### A. Governing law.

Because Ms. Gomolla seeks to withdraw a no-contest plea after sentencing, she must demonstrate that "a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A plea that was "not knowing, intelligent, and voluntary … violates fundamental due process," necessarily resulting in a manifest injustice. *Id.*, ¶19 (internal quotation marks omitted). Under these circumstances, plea withdrawal is permitted "as a matter of right." *Id.*

Both statute and case law set forth duties a circuit court must fulfill at a plea hearing "to ensure that a defendant's plea is knowing, intelligent, and voluntary." *Id.*, ¶23. The Wisconsin Supreme Court has explained that a circuit court's "faithful discharge of these duties is the best way … to demonstrate the critical importance of pleas in our system of justice and to avoid constitutional problems." *Id.*

Under Wis. Stat. § 971.08 and related case law, a circuit court must engage the defendant at the plea hearing to verify her understanding of the direct consequences of her plea. *See generally Brown*, 293 Wis. 2d 594, ¶¶34-35. Section 971.08(1)(a) specifically provides that the circuit court must ascertain the defendant's understanding of "the potential punishment if convicted." The Wisconsin Supreme Court's seminal decision in *State v. Bangert* reiterated this obligation, directing circuit courts to establish, with a "personal colloquy," the defendant's understanding of the range of applicable punishments. 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986). And in *Brown*, which reaffirmed and supplemented *Bangert* 20 years later, the Wisconsin Supreme Court again held that a circuit court "must address the defendant personally and … [e]stablish the defendant's understanding of … the range of punishments to which he is subjecting himself by entering a plea." *Brown*, 293 Wis. 2d 594, ¶35.

In discharging their duties under § 971.08 and the *Bangert* line of cases, circuit courts often refer to plea questionnaires. Several published cases examine the extent to which such references can supplement a

colloquy. The most recent and most thorough discussion of this issue appears in *State v. Hoppe*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794. But to set the foundation, it helps to start with a case decided just a year after *Bangert*.

The defendant in *State v. Moederndorfer* filled out a plea questionnaire 15 minutes before his plea hearing. 141 Wis. 2d 823, 825, 416 N.W.2d 627 (Ct. App. 1987). The circuit court relied on the questionnaire "largely in lieu of a personal colloquy." *Id.* The court of appeals held this procedure acceptable under *Bangert*, saying the circuit court could "refer to some portion of the record or some communication between defense counsel and [the] defendant" instead of engaging in a colloquy. *Id.* at 827 (quoting *Bangert*, 131 Wis. 2d at 270-71).

At first glance, and read alone, *Moederndorfer* seems to endorse a circuit court's total reliance on a plea questionnaire—so long as the defendant says she reviewed it with counsel before the plea hearing. But later cases, including some from the Wisconsin Supreme Court that trump any contrary language in *Moederndorfer*, have limited its holding.

In *State v. Hansen*, the circuit court verified that the defendant had reviewed the plea questionnaire with counsel, signed it, and understood it. 158 Wis. 2d 749, 752, 485 N.W.2d 74 (Ct. App. 1992). It did not discuss the information contained within the questionnaire. *Id.* The court of appeals held this approach inadequate. *Id.* at 755-56. *Moederndorfer*, the *Hansen* court explained, "was not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding."

*Id.* at 755. And here, it continued, the circuit court failed to make that record: it established that the defendant "read and understood" the plea questionnaire but not that he understood "he was waiving his applicable constitutional rights." *Id.* at 756.

The line between what *Hansen* rejected and what *Moederndorfer* authorized has proved fine. Confusion, and litigation, have ensued. In *Hoppe*, the Wisconsin Supreme Court took this confusion on directly.

*Hoppe* considered a plea colloquy in which the circuit court "specifically invoked" the plea questionnaire, "ascertained that the defendant's counsel had helped the defendant to review [it]," "and further ascertained that the defendant generally understood [its] contents." 317 Wis. 2d 161, ¶26. The court of appeals deemed this record sufficient, as it considered the plea questionnaire "an integral part of the plea colloquy." *Id.*, ¶27. The Wisconsin Supreme Court disagreed. *See id.*, ¶33. It held that a circuit court may not "rely entirely" on a plea questionnaire "as a substitute for a substantive in-court plea colloquy." *Id.*, ¶31. While judges can refer to plea questionnaires, they must also engage in a "substantive colloquy to satisfy *each of the duties* listed in *Brown*." *Id.* (emphasis added). In the colloquy under review, neither the defendant nor the circuit court had "made any statements … relating to promises or threats … [or to] the range of punishments" the defendant faced. *Id.*, ¶34. Thus, on these two points, the colloquy was deficient. *Id.*

These cases offer little bright-line guidance as to a circuit court's reliance on a plea questionnaire during a plea colloquy. But they make one thing clear: a circuit court cannot simply cite a completed plea questionnaire in lieu of fulfilling a mandatory colloquy duty. Doing so—even if the circuit court confirms that the defendant read and understood the plea questionnaire, and even if that questionnaire gives accurate information—makes for a deficient plea colloquy.

When a circuit court fails to fulfill one of its mandatory duties at a plea hearing, and the defendant files a plea withdrawal motion alleging that she did not know or understand the information the circuit court omitted, an evidentiary hearing is required. *Id.*, ¶36. The State carries the burden at that hearing. *Id.*, ¶40. It must prove "by clear and convincing evidence that the … plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." *Id.* In its effort to meet that burden, the State may rely on evidence "outside the plea hearing record." *Id.* (internal quotation marks omitted).

The evidence necessary to establish a knowing, intelligent, and voluntary plea, despite a deficient colloquy, varies across cases. But one relatively recent case—*State v. Finley*, 2016 WI 63, 370 Wis. 2d 402, 882 N.W.2d—is instructive. In *Finley*, the circuit court misadvised the defendant of the applicable penalties during the plea colloquy. *Id.*, ¶29. Its misadvice stemmed from misinformation in the plea questionnaire. *Id.*, ¶28. At the postconviction hearing, trial counsel testified that he couldn't specifically recall the advice he'd given the

defendant, but his ordinary practice was to go through the plea questionnaire—which, he agreed, set forth the wrong maximum penalty. *Id.*, ¶¶46-47. The State offered no additional evidence, outside the plea hearing record or within it, to establish the plea's validity. *Id.*, ¶46.

By the time *Finley* reached the Wisconsin Supreme Court, there was no dispute that the colloquy was deficient or that the State had failed to meet its burden to prove the validity of the defendant's plea despite the deficient colloquy. Even the State agreed it had fallen short. *See id.*, ¶54 n.32.

This Court will review the sufficiency of Ms. Gomolla's plea colloquy de novo to determine whether the circuit court failed to fulfill any of its "mandatory duties." *Brown*, 293 Wis. 2d 594, ¶21. It will assess whether her plea was knowing, intelligent, and voluntary in two steps, "accept[ing] the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous" but deciding "independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." *Id.*, ¶19.

B. Ms. Gomolla's plea colloquy was deficient.

The circuit court failed to fulfill one of its plea colloquy duties: it did not ascertain Ms. Gomolla's understanding of the range of punishments she would face upon pleading. This omission rendered the plea colloquy deficient. Indeed, the deficiency here mirrors one in *Hoppe*: the circuit court in that case also failed to verify that the defendant understood the applicable penalties. This Court should adhere to the *Hoppe* court's

binding reasoning and hold that Ms. Gomolla's plea colloquy was inadequate.

Neither the circuit court's discussion of the plea questionnaire at the outset of Ms. Gomolla's plea hearing, nor its vague reference to "penalties … attached" to her plea questionnaire, alter this analysis. Consider the specifics of the circuit court's exchange with Ms. Gomolla. Upon calling Ms. Gomolla's case, the circuit court noted its receipt of "a full completed plea questionnaire with a number of attachments, a lot of information contained within." (92:2; App. 54). It then asked Ms. Gomolla, "Did you have enough time to go over all the information contained in this plea questionnaire with your attorney?" (92:2). Ms. Gomolla answered, "Yes." (92:2; App. 54). There was no mention of penalties during this portion of the colloquy. A little bit later, after going through some of the plea questionnaire's contents and a handful of other issues—not including penalties—the circuit court concluded as follows: "the penalties and the elements of the crime, the jury instructions have been attached to this plea questionnaire and the Court finds that [Ms. Gomolla] is an intelligent young woman. She's had enough time to go over this plea form. She's thinking clearly today…. The Court believes that [her] pleas today are knowingly, intelligently, and voluntarily made." (92:3-4; App. 55-56).

The penalties were not, in fact, attached to Ms. Gomolla's plea questionnaire; they were written into the questionnaire itself, and they were wrong. Thus, at

best, the plea hearing transcript shows that Ms. Gomolla understood the contents of her plea questionnaire but misunderstood the range of punishments she faced.

Even if the plea questionnaire had been accurate, the colloquy would have been defective: "it is not enough for the circuit court to ascertain that a defendant generally understands the [questionnaire's] contents." *Hoppe*, 317 Wis. 2d 161, ¶38. But it was *not* accurate. No case law suggests that an inaccurate plea questionnaire can substitute for "an in-court personal colloquy." *Id.* Misinformation plus no information does not equal sufficient information. The plea colloquy was deficient.

C. Ms. Gomolla did not enter a knowing, intelligent, and voluntary plea.

The State had the burden to prove Ms. Gomolla's plea knowing, intelligent, and voluntary despite her deficient plea colloquy. To meet this burden, the State elicited testimony from trial counsel and Ms. Gomolla. Their testimony demonstrated that Ms. Gomolla was misinformed and unaware of the applicable penalties. Neither testified that Ms. Gomolla understood the range of punishments she truly faced, and thus neither offered testimony that could fill in the plea colloquy's gap.

Trial counsel confirmed that she filled out and reviewed a plea questionnaire with Ms. Gomolla and that she believed Ms. Gomolla understood its contents. The State did not ask, and trial counsel did not say, that she provided accurate information about the applicable

penalties despite the error in the plea questionnaire. On the contrary, in response to a question from the circuit court, trial counsel acknowledged miscalculating it.

Ms. Gomolla also confirmed that she filled out and reviewed a plea questionnaire with trial counsel, but she described her lawyer as busy and distracted while they did so. Ms. Gomolla also testified that she did not recall talking to trial counsel about the maximum penalty she would face upon pleading. On that point, the State asked, "is it that you don't remember that conversation occurring or do you specifically remember that that conversation never occurred?" (166:34; App. 45). Ms. Gomolla responded, "I think it's that conversation never occurred at all." (166:34; App. 45).

Although the State had no evidence showing that Ms. Gomolla understood the applicable penalties, it contended that her plea was knowing, intelligent, and voluntary. It argued, and the circuit court held, that the fact that trial counsel and Ms. Gomolla went through the plea questionnaire (even if hastily), combined with the fact that the questionnaire listed a maximum penalty in the ballpark of the correct one, meant her plea was valid. (*See* 167:7, 10-11; App. 9, 12-13).

The circuit court cited *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, to support its conclusion. (167:11-12; App. 13-14). In *Cross*, the circuit informed the defendant, during the plea colloquy, that he faced up to 40 years of imprisonment. 326 Wis. 2d 492, ¶1. The true maximum was 10 years less. The Wisconsin Supreme

Court held that the plea colloquy was not deficient under these circumstances, as the defendant was informed of a potential maximum punishment that was not "substantially higher … than that authorized by law." *Id.*, ¶¶40-41. Without a colloquy deficiency, the *Cross* court didn't need to address whether the State had proven the defendant's plea knowing, intelligent, and voluntary—the question posed here.

*Cross* is like this case in that both defendants were, at some point, told they could get more prison time than the law allowed. But it's significantly different from this case in that the circuit court in *Cross* addressed the applicable penalties during the plea colloquy. *Cross* governs situations in which a circuit court makes an "insubstantial error" as to the maximum penalty when discussing it during a personal colloquy. *Id.*, ¶38 n.8. That is not what happened here. *Hoppe* governs when a circuit court fails to conduct a personal colloquy and instead relies on a plea questionnaire. That *is* what happened here. *Hoppe* controls this case.

To salvage Ms. Gomolla's plea, the State had to present clear and convincing evidence that the plea was knowing, intelligent, and voluntary despite the inadequate plea colloquy. It did not do so. Indeed, the State presented nothing—no evidence at all—suggesting that Ms. Gomolla was ever informed, or ever knew, the true range of punishments she faced.

Both the plea hearing record and the testimony elicited at the postconviction hearing demonstrate that Ms. Gomolla did not know the maximum penalty her

plea would carry. It follows that her plea was not knowing, intelligent, and voluntary. She asks this Court to let her to withdraw it.

## CONCLUSION

Kasey Ann Gomolla respectfully requests that this Court reverse the circuit court's decision denying plea withdrawal and remand the case to the circuit court with instructions to vacate the judgment of conviction and permit Ms. Gomolla to withdraw her plea.

Dated this 22nd day of December, 2022.

Respectfully submitted,

*Electronically signed by*
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## CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b) and (c) for a brief. The length of this brief is 3,431 words.

## CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 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.

Dated and filed this 22nd day of December, 2022.

Signed:

*Electronically signed by*
*Megan Sanders-Drazen*

Megan Sanders-Drazen