STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2022AP000199 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KASEY ANN GOMOLLA,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Introduction.

Trial counsel told Ms. Gomolla the wrong maximum penalties when they went through the plea questionnaire together. The circuit court failed to address the maximum penalties—at all—during the plea colloquy. Misinformation from trial counsel plus zero information from the circuit court does not equal information sufficient to establish the validity of Ms. Gomolla's plea.

At the *Bangert* hearing,[1] the State had to overcome the inadequate record with clear and convincing evidence that Ms. Gomolla's plea was still knowing, intelligent, and voluntary—i.e., that she understood the penalties she faced even though her lawyer got them wrong, and even thought the circuit court was silent on the topic. The State did not meet its burden.

Trial counsel, whom the circuit court deemed credible, testified—but she simply confirmed that she conveyed the wrong maximum penalties. Ms. Gomolla, whom the circuit court did not deem credible, also testified, saying she did not even understand the incorrect penalties trial counsel conveyed because they went through the plea questionnaire so quickly. There were no other witnesses, nor any other evidence relevant to Ms. Gomolla's grasp of the penalties she faced.

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[1] *See State v. Bangert*, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986).

Even viewed in the light most favorable to the State (which is not what its clear-and-convincing burden requires), Ms. Gomolla did not grasp a fundamental direct consequence of pleading guilty. Thus, her plea was not knowing, intelligent, and voluntary. She respectfully requests that this Court allow her to withdraw it.

II. The parties now agree: the plea colloquy was deficient.

In her opening brief, Ms. Gomolla argued, first, that the plea colloquy was deficient, and second, that the State did not meet its burden of proving her plea valid despite the deficient colloquy. The first issue has now been resolved: the State concedes that the circuit court did not fulfill its colloquy obligations and thus that the plea hearing record does not, on its face, show that Ms. Gomolla's plea was valid. More specifically, the State concedes that the circuit court was required to ascertain Ms. Gomolla's understanding of the range of potential punishments she faced, but didn't.

III. The State did not prove that Ms. Gomolla understood the direct consequences of her plea.

A. The State's peculiar reframe of the issue.

Given its concession that the plea colloquy was deficient, the State focuses on whether it met its burden at the *Bangert* hearing. It says it "easily" did. *See* State's Br. 10. It reasons that the inaccurate penalty information Ms. Gomolla received from trial counsel compensated for the absence of penalty information in the plea

colloquy. It then severs this counterintuitive claim into two parts. First, it argues that Ms. Gomolla understood *some* possible penalties: "[C]ounsel's miscommunication of a potential range of punishment is still communication of a potential range of punishment." State's Br. 12. Second, it says the inaccurate penalties Ms. Gomolla understood were close enough to the real thing to render her plea valid. *Id.* The State considers these matters "entirely separate." State's Br. 11.

This is a strange framing of the one issue before the Court—namely, did the State prove Ms. Gomolla's plea knowing, intelligent, and voluntary despite the deficient plea colloquy? It disaggregates the question presented into misleading parts and conflates discrete issues in the process. More fundamentally, the State ignores that it's "of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard." *See State v. Brown*, 2006 WI 100, ¶33, 293 Wis. 2d 594, 716 N.W.2d 906. Keeping that precept in mind and following the traditional analysis shows that the State has not overcome the circuit court's critical omission with evidence that Ms. Gomolla nevertheless understood the direct consequences of her plea.

B. A refresher on the applicable law.

Before delving into the State's errors in reasoning, recall these basic principles:

- A full understanding of the maximum applicable penalties is a prerequisite to a knowing, intelligent, and voluntary plea. *Id.*, ¶35.

- To help ensure the defendant is entering a knowing, intelligent, and voluntary plea, a circuit court is required ascertain the defendant's understanding of the maximum penalties with a personal colloquy. *Id.*, ¶¶25, 33-35.

- A circuit court may refer to a completed plea questionnaire during the plea colloquy. *State v. Hoppe*, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794. But the questionnaire is there to support the colloquy, not replace it. *Id.*, ¶31. The circuit court still has an affirmative duty to ensure, with in-court questions, that the defendant understands the maximum penalties she faces. *Brown*, 293 Wis. 2d 594, ¶¶32, 35.

- If the circuit court omits information from its plea colloquy and the defendant alleges that she did not have that information, then, to salvage the plea, the State must rebut the inadequate record with proof that the plea was entered knowingly, intelligently, and voluntarily. *Id.*, ¶36. To meet its burden, the State usually relies on the contents of the plea questionnaire and testimony from the defendant and her lawyer. *See id.*, ¶40.

C. The first step in the State's novel analysis.

Now consider the first component of the State's analysis: it says it "provided sufficient evidence" that Ms. Gomolla grasped "a potential range of punishment,"

albeit an incorrect one. State's Br. 11. It seems to perceive this low bar as what it must meet. It also seems to believe that meeting this low bar triggers a second burden shift. If a judge fails to address the applicable penalties but the State proves the defendant was aware of *some* penalties, then, per the State, the defendant must show that the penalties she believed she faced were substantially inaccurate. Otherwise, neither the gap in the colloquy nor the inaccurate information that preceded it matter.

The State has invented this procedure. It makes little sense, violates case law, and would lead courts to uphold pleas that fall short of the constitutional standard enunciated by the United States Supreme Court.

Whether Ms. Gomolla's plea was knowing, intelligent, and voluntary despite her defective colloquy turns on whether she learned what she needed to—the penalties *she actually faced*—from sources outside the colloquy. A person might glean such information from the plea questionnaire, from a conversation with her lawyer, or from a statement by the circuit court at an earlier hearing. But proving that the person learned the *wrong* thing from an extrinsic source, as here, does no good. Such evidence is worse than irrelevant: it suggests the defendant lacked a full understanding of the direct consequences of her plea—that she was misled before waiving a host of constitutional rights. It undercuts, rather than proves, the validity of her plea.

Case law confirms this analysis. The United States Supreme Court long ago held that, given the significant sacrifice of constitutional rights inherent in a guilty plea,

it is incumbent on the government to create a record showing that the plea "is voluntarily made." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Otherwise, the record could mask "[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats"—all possible causes of an invalid plea. *Id.* at 242-43. The upshot is that a guilty plea "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 243-44. A plea upheld despite a defective colloquy, based on evidence of a *mis*understanding "of its consequences," violates this principle. *Id.* at 244. Yet, that is what the State seeks.

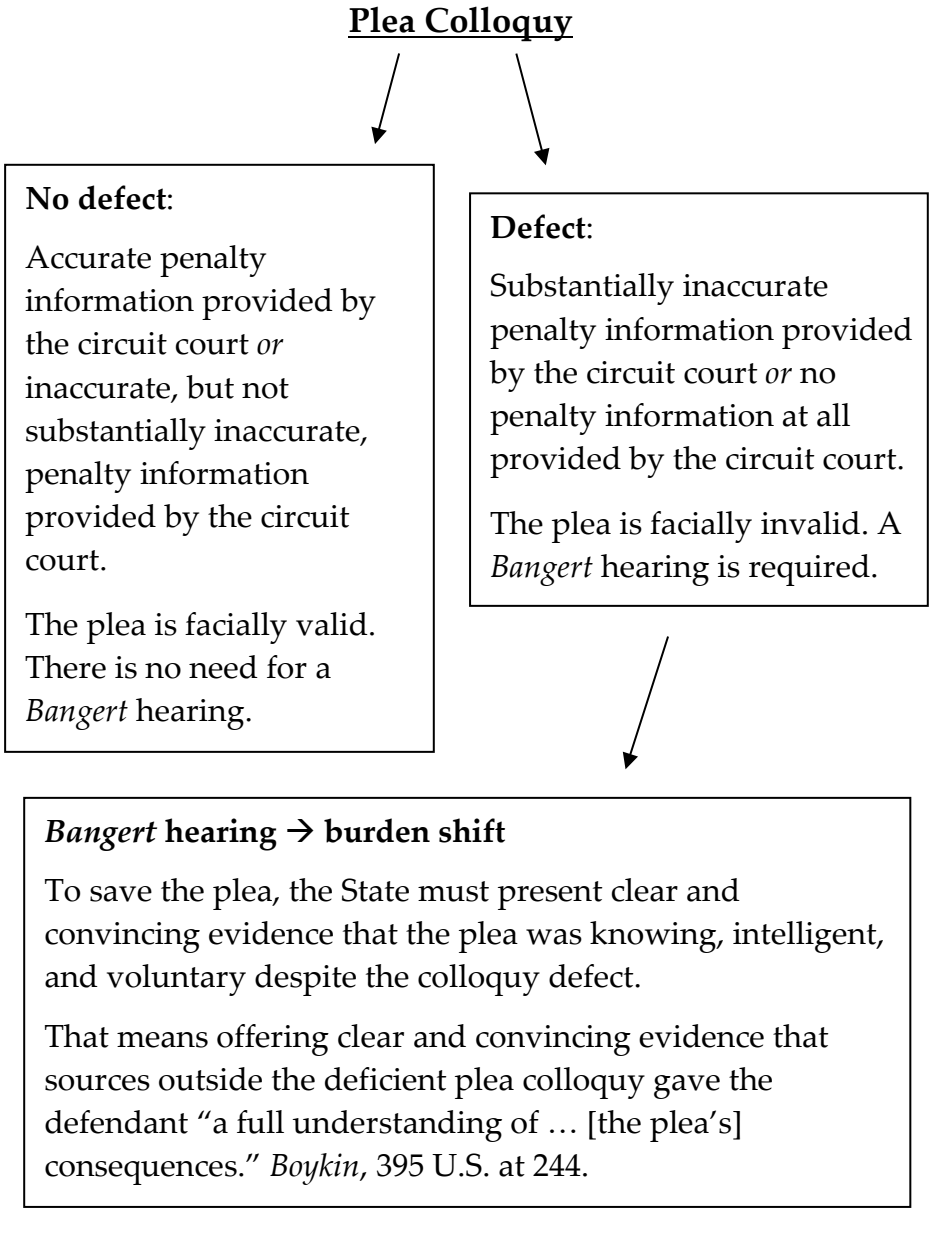
There is one saving grace in the first step of the State's analysis: it makes clear that it agrees that trial counsel told Ms. Gomolla the wrong penalties, and that no other source informed Ms. Gomolla of the right penalties. The final question, then, is whether it matters that the system wholly failed to inform Ms. Gomolla of the true direct consequences of her plea, leading her to enter it ignorant of the maximum penalties she faced.

D. The second step in the State's novel analysis.

The State contends that what Ms. Gomolla got was good enough. It belittles the plea process and the circuit court's central role in ensuring valid pleas.

To support its claim that the incorrect information trial counsel provided compensated for the omission in Ms. Gomolla's plea colloquy, the State cites *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64. But *Cross*

doesn't say what to do when the circuit court omits penalty information altogether; it holds that an *error* in the circuit court's statement of the penalties might not be a colloquy defect if the error was insubstantial. *Id.*, ¶40. The diagram below visualizes this distinction:



Thus, while *Cross* tackled the question of whether there was a defect in the plea colloquy necessitating a burden shift, here the defect is undisputed and the burden has already shifted. The only issue is whether the State has fulfilled that burden: does trial counsel's testimony that she misinformed Ms. Gomolla of the maximum penalties, giving her a number six years too high, amount to clear and convincing evidence that Ms. Gomolla had "a full understanding" of her plea's consequences? *See Boykin*, 395 U.S. at 244.

Just as moderate misinformation in the plea colloquy wasn't enough to meet the defendant's burden of establishing a *Bangert* violation in *Cross*, moderate misinformation from trial counsel isn't enough to meet the State's burden of proving Ms. Gomolla's plea valid here. Recall that in *Cross*, the plea was presumed knowing, intelligent, and voluntary, and the defendant had the burden to overcome that presumption by establishing a *Bangert* violation and alleging that he did not know or understand the information left out of the colloquy. Given its posture, the benefit of the doubt in *Cross* went to the State. Here, the defendant's plea is presumed invalid, and the State has the burden to overcome that presumption with clear and convincing evidence that Ms. Gomolla understood the direct consequences of her plea despite her inadequate colloquy. Given the posture of this case, the benefit of the doubt goes to Ms. Gomolla.

In sum, the State's reliance on *Cross* is misplaced. The questions presented here and in *Cross* are significantly different, as is the party bearing the burden.

State v. Finley, discussed in Ms. Gomolla's opening brief (*see* Appellant's Br. 12-13), is a much closer analog to the case at hand. 2016 WI 63, 370 Wis. 2d 402, 882 N.W.2d 761. In *Finley*, as here, there was a colloquy defect regarding the maximum penalties the defendant faced, and the State offered no evidence that the defendant received accurate penalty information from any extrinsic source. The defendant in *Finley* was permitted to withdraw his plea. Ms. Gomolla seeks the same treatment here.

* * * *

Prior cases have upheld pleas, despite colloquy defects, only when the State offers evidence that the defendant accurately understood the information the colloquy omitted. This limit makes sense given the core role guilty pleas play in the criminal legal system, the sweeping waiver of constitutional rights such pleas entail, and the core role colloquies play in ensuring such waivers are the product of informed decisionmaking.

Given the absence of evidence that Ms. Gomolla accurately understood the penalties she faced, upholding her plea would mean charting new territory and undermining key structures precedent has built to protect the plea-or-trial decisionmaking process. Adhering to *Finley* and related cases, meanwhile, would acknowledge that the circuit court failed to perform its mandatory duties at Ms. Gomolla's plea hearing and that no other source filled the gap.

Ms. Gomolla did not have the basic information she needed to make an informed decision whether to forego a trial—"generally the most important decision to be made in a criminal case." *State v. Dillard*, 2014 WI 123, ¶90, 358 Wis. 2d 543, 859 N.W.2d 44. Thus, her plea does not meet the constitutional standard, and she should be permitted to withdraw it.

CONCLUSION

For the reasons set forth here and in her brief-in-chief, Ms. Gomolla respectfully requests that this Court reverse the circuit court's order denying postconviction relief and remand the case with instructions to vacate the judgment of conviction and permit Ms. Gomolla to withdraw her plea.

Dated this 5th day of April, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,180 words.

Dated this 5th day of April, 2023.

Signed:

Electronically signed by
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