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

Defendant-Appellant's Reply Brief

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Argument

I. The state never asserted before the circuit court that it had proved that Taylor, in fact, understood the elements of the offenses; and, therefore, that argument is forfeited on appeal.

As Taylor pointed out in his opening brief, where a motion to withdraw a plea is premised upon a defect in the plea colloquy, such as where the court does not create a record sufficient to demonstrate that the defendant understands the essential nature of the offenses, the defendant's motion must (1) demonstrate that the plea colloquy is, in fact, defective; (2) affirmatively allege that the defendant did not understand the nature of the offenses; and, if so, then the court must conduct an evidentiary hearing at which the *burden of proof shifts to the state* to prove that the defendant did, in fact, understand the nature of the offense. *See, e.g. State v. Cajujuan Pegeese*, 2019 WI 60, ¶¶ 26-27, 387 Wis. 2d 119, 139–40, 928 N.W.2d 590, 600

Here, the court conducted an evidentiary hearing. Thus, the circuit court made an implicit finding that the plea colloquy was defective.

In its brief, the state makes the remarkable assertion-- for the first time on appeal-- that it did, in fact, prove that Taylor actually understood the nature of the offenses. According to

the state, "[T]he totality of the record shows that Taylor in fact understood the elements of the crimes with which he was charged . . . The circuit court's finding that Taylor understood the elements of the crimes to which he pleaded was based primarily on Taylor's own representations to the court." [Resp. brief p. 12]

There are three major problems with the state's argument. First off, the argument was forfeited on appeal because in the circuit court the state never attempted to meet its burden of proving that Taylor actually understood the nature of the offenses. Secondly, the circuit court made no specific finding that Taylor actually understood the nature of the offenses. And, finally, regardless of whether the state forfeited this argument, Taylor's admission that his attorney talked to him about the elements of the offenses falls woefully short of proving that Taylor understood the elements of the offenses. There is no evidence in the record to show *what* the attorney said to Taylor about the elements of the offenses.

As mentioned above, for the first time on appeal, the state claims that it successfully met its burden of proving that, despite his testimony to the contrary, Taylor actually understood the nature of the offenses.

A party to an appeal cannot urge the court of appeals to affirm or reverse an order on a basis that was not presented to and ruled upon by the circuit court. *See, e.g., State v. Holt,*

128 Wis. 2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985); *State v. Rogers,* 196 Wis. 2d 817, 826, 539 N.W.2d 897, 900, 1995 Wisc.

Until now, the state has *never* claimed that Taylor actually understood the nature of the offenses. In its written response to Taylor's postconviction motion, the state made no claim that it could establish that Taylor, in fact, understood the nature of the charges. Rather, the closest the state came is when it wrote, "He never gave any indication he did understand the process . . ." [R:113-2]

The state's argument at the postconviction motion hearing was no better. The prosecutor said, "Um, the plea questionnaire and the transcript together I think clearly show that the judge did talk to Mr. Longacre, and Mr. Longacre said that he did talk to Mr. Taylor about the elements. It would be Mr. Taylor's word against Mr. Longacre's[1]." [R:128-38]

Finally, in denying Taylor's postconviction motion, the judge did not make any finding that the state proved that Taylor understood the essential elements of the offenses. Here is the circuit court's ruling on that point, "The Court is satisfied that in taking the plea as, um, I was doing it that I sufficiently explained to Mr. Taylor what those elements are, and your motion is denied." [R:128-39, 40] In other words, the judge made a "finding" that the plea colloquy *was not defective* concerning the

[1] Longacre's "word" is not in the record. The state did not call him as a witness.

court's explanation of the nature of the offenses.[2] The court made no factual finding that Taylor actually understood the nature of the offenses.

First off, the plea colloquy is obviously defective. The court did not explain to Taylor the essential elements of the offenses. Rather, the judge merely told Taylor the name of each of the offenses, and then relied upon whatever it was that Longacre said to Taylor during their discussion about the plea.

More importantly, though, Taylor's admission that Longacre talked to him about the nature of the offenses, and his conclusory assertion that he understood the elements of the offenses, standing alone, is wholly inadequate to demonstrate that Taylor actually and accurately understood the elements of the charges. There is no evidence as to what Longacre told Taylor about the nature of the offenses. Longacre could have told Taylor almost anything about the nature of the offenses.

Likewise, Taylor's blanket assertion that he understood the nature of the offenses is equally meaningless. The whole point of requiring the court to make a record concerning the nature of the offenses is to avoid the situation where a defendant may believe that his conduct was illegal, but where the conduct does not actually violate the law.

[2] This, of course, is wholly at odds with the court's decision to conduct an evidentiary hearing into Taylor's motion. Implicit in the court's decision to set the matter for an evidentiary hearing is a finding that the plea colloquy is, in fact, defective.

II. Taylor made no claim of ineffective assistance of counsel; and, therefore, he need not prove deficient performance or prejudice.

Taylor's postconviction motion alleged that, in part, his plea was involuntary because he held a subjective belief that his attorney was unprepared for trial, and this is what prompted him to enter the pleas. At the evidentiary hearing, Taylor explained why he believed his attorney was unprepared. Whether Longacre was in fact prepared or not, is wholly beside the point. The issue of unpreparedness was raised only insofar as it informed Taylor's plea decision.

In its brief, the state at first appeared to understand Taylor's argument. The state acknowledged, "[T]aylor does not even claim that his attorney performed deficiently in any way. (Taylor's Br. 23.) Instead, he argues only that he feared his attorney was not prepared for trial." [Resp. brief p. 14]

Nevertheless, the state then boldly proclaims, "That speculative fear does not come close to meeting his burden of proving ineffective assistance of counsel." [Resp. brief p. 14]

Taylor did not claim ineffective assistance of counsel; and, therefore, he had no burden of proving that his attorney was ineffective. The state's argument makes no sense.

Rather, Taylor asserted that the circumstances and the behavior of Longacre reasonably led Taylor to believe that Longacre was not properly prepared. This is what, in part,

prompted Taylor to plead no contest. The state presented no evidence so, other than what the prosecutor may have accomplished on cross-examination of Taylor, there is no evidence in the record to contradict Taylor's claim concerning his subjective belief about Longacre's preparedness.

Undeterred, the state claims that, "At his plea hearing, Taylor told the court that he was not threatened, forced, or coerced 'in any fashion' to enter a plea. [Resp. brief p. 15]

No reasonable person would think that Taylor's subjective belief that his attorney was unprepared for trial amounts to a threat or some form of coercion. Thus, Taylor's assertion that he was not threatened or coerced certainly does not permit the inference that Taylor did not really believe that Longacre was unprepared.

Dated at Milwaukee, Wisconsin, this 13th day of August, 2022.

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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 1554 words

Dated at Milwaukee, Wisconsin, this 13th day of August, 2022

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