State of Wisconsin
Court of Appeals
District 4
Appeal No. 2022AP000272-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Damon D. Taylor,

Defendant-Appellant.

On appeal from a judgment of the La Crosse County Circuit Court, The Honorable Ramona A. Gonzalez, presiding

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Defendant-Appellant's Brief and Appendix

Law Offices of Jeffrey W. Jensen
111 E. Wisconsin Avenue, Suite 1925
Milwaukee, WI 53202-4825

414-671-9484
jensen@milwaukeecriminaldefense.pro

Attorneys for the Appellant

Table of Authority

Cases

Statutes

Table of Contents

Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

While maintaining his innocence, Taylor entered no contest pleas to two charges in the information. Later, Taylor filed a postconviction motion seeking to withdraw his no contest pleas because (1) the plea was not knowingly entered because the record of the plea colloquy fails to demonstrate that Taylor understood the essential elements of the offenses; (2) the plea was not voluntarily entered because Taylor plausibly testified that the only reason he pleaded no contest was because he sincerely believed that his attorney was unprepared for trial; and, (3) because this was a so-called "Alford" plea, the record must demonstrate that there is "strong proof" of Taylor's guilt, and the record fails to do so.

Thus, the issue is: Did the circuit court err in denying Taylor's postconviction motion to withdraw his no contest pleas?

Summary of the Argument

The circuit court erred in denying Taylor's postconviction motion to withdraw his no contest pleas (so-called "Alford pleas"). Taylor established that the pleas were not knowingly entered, they were not voluntarily entered, and the record fails to demonstrate that there is strong proof of his guilt.

The pleas were not knowingly entered because the record of the plea hearing fails to demonstrate that the judge explained to Taylor the essential nature of the charges to which he was pleading no contest. There is a plea questionnaire in the record, but the plea questionnaire does not inform Taylor of the elements of the offenses. Taylor testified at the motion hearing that he did not know the elements of the offenses, and the state made no effort to prove that Taylor did, in fact, know the elements. Thus, the plea was not knowingly entered.

The pleas were not voluntarily entered because Taylor testified that the only reason he entered the no contest pleas was because he did not believe that his attorney was prepared to defend him at trial. The state did not call the attorney as a witness; and, therefore, Taylor's testimony on this point is uncontroverted.

Finally, because these were "Alford pleas", it is required that the record demonstrates that there is strong proof of the

defendant's guilt. Here, the record does not demonstrate strong proof of Taylor's guilt, and, at the postconviction motion hearing, the circuit court made no finding that there was strong proof of Taylor's guilt.

Statement of the Case

On April 11, 2017, in a criminal complaint filed in La Crosse County, the defendant-appellant, Damon Taylor (hereinafter "Taylor"), was charged with: (1) attempted first degree intentional homicide, repeater, use of a dangerous weapon on April 5, 2017; (2) disorderly conduct as a repeater on January 24, 2017; (3) theft of movable property on March 2, 2017 to March 8, 2017; (4) possession of a firearm by a felon on January 24, 2017; (5) possession of methamphetamine on April 5, 2017; (6) possession of drug paraphernalia on April 5, 2017; and, (7) failure to comply with officer's attempt to take him into custody. (R:1)

In a nutshell, the complaint alleged in pertinent part that on April 5, 2017, police responded to a report of a shooting. Police determined that JLB and TM walked up to the door of a residence thought to be occupied by Ontario Lowry and Taylor. According to JLB, Lowry owed him (JLB) $1000, and Lowry invited JLB to come to the residence to pick up the money. When JLB and TM got up to the door, someone inside started

shooting at them. They claim to have seen Lowry standing in a window looking at them. Police, who were surveilling the residence, saw the two men running away from the residence as someone from inside the residence was shooting at them. *Id.* JLB was shot in the leg.

Eventually[1], the matter proceeded to a preliminary hearing. Following the receipt of the testimony, the court dismissed count three (R:33-12); but bound Taylor over on the remaining counts. *Id.* The state filed an information (R:24), and Taylor entered not guilty pleas (R:33-14)

The case was called for trial on February 12, 2018. Following jury selection, the court conducted a colloquy with Taylor about whether he had been informed of the state's latest plea offer, and whether he rejected it. The judge said, "So, Mr. Taylor, the offer that the State is making you is a maximum sentence available to the Court of 27 years. The maximum that would be available to the Court if you were convicted of all charges as we proceed to trial is 100 years and a half. Do you understand that that's what we're looking at?" (R:57-57)

Taylor protested that he didn't do it. *Id.*

Taylor and his attorney were then given the opportunity to have further private discussions about the plea offer. Following that, the attorney informed the court, "Mr. Taylor will

[1] There was a delay because defense counsel raised the issue of Taylor's competence to proceed. The court ordered an examination, and, following the return of the doctor's report, the court determined that Taylor was competent to proceed.

take the deal . . . This will be an Alford plea." (R:57-60)

According to the plea agreement, Taylor maintained his innocence but indicated that he would enter an *Alford* plea to Count 1 as amended to second degree reckless endangerment while armed with a dangerous weapon; Count 2, possession of a firearm as a felon; and Count 5, failure to comply with the officer's attempt to take him into custody. Counts 3 and 4 would be dismissed. The state filed an amended information. (R:36)

Concerning the state's offer of proof, among other things, the prosecutor mentioned that one of the alleged victims, JLB, was not available for trial; and neither was Lowery. Nevertheless, the prosecutor told the court:

- "[TM], however, was ready to testify. Um, he would testify that they walked up to the door. *He did have a handgun*. He thought they were going to buy weed. When the door opened, he saw a person that he does not know that he identified as wearing dreadlocks that were blond tips with a distinctive tattoo on his face, which is Damon Taylor. He saw the gun fire at them, and he ran away. He returned fire, um, as he ran away trying to keep the person from coming out after them. " (R:57-68)
- "Seconds after the shooting, Investigator Mancuso observed Ontario Lowery in the upstairs window, um, so seeming to indicate that Ontario Lowery was

not the shooter, not in a position to shoot, and [TM] who doesn't know either individual identified the person with the tattoo on the face and dreads doing the shooting." *Id.*

- Lowery may not have appeared for trial. (R:57-69)
- After an alleged stand-off with police, Taylor was arrested in the residence where the shooting occurred. (R:57-71)

The court indicated that, "[T]he facts as recited by Mr. Gruenke into the record would support a finding of guilt if that was presented to the jury . . " but the judge made no finding that these facts constituted "strong proof of guilt". (R:57-71)

Concerning the elements of the offenses, the court said to Taylor, "Each crime would require that the State prove certain things with evidence beyond a reasonable doubt to convict you of those crimes. Did you review those with Mr. Longacre?" (R:57-67) Taylor answered in the affirmative. *Id.*

There is a completed plea questionnaire in the file. (R:39-5) The plea questionnaire, though, does not set forth the elements of the offenses to which Taylor entered guilty pleas.

While accepting Taylor's no contest pleas, the court gave a brief summary of each of the charges, but this amounted to no more than the "name" of the offense. For example:

- "Then I direct your attention to Count 1 of the Amended Information. The charge reads second

degree recklessly endangering safety, use of a dangerous weapon, as a repeater." (R:57-74)

- "And Count 5 charges failure to comply with officer's attempt to take person into custody, as a repeater, and the allegation is that on the same date, time, and place as the two previous counts you did intentionally refuse to comply with an officer's lawful attempt to take you into custody and retreated or remained in a building or place, through action or threat attempted to prevent the officer from taking you -- or taking you into custody, and while doing each of the above, you re -- you became -- remained or became armed with a dangerous weapon or threatened to use a dangerous weapon." (R:57-75, 76)

Taylor did inform the court that he was satisfied with the representation that his attorney had provided. (R:57-63)

Later, the court sentenced Taylor to a total of 10 years of initial confinement, and seven years of extended supervision.

Taylor timely filed a notice of intent to pursue postconviction relief.

On August 31, 2021, Taylor filed an amended postconviction motion. (R:112)[2] Taylor's postconviction motion sought to withdraw his no contest pleas because: (1) the court's

[2] For a time, Taylor was proceeding *pro se* during postconviction proceedings. He eventually hired counsel, and counsel filed the amended postconviction motion.

plea colloquy with Taylor was defective in that the judge did not explain to Taylor the essential elements of each offense, and, therefore, the record fails to demonstrate that Taylor understood the nature of the charges; (2) Taylor maintained his innocence and entered his no contest pleas pursuant to the Alford decision, and the record of the plea hearing fails to demonstrate that there is "strong proof" of the defendant's guilt; and, finally, (3) Taylor's no contest plea was not freely and voluntarily entered because he sincerely believed that his attorney was unprepared for trial, and, therefore, his only alternative was to accept the state's offer (R:112-1)

On February 3, 2022, the court conducted a hearing into Taylor's postconviction motion. Taylor testified at the hearing. According to Taylor, his trial counsel, Adrian Longacre, never asked him about what happened during the incident alleged in the complaint. (R:128-7) Nevertheless, Taylor told Longacre that he did not do what is alleged in the complaint (R:128-8) Taylor explained that, approximately a month before the start of trial, he had unsuccessfully attempted to fire Longacre. (R:128-9) This was because Longacre refused to file a motion to suppress evidence because he did not want to "piss anyone off." (R:128-10) Nevertheless, Taylor admitted that he eventually agreed to have Longacre continue as defense counsel. (R:128-11)

Longacre did meet with Taylor shortly before the start of

trial, but there was no discussion about trial strategy or the facts of the case. (R:128-11)

Thus, Taylor said, as the trial was about to start, he felt that he had no chance. (R:128-12) When the judge discussed the state's final offer with Taylor, he asked to have a moment to speak with Longacre. Following the meeting, Longacre informed the court that Taylor would enter a no contest plea pursuant to *Alford*.

Significantly, though, Taylor testified at the postconviction motion hearing that Longacre never discussed the elements of the offenses with him. (R:128-15, 16; R:128-18) Further, Taylor testified that, at the time he entered his pleas, he did not know the elements of the offenses. (R:128-16) Taylor admitted that he signed the plea questionnaire that was in the record; but, significantly, the plea questionnaire does not contain a description of the elements of the offenses. (R:128-17)

Taylor told the court that his guilty plea was not entered voluntarily because the only reason he pleaded guilty was because he believed that Longacre was unprepared to defend him; and, further, his plea was not intelligently entered because he did not understand the nature of the offenses. (R:128-21)

Longacre did not testify at the postconviction motion hearing.

The court denied Taylor's postconviction motion to withdraw his pleas. The court found that, "Mr. Longacre is a

very practiced attorney. The Court had confidence in his abilities. There was no question in my mind that he was prepared for trial if that's what Mr. Taylor wanted, but clearly with all of the facts as they were known, the offer that [the prosecutor] was making was in Mr. Longacre's opinion in the best interest of this defendant. The Court accepted the plea, quite frankly, because I agreed with Mr. Longacre based upon the (inaudible)" (R:128-38) Further, "The Court is satisfied that in taking the plea as . . . I was doing it that I sufficiently explained to Mr. Taylor what those elements are, and your motion is denied. " (R:128-39, 40)

Argument

I. The circuit court erred in denying Taylor's postconviction motion to withdraw his no contest pleas.

The circuit court erred in denying Taylor's postconviction motion to withdraw his no contest pleas (so-called "Alford pleas"). Taylor established that the pleas were not knowingly entered, they were not voluntarily entered, and the record fails to demonstrate that there is strong proof of his guilt.

The pleas were not knowingly entered because the record of the plea hearing fails to demonstrate that the judge explained to Taylor the essential nature of the charges to which

he was pleading no contest. There is a plea questionnaire in the record, but the plea questionnaire does not inform Taylor of the elements of the offenses. Taylor testified at the motion hearing that he did not know the elements of the offenses, and the state made no effort to prove that Taylor did, in fact, know the elements. Thus, the plea was not knowingly entered.

The pleas were not voluntarily entered because Taylor testified that the only reason he entered the no contest pleas was because he did not believe that his attorney was prepared to defend him at trial. The state did not call the attorney as a witness; and, therefore, Taylor's testimony on this point is uncontroverted.

Finally, because these were "Alford pleas", it is required that the record demonstrates that there is strong proof of the defendant's guilt. Here, the record does not demonstrate strong proof of Taylor's guilt, and, at the postconviction motion hearing, the circuit court made no finding that there was strong proof of Taylor's guilt.

A. Standard of appellate review

In this case, Taylor sought to withdraw his guilty plea for three reasons: (1) the record of the plea colloquy does not establish that the court ensured that Taylor understood the essential nature of the charges to which he was pleading no contest; (2) that the state failed to make an adequate showing

that it possessed "strong proof" of Taylor's guilt; and, (3) Taylor's plea was not voluntary because he sincerely believed that his trial counsel was unprepared for trial. The first two allegations pertain to the sufficiency of the record. The last allegation pertains to facts outside the record, and which were the topic of an evidentiary hearing. Thus, there are differing standards of appellate review depending upon which claim the appellate court is considering.

i. Claim that the plea colloquy was defective: "Bangert standard"

In, *State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232, 233-234 (Wis. 1996), the court stated, "Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice." One of the situations where plea withdrawal is necessary to correct a manifest injustice is where the plea was entered without knowledge of the charge. *State v. Trochinski*, 253 Wis.2d 38, 644 N.W.2d 891 (2002)."

Recently, in *State v. Cajujuan Pegeese*, 2019 WI 60, ¶¶ 26-27, 387 Wis. 2d 119, 139–40, 928 N.W.2d 590, 600 the supreme court reaffirmed the so-called "*Bangert* procedure" for adjudicating a motion to withdraw a guilty plea after sentencing. The court explained:

> Defendants such as Pegeese who move to withdraw a plea based on a defective plea colloquy have the initial burden to meet a

two-prong test: (1) the defendant must "make a prima facie showing of a violation of Wis. Stat. § 971.08 or other court-mandated duty"; and (2) the defendant must "allege that the defendant did not, in fact, know or understand the information that should have been provided during the plea colloquy." *Id.*, ¶32 (citing *Bangert*, 131 Wis. 2d at 274, 389 N.W.2d 12). In order to make a prima facie showing, the defendant may not rely on conclusory allegations. Id. The defendant "must point to deficiencies in the plea hearing transcript" to meet his initial burden. Id. If the defendant fails to meet his initial burden, then the circuit court must deny the defendant's plea withdrawal motion. *See id.*

When a defendant successfully meets both prongs, then that defendant is entitled to an evidentiary hearing, also known as a "*Bangert* hearing." *Id.* If a *Bangert* hearing occurs, the burden of proof shifts to the State to show "by clear and convincing evidence that the defendant's plea, despite the inadequacy of the plea colloquy, was knowing, intelligent, and voluntary." *Id.* (citing *Bangert*, 131 Wis. 2d at 274, 389 N.W.2d 12). In attempting to meet its burden, "[t]he State may use 'any evidence' to prove that the defendant's plea was knowing, intelligent, and voluntary, including any documents in the record and testimony of the defendant or defendant's counsel." *Id.* (citing *Bangert*, 131 Wis. 2d at 274–75, 389 N.W.2d 12). If the State fails to meet its burden at the *Bangert* hearing, then the defendant is entitled to withdraw his guilty or no contest plea. *See id*

ii. Claim that defense counsel was unprepared: "Nelson/Bentley standard"

Taylor testified that his no contest pleas were not

voluntary because he reasonably believed the Longacre was unprepared to defend a trial.

It is well-settled that, "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.' [internal citation omitted] One way the defendant can show manifest injustice is to prove that his plea was not entered . . . voluntarily. [internal citation omitted] *State v. Taylor,* 2013 WI 34, ¶¶ 24-25, 347 Wis. 2d 30, 44–45, 829 N.W.2d 482, 489

"A plea not entered . . . voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right. [internal citation omitted]. Whether a plea was entered . . . voluntarily is a question of constitutional fact that is reviewed independently." *Taylor,* 347 Wis. 2d at 45.

In *State v. Hoppe*, 2009 WI 41, P45, 317 Wis. 2d 161, 185-186, 765 N.W.2d 794, 806, 2009 Wisc. LEXIS 31, *29 as in this case, the defendant claimed that his plea was involuntary because he believed his attorney was unprepared to defend him at trial. 317 Wis. 2d at 194, 765 N.W.2d at 810 There, as here, the court conducted a hearing into the claims. Ultimately, the circuit court disbelieved Hoppe's testimony that he perceived that his attorney was unprepared, but, nevertheless, the claim was the subject of an evidentiary hearing.

On appeal from an order denying the appellant's

postconviction motion seeking to withdraw his no contest plea, where the court has held an evidentiary hearing, the appellate court will, "[A]ccept the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. We independently determine whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." *Hoppe*, 2009 WI 41, P45, 317 Wis. 2d 161, 185-186, 765 N.W.2d 794, 806.

iii. Claim that there is no record of "strong proof" of Taylor's guilt.

Taylor's third claim is that the record fails to demonstrate that there is "strong proof" of his guilt. Appellate review of this claim is a version of the *Bangert* standard; however, concerning the factual basis for the plea, the record must contain "strong proof" of the defendant's guilt.

In *State v. Smith*, *supra*, the supreme court explained, "When the plea entered is an *Alford* plea, the factual basis is deemed sufficient only if there is strong proof of guilt that the defendant committed the crime to which the defendant pleads." *Id.* at 25. Thus, "a trial court is required to find a sufficient factual basis, *i.e.*, strong evidence of guilt, in order to conclude that the defendant committed the crime to which he or she is entering the plea." *Id.* at 26.

B. Standards as applied to Taylor's motion

i. The plea colloquy was defective, and the state failed to present any proof that Taylor, in fact, knew the elements of the offenses.

The requirements for acceptance of a guilty plea are prescribed by statute. §971.08(1), Stats., provides that, "Before the court accepts a plea of guilty or no contest, it shall do all of the following: (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and ***t***he potential punishment if convicted." (emphasis provided).

A defendant seeking to withdraw his plea on the grounds that he did not understand the elements of the offense, must show the following: (1) Establish that the record of the plea hearing was inadequate; and, (2) Affirmatively allege that the defendant did not know the nature of the charges. If this is accomplished, the court must then conduct a hearing into whether the plea was validly entered. *See, e.g., State v. Howell,* 2007 WI 75, P27 (Wis. 2007) At this hearing, it is the state's burden to establish that the defendant's plea was, in fact, intelligently entered. *State v. Bangert*, 131 Wis. 2d 246, 261-262 (Wis. 1986)

Where, as here, the plea questionnaire is incorporated into the court's plea colloquy, the sufficiency of the plea questionnaire must be considered. In, *State v. Brandt*, 226 Wis.

2d 610, 621-622 (Wis. 1999), the Supreme Court held that where, "[T[he plea questionnaire is the underlying basis on which the plea is accepted, the sufficiency of the questionnaire drives the sufficiency of the plea. If the relied upon part of the questionnaire is deficient, so too is the plea taken in reliance of that part of the questionnaire. "

In, *State v. Brown*, 2006 WI 100, P19 (Wis. 2006), which also involved a post-sentencing motion to withdraw a guilty plea, the court addressed the defendant in almost the same words that the court addressed Taylor in this case:

> THE COURT: All right. Then he can sign the one that he's got.
> MR. EARLE: I wasn't able to put all the elements of all three offenses on each one. I started to fill out one and decided I could do it orally with him. So I don't have three for him to sign, just this one. I would have to do three more.
> THE COURT: But he understands those elements of the offenses?
> MR. EARLE: Yes.
> THE COURT: You've gone over those elements with him?
> MR. EARLE: Yes.
> THE COURT: Okay. Sir, do you understand what you're charged with, the **charges** against you? The first degree sexual assault while armed; is that correct?
> THE DEFENDANT: Yeah.
> THE COURT: And the armed robbery, party to a crime?
> THE DEFENDANT: Yeah.
> THE COURT: And the kidnapping, party to a crime?
> THE DEFENDANT: Yeah.
> THE COURT: You have read the Complaint or had it read to you?
> THE DEFENDANT: Yeah.
> THE COURT: So you understand it?

THE DEFENDANT: Yes.

In *Brown*, the Supreme Court found this very plea colloquy woefully inadequate to meet the statutory requirement that, before accepting a guilty plea, the court explain to the defendant the essential nature of the charges and that the defendant understands the charges. The *Brown* court wrote:

> In the present case, the circuit court did not follow any of the methods established in *Bangert*. The circuit court never enumerated, explained, or discussed the elements of first-degree sexual assault, armed robbery, or kidnapping, or the facts making up the elements. Although Brown's attorney stated that he had explained the nature of the charges to Brown, the circuit court never asked either Brown or his attorney to summarize the extent of the explanation or the elements of the crimes on the record. The circuit court never referred to the record from prior court proceedings to establish that Brown understood the nature of the charges. n25 The circuit court never referred to or summarized the charges as found in a plea questionnaire or other writing signed by Brown, because there were no such documents.

Brown, 2006 WI 100, P53.

Here, the judge never explained to Taylor the elements of the offenses. Instead, the court relied on a plea questionnaire that defense counsel supposedly completed with Taylor. The plea questionnaire, though, does not set forth the elements of the offenses.

Thus, a presumption arises that Taylor's plea was not knowingly entered. The plea colloquy was defective in that it failed to inform Taylor of the essential elements of the offenses.

The burden, then, shifted to the state to prove that Taylor nevertheless knew the elements of the offenses. Here, the state offered no evidence at all. The prosecutor did not even question Taylor about his knowledge of the elements on cross-examination. Rather, the prosecutor focused on why Taylor believed that Longacre was unprepared for trial.

Thus, the court's plea colloquy with Taylor was defective. The record demonstrates that the judge did not explain the essential elements of the offense to Taylor. Taylor testified at the motion hearing that he did not know the elements of the offenses; and the state presented utterly no evidence that Taylor did, in fact, know the elements of the offense.

ii. Taylor's plea was involuntary because he reasonably testified that his attorney was not prepared for trial.

"A plea not entered . . . voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right. [internal citation omitted]. Whether a plea was entered . . . voluntarily is a question of constitutional fact that is reviewed independently." *Taylor,* 347 Wis. 2d at 45.

A defendant's motion is treated as a so-called "*Nelson/Bentley* motion"[3] where it alleges facts that are

[3] As opposed to a "Bangert Motion" which occurs when there is a defect in the plea colloquy

extrinsic to the plea colloquy. *State v. Hoppe*, 2009 WI 41, ¶ 59, 317 Wis. 2d 161, 765 N.W.2d 794; *see also, Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); *State v. Bentley,* 201 Wis. 2d 303, 548 N.W.2d 50 (1996). The first element of the *Nelson/Bentley* test looks at "whether a motion alleges facts which, if true, would entitle a defendant to relief . . . ." *Bentley*, 201 Wis. 2d at 310. If the motion meets that standard, the circuit court must hold an evidentiary hearing. *Id.* Should the motion fail the first *Nelson/Bentley* prong, the second prong is applied: the circuit court has discretion to deny a withdrawal motion without a hearing if (1) the defendant fails to allege sufficient facts in his motion to raise a question of fact, (2) the withdrawal motion presents only conclusory allegations, or (3) the record conclusively demonstrates that the defendant is not entitled to relief. Id. at 309-10 (quoting *Nelson,* 54 Wis. 2d at 497-98)

In *Hoppe*, the defendant claimed that his plea was involuntary because he believed his attorney was unprepared to defend him at trial. 317 Wis. 2d at 194, 765 N.W.2d at 810 There, the court conducted a hearing into the claims. Ultimately, the circuit court disbelieved Hoppe's testimony that he perceived that his attorney was unprepared, but, nevertheless, the claim was the subject of an evidentiary hearing.

Here, Taylor testified plausibly that, from his subjective

point of view, Longacre was not prepared for trial; and that this is what prompted Taylor to plead no contest. Although the prosecutor extensively cross-examined Taylor about his belief, the state did not call Longacre as a witness at the postconviction motion hearing. As such, Taylor's assertions are, essentially, uncontroverted. The judge made so-called findings of fact that Longacre was a "seasoned attorney", and the judge had no doubt that Longacre was prepared to defend Taylor at trial. But his "finding" is evidently based upon the judge's knowledge of Longacre's reputation, not upon any evidence presented at the hearing.

Plainly, then, Taylor established that his no contest plea was not voluntarily entered.

iii. The record fails to show that there is strong proof of Taylor's guilt.

Before the court may properly accept an *Alford* plea, the record must demonstrate that there is "strong proof of guilt". *State v. Garcia*, 192 Wis. 2d 845, 859-60, 532 N.W.2d 111, 116-17 (1995) That is, "[T]he circuit court must examine the record to determine whether a "sufficient factual basis was established at the plea proceeding to substantially negate [the] defendant's claim of innocence." *State v. Nash*, 2020 WI 85, P36, 394 Wis. 2d 238, 267, 951 N.W.2d 404, 418, 2020 Wisc.

LEXIS 187, *30

"'"Strong proof of guilt' is not the equivalent of proof beyond a reasonable doubt, but it is 'clearly greater than what is needed to meet the factual basis requirement under a guilty plea." *Nash*, 2020 WI 85, P35, 394 Wis. 2d 238, 266, 951 N.W.2d 404, 417, 2020 Wisc. LEXIS 187, *29

"When determining whether the record contains facts sufficient to accept a defendant's *Alford* plea, the circuit court must find strong proof of guilt for each element of the alleged crime. *See Smith,* 202 Wis. 2d at 26 ("If there is no evidence as to one of the elements of the crime, the defendant's *Alford* plea cannot be accepted and the factual basis requirement cannot be met."). Accordingly, to accept an *Alford* plea, the circuit court looks at the record as a whole and determines whether the facts in the record show a strong proof of guilt as to each element of the alleged crime."*Nash*, 2020 WI 85, P37, 394 Wis. 2d 238, 267-268, 951 N.W.2d 404, 418, 2020 Wisc. LEXIS 187, *30-31

To convict Taylor of second-degree recklessly endangering safety, the State was required to prove that: (1) Taylor endangered the safety of another human being; and (2) Taylor endangered the safety of another by criminally reckless

conduct. Wis JI-Criminal 1347. This requires that Taylor's conduct created an unreasonable and substantial risk of death or great bodily harm to another and that Taylor was aware that his conduct created such a risk.

First, there is no strong proof that Taylor was the person who answered the door. According to the prosecutor's proffer, JLM did not know Taylor and, at most, he could testify that the man at the door had a facial tattoo that was similar to a tattoo that Taylor has on his face. The state seems to assert that there is circumstantial evidence that Taylor answered the door because, during the shooting, Lowry was seen looking out the window. This, of course, assumes that there were only two people in the house. There is nothing in the prosecutor's proffer to substantiate any claim that there were only two people in the house. In fact, according to the proffer, Lowery was seen by police jumping out of the window shortly after the shooting.

More importantly, there is almost no detail given about the circumstances of the shooting. The circumstances of the shooting must demonstrate that Taylor's conduct created an unreasonable and substantial risk of death or great bodily harm, and that he was aware of the risk. Concerning the shooting,

here is what the prosecutor said, "[JLM] would testify that they walked up to the door. *He did have a handgun*. He thought they were going to buy weed. When the door opened, he saw a person that he does not know that he identified as wearing dreadlocks that were blond tips with a distinctive tattoo on his face, which is Damon Taylor. He saw the gun fire at them, and he ran away. He returned fire, um, as he ran away trying to keep the person from coming out after them." (R:57-68)

These facts fall woefully short of being "strong proof" that the shooter's behavior was unreasonable. Where a person is acting in self-defense, behavior that creates a substantial risk of death or great bodily harm is not unreasonable. In other words, if a defendant charged with a crime of recklessness raises the issue of self-defense, the burden then shifts to the state to prove that the defendant's behavior was unreasonable. *See, State v. Austin, 2013 WI App 96, P1, 349 Wis. 2d 744, 747, 836 N.W.2d 833, 834, 2013 Wisc. App. LEXIS 615, *1, 2013 WL 3884140*

The prosecutor's proffer raises the specter of self-defense. This was going to be a drug deal, and Martin went to the drug deal with a gun. The person answering the door certainly could have reasonably believed that this was

going to be a home-invasion robbery. Thus, in order to prevail at trial, the state would have had to prove beyond a reasonable doubt that the person answering the door did not reasonably believe he was about to be robbed, and was acting in self-defense.

According to the proffer, the "strong proof" that Taylor possessed a firearm is a Facebook photo of him holding what appears to be a pistol. Obviously, there is no evidence that this was even a real pistol; and, therefore, it is significantly less than strong proof.[4] Much less does the Facebook photo establish that Taylor possessed the firearm during the charging period alleged in the information.

Thus, the record fails to demonstrate that the court properly accepted Taylor's no contest pleas under *Alford.* Additionally, in denying Taylor's motion, the circuit court made no finding that there was "strong proof" of Taylor's guilt.

Conclusion

For these reasons, it is respectfully request that the court

[4] Without conceding that there was strong proof to prove Taylor guilty of possessing methamphetamine and failure to comply with an officer's attempt to take Taylor into custody, these issues will not be discussed. If the court permits Taylor to withdraw his guilty pleas to recklessly endangering safety and felon in possession, the court will also have to vacate the guilty pleas on those two counts because the plea was entered in reliance on the totality of the plea agreement.

of appeals reverse the order of the circuit court denying Taylor's postconviction motion to withdraw his no contest pleas; and remand the matter to the circuit court with instructions to grant the motion.

Dated at Milwaukee, Wisconsin, this 24th day of May, 2022.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant
Electronically signed by:
Jeffrey W. Jensen
State Bar No. 01012529

111 E. Wisconsin Avenue
Suite 1925
Milwaukee, WI 53202-4825

414.671.9484
jensen@milwaukeecriminaldefense.pro

Certification as to Length and E-Filing

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 6061 words.

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