

FILED
06-09-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP450-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CAROLINE J. ARNDT,

Defendant-Appellant.

On Notice of Appeal to Review a Judgment of
Conviction and Order Denying Postconviction Relief
Entered in the Circuit Court for Racine County, the
Honorable Stephen A. Simanek and the Honorable
Mark F. Nielsen presiding

BRIEF OF
DEFENDANT-APPELLANT

BRIAN P. MULLINS
Assistant State Public Defender
State Bar No. 1026891

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
mullinsb@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	5
POSITION ON ORAL ARGUMENT AND PUBLICATION	6
STATEMENT OF THE CASE	6
ARGUMENT	12
I. Ms. Arndt is entitled to an evidentiary hearing regarding her claim to withdraw her guilty plea.	12
A. Standard of review	12
B. Legal standards	12
C. Analysis	15
II. The postconviction court erroneously exercised its discretion when it denied Ms. Arndt's request to amend the judgment of conviction by removing the domestic abuse surcharge from the description of the offense.	17
A. Standard of review	17
B. Analysis	18
CONCLUSION	20
CERTIFICATION AS TO FORM/LENGTH	21
CERTIFICATION AS TO APPENDIX	21

CASES CITED

<i>Cree, Inc. v. Labor & Industry Review Comm’n</i> , 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837	19
<i>Krueger v. State</i> , 86 Wis.2d 435, 272 N.W.2d 847 (1979)	17
<i>State v. Allen</i> , 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433	16, 17
<i>State v. Bangert</i> , 131 Wis. 2d 246, 389 N.W.2d 12 (1986)	13
<i>State v. Brown</i> , 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906 .	12, 13, 15
<i>State v. Giebel</i> , 198 Wis. 2d 207, 541 N.W.2d 815 (Ct. App. 1995)	12
<i>State v. McCallum</i> , 208 Wis. 2d 463, 561 N.W.2d 707 (1997) ..	17
<i>State v. Neis</i> , 2010 WI App 120, 329 Wis.2d 270, 789 N.W.2d 754 (unpublished)	18
<i>State v. Thomas</i> , 2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836	12

STATUTES CITEDWisconsin Statutes

§ 809.23(3)	19
§ 814.76.....	18
§ 814.76(15)	18
§ 814.76(1j)	18
§ 814.76(6)	18
§ 814.76(7m)	18
§ 939.48.....	16
§ 939.51(3)(b)	6
§ 939.62(1)(a)	6
§ 947.01.....	18
§ 947.01(1)	6, 11, 15
§ 968.075.....	11
§ 968.075(1)(a).....	6, 10
§ 971.08.....	12, 13
§ 973.055.....	11
§ 973.055(1)	6, 10, 11, 18

ISSUES PRESENTED

1. When Caroline Arndt pled guilty to disorderly conduct, the circuit court omitted six of ten admonitions required by Wisconsin law before a court accepts a guilty plea – including the elements of the offense and potential defenses to the offense. In her postconviction motion, Ms. Arndt states that she did not understand the elements of disorderly conduct or that she could have argued self-defense if the case proceeded to trial.

Does Ms. Arndt's postconviction motion require an evidentiary hearing because she alleges sufficient facts that, if true, entitle her to withdraw her guilty plea?

The postconviction court answered no because Ms. Arndt's postconviction offer of proof was inconsistent with her statements during the plea hearing.

2. Ms. Arndt was convicted of disorderly conduct and assessed a domestic abuse surcharge. Should the judgment of conviction refer to the domestic abuse surcharge in its description of the offense?

The postconviction court denied Ms. Arndt's request to amend the judgment of conviction by deleting the domestic abuse surcharge from the

description of the offense and referring to it as a financial obligation.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Ms. Arndt does not request oral argument or publication because the issues concern established law applied to the facts of this case.

STATEMENT OF THE CASE

A. Criminal Complaint

A criminal complaint filed in the Racine County Circuit Court on October 9, 2020, charged Ms. Arndt with disorderly conduct as a repeat offender, contrary to Wis. Stats. §§ 947.01(1), 939.51(3)(b), 968.075(1)(a), 939.62(1)(a), and 973.055(1). (R. 2:1). The complaint included a domestic abuse surcharge to the offense pursuant to Wis. Stat. § 973.055(1). (R. 2:1).

The complaint alleged that on October 8, 2020, Ms. Arndt was asked to leave the AmericInn Lodge and Suites by hotel personnel because she was intoxicated and was not a registered guest. (R. 2:2). Burlington Police transported Ms. Arndt from the AmericInn to her home in Rochester, where she lived with her father - MJP. (R. 2:2).

MJP reported to police that when Ms. Arndt came home, she wanted to smoke a cigarette outside but he did not want her to leave the house because she

was intoxicated. (R. 2:2). According to MJP, Ms. Arndt became agitated, tried to go toward the front door, and pushed him with both hands on his chest. (R. 2:2). MJP said he restrained Ms. Arndt, but she continued to fight with him. The complaint states that Ms. Arndt told police that MJP struck her, but she had no visible injuries. (R. 2:2). The complaint charged that Ms. Arndt was convicted of at least three prior misdemeanors within five years before the offense occurred. (R. 2:3).

B. Plea and Sentencing

Plea and sentencing hearings were held on April 9, 2021.¹ Pursuant to a plea agreement, the State agreed to dismiss the repeat offender enhancement while Ms. Arndt pled guilty to disorderly conduct. (R. 25:2). The State also agreed to recommend a sentence of fifteen days in jail. (R. 25:2).

Ms. Arndt signed a plea questionnaire and waiver of rights form on April 9, 2021. The form stated that the parties agreed that Ms. Arndt pled to the charge alleged in the complaint without the repeater enhancer with the State recommending fifteen days in jail and Ms. Arndt free to argue for any sentence. (R. 17:2).

The plea questionnaire indicated that Ms. Arndt had a high school diploma, GED or HSED, understood English, understood the charge to which she was pleading, was currently receiving treatment for a

¹ The Honorable Stephen A. Simanek presided at the plea and sentencing hearings. The Honorable Mark F. Nielsen addressed the postconviction motion.

mental illness or disorder, and consumed prescribed medications within the last twenty-four hours. (R. 17:1). The plea questionnaire listed the trial rights Ms. Arndt waived by pleading guilty and that the judge was not bound by any plea agreement. (R. 17:1). The questionnaire described the maximum penalties for the offense as \$1,000 fine and ninety days in jail and the mandatory minimum penalty of \$100 for the domestic abuse surcharge. (R.17:1). The plea questionnaire said that Ms. Arndt understood if the court accepted her plea, it would find her guilty of the offense based upon the facts in the criminal complaint. (R. 17:2). The jury instructions for disorderly conduct were attached to the plea questionnaire. (R. 17:3).

Ms. Arndt advised the circuit court that she reviewed the plea questionnaire with her lawyer and understood its contents. (R. 25:3). The circuit court remarked: "I'm almost afraid to ask the next question. It says you're on medication." (R. 25:3). Ms. Arndt affirmed that she was on medication. The circuit court then asked: "Is there anything with regard to that medication that would cause you to not understand or know what's going on this morning?" Ms. Arndt said "no." (R. 25:3).

The Court reviewed the maximum penalties with Ms. Arndt and noted the repeat offender enhancement was dismissed. Ms. Arndt said she understood the maximum penalties. (R. 25:3).

The circuit court asked Ms. Arndt if she had enough time to talk with her lawyer. Ms. Arndt said "yes." (R. 25:4). The circuit court asked Ms. Arndt if she had any questions about "what's going on." Ms. Arndt said "no." (R. 25:4). Defense counsel indicated

she was satisfied Ms. Arndt understood her rights, the charge, the penalty, and that Ms. Arndt wanted to voluntarily enter a guilty plea. (R. 25:4). The circuit court clarified that the repeater allegation was dismissed, but the domestic abuse surcharge remained and carried a mandatory court cost. (R. 25:4). Defense counsel did not object to the circuit court relying on the complaint as the factual basis for Ms. Arndt's plea, and the circuit court accepted her guilty plea. (R. 25:5).

The circuit court proceeded with Ms. Arndt's sentencing. Defense counsel noted that, although Ms. Arndt started the altercation, her father was the primary aggressor and held her down until police arrived. (R. 25:6).

The circuit court sentenced Ms. Arndt to time served (fourteen days in jail), no fine, and court costs totaling \$543. (R. 25:8).

C. Postconviction Proceedings

Ms. Arndt filed a postconviction motion asking the circuit court to allow her to withdraw her guilty plea to disorderly conduct. (R. 32:1-9). Ms. Arndt argued that the circuit court did not comply with the requirements to accept a guilty plea because the court did not: 1) determine the extent of Ms. Arndt's education and general comprehension to assess her ability to understand the issues at the hearing; 2) determine whether any promises, agreements, or threats were made in connection with her plea; 3) alert Ms. Arndt that an attorney may discover defenses or mitigating circumstances; 4) establish her understanding of the nature of the crime with which

she was charged; 5) inform Ms. Arndt of the constitutional rights she waived by entering a plea and verify that she understood she gave up those rights; and 6) establish personally that Ms. Arndt understood the court was not bound by the terms of the plea agreement. (R. 32:7).

Ms. Arndt's motion advised the circuit court that she did not understand the elements of disorderly conduct or that she could have argued self-defense if the case proceeded to trial. (R. 32:7-8). The motion explained that, although the plea questionnaire included the jury instruction for disorderly conduct, she was prescribed three psychotropic medications that affected her ability to comprehend the plea questionnaire. (R. 32:8). The motion requested an evidentiary hearing to determine whether Ms. Arndt did not understand an aspect of the plea because the court did not conduct a proper colloquy. (R. 32:7-8).

The motion also asked the circuit court to amend the judgment of conviction, which stated that she was convicted of "[968.075(1)(a) Domestic Abuse] Disorderly Conduct." (R. 15:1). Ms. Arndt asked the court to remove the reference to the domestic abuse surcharge from the description of the offense because she was convicted of disorderly conduct, but subject to the domestic abuse surcharge under Wis. Stat. § 973.055(1). (R. 32:8).

The postconviction court denied Ms. Arndt's postconviction motion to withdraw her plea without holding an evidentiary hearing:

While the plea colloquay [sic] did not explicitly enumerate the elements of the offense, it is supported by a plea questionnaire that explicitly listed the elements of the offense in its attachment. It is also supported by a questionnaire that explicitly lists the seven rights that make up the right to a jury trial, which are explicitly checked off. The defendant stated that she had gone over the form, understood the form and had no questions about the form. Contrary to her assertion in the motion, she explicitly stated that she was not affected by her medications in understanding the form and its contents.

(R. 34:1).

The postconviction court granted Ms. Arndt's motion to amend the judgment of conviction to reflect that the citation to Wis. Stat. § 968.075 was in error and the correct citation was to Wis. Stat. § 973.055. (R. 34:2). The amended judgment of conviction states that Ms. Arndt was found guilty of the following offense: "[973.055(1) Domestic Abuse Surcharge] Disorderly Conduct 947.01(1)." (R. 35:1).

Subsequently, Ms. Arndt asked the postconviction court to reconsider its order regarding the amended judgment of conviction and requested the court to further amend the judgment of conviction by moving the citation to "973.055(1) Domestic Abuse Surcharge" from the judgment's description of the offense to the judgment's summary of financial obligations. (R. 36:2). Ms. Arndt argued that surcharges are customarily referred to in the

judgment of conviction's financial obligation section, not as a description of the offense. (R. 36:2).

The postconviction court denied Ms. Arndt's motion to reconsider by written order. (R. 37:1). Ms. Arndt then filed a timely notice of appeal. (R. 38:1).

ARGUMENT

I. Ms. Arndt is entitled to an evidentiary hearing regarding her claim to withdraw her guilty plea.

A. Standard of review

Whether Ms. Arndt established that the plea colloquy did not satisfy the requirements of Wis. Stat. § 971.08 or other mandatory duties is reviewed de novo. *State v. Brown*, 2006 WI 100, ¶ 21, 293 Wis. 2d 594, 716 N.W.2d 906. Whether Ms. Arndt sufficiently alleged that she did not know or understand information that should have been provided at the plea hearing is a legal issue that is also reviewed de novo. *Id.*

B. Legal standards

To withdraw her plea after sentencing, Ms. Arndt must establish by clear and convincing evidence that failing to allow plea withdrawal will result in a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. A manifest injustice occurs where a plea is not knowing, intelligent, and voluntary. *State v. Giebel*, 198 Wis. 2d 207, 212, 541

N.W.2d 815 (Ct. App. 1995). “When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right, because such a plea violates fundamental due process.” *Brown*, 2006 WI 100, ¶ 19.

To make a prima facie case for plea withdrawal, Ms. Arndt must show that the circuit court did not comply with the requirements of Wis. Stat. § 971.08, or other mandatory duties, when it accepted her plea. *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Ms. Arndt must also allege that she “in fact did not know or understand the information which should have been provided at the plea hearing.” *Id.* at 274. Once the defendant makes a prima facie case, the burden shifts to the State to prove by clear and convincing evidence that the defendant’s plea was knowingly, voluntarily, and intelligently entered despite the inadequacy of the record at the plea hearing. *Id.*

In *Brown*, 2006 WI 100, ¶ 35, the Supreme Court reviewed the trial court’s mandatory duties during a plea hearing to personally address the defendant and:

- (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
- (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, [her] appearance at the hearing, or any decision to forgo an attorney;
- (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating

circumstances that would not be apparent to a layman such as the defendant;

(4) Ensure the defendant understands that if [s]he is indigent and cannot afford an attorney, an attorney will be provided at no expense to [her];

(5) Establish the defendant's understanding of the nature of the crime with which [s]he is charged and the range of punishments to which [s]he is subjecting himself by entering a plea;

(6) Ascertain personally whether a factual basis exists to support the plea;

(7) Inform the defendant of the constitutional rights [s]he waives by entering a plea and verify that the defendant understands [s]he is giving up these rights;

(8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;

(9) Notify the defendant of the direct consequences of [her] plea; and

(10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

C. Analysis

The circuit court did not comply with the following requirements to accept a guilty plea: 1) determine the extent of Ms. Arndt's education and general comprehension to assess her ability to understand the issues at the hearing; 2) determine whether any promises, agreements, or threats were made in connection with her plea; 3) alert Ms. Arndt that an attorney may discover defenses or mitigating circumstances; 4) establish her understanding of the nature of the crime with which she was charged; 5) inform Ms. Arndt of the constitutional rights she waived by entering a plea and verified that she understood she gave up those rights; and 6) establish personally that Ms. Arndt understood the Court was not bound by the terms of the plea agreement.

If the Court fails to meet the requirements to accept a guilty plea, an evidentiary hearing is necessary if the defendant's postconviction motion alleges that she did not understand an aspect of the plea because of the omission. *Brown*, 2006 WI 100, ¶ 36. As alleged in her postconviction motion, Ms. Arndt would testify at an evidentiary hearing that she did not understand the elements of disorderly conduct. Specifically, she did not understand that the State needed to prove: 1) that she engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct; and 2) the conduct tended to cause or provoke a disturbance. *See* Wis. Stat. § 947.01(1). Ms. Arndt would also testify that she did not understand that she could have

argued self-defense if the case proceeded to trial. *See* Wis. Stat. § 939.48. Although Ms. Arndt's plea questionnaire included the jury instruction for disorderly conduct, she would testify that she was prescribed three psychotropic medications that affected her ability to comprehend the plea questionnaire.

Ms. Arndt's postconviction motion alleged who, what and where by citing the plea colloquy requirements that the circuit court omitted. The motion also alleged why and how she did not understand the elements of the offense and a potential defense to the offense by the circuit court's omissions. Ms. Arndt's postconviction motion therefore raised sufficient facts which, if true, entitle her to relief. *See State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433 (proposing that a postconviction motion alleging the "five 'w's' and one 'h' meets the pleading requirements for a postconviction motion to withdraw a plea).

The postconviction court acknowledged that the circuit court did not review the elements of the offense with Ms. Arndt during the plea colloquy. However, the postconviction court did not find Ms. Arndt's postconviction offer of proof credible because, "[c]ontrary to her assertion in the motion, she explicitly stated to Judge Simanek that she was not affected by her medications in understanding the form and its contents." (R. 34:1).

The postconviction court erroneously exercised its discretion because its order denying Ms. Arndt's postconviction motion was based on an erroneous application of law. *See State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707, 710 (1997). The postconviction court assessed Ms. Arndt's credibility without holding an evidentiary hearing, which is the proper forum to resolve witness inconsistencies and to determine Ms. Arndt's credibility. *See Allen*, 2004 WI 106, ¶ 12 n.6 (“[i]f the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing”).

Ms. Arndt asks the Court to reverse the postconviction court's order denying her postconviction motion and remand to the circuit court with directions to hold an evidentiary hearing.

II. The postconviction court erroneously exercised its discretion when it denied Ms. Arndt's request to amend the judgment of conviction by removing the domestic abuse surcharge from the description of the offense.

A. Standard of review

A trial court has the power to amend a judgment of conviction to correct a clerical error. *Krueger v. State*, 86 Wis.2d 435, 439, 272 N.W.2d 847 (1979). This Court reviews the circuit court's order denying a motion to amend a judgment of conviction for the erroneous exercise of discretion. *Id.*

B. Analysis

The amended judgment of conviction describes the offense as “[973.055(1) Domestic Abuse Surcharge] Disorderly Conduct 947.01.” (R. 35:1). Ms. Arndt asked the postconviction court to reconsider its motion to amend the judgment of conviction by moving the citation to “973.055(1) Domestic Abuse Surcharge” from the judgment’s description of the offense to the judgment’s summary of financial obligations.

Section 973.055(1) directs the circuit court to impose a domestic abuse surcharge for defendants convicted of qualifying offenses pursuant to chapter 814 of the Wisconsin Statutes, which provides for court costs, fees, and surcharges. Section 814.76 lists the various surcharges for criminal actions, including the domestic abuse surcharge. Wis. Stat. § 814.76(6). Among other surcharges listed are child pornography, § 814.76(1j); ignition interlock, § 814.76(7m); and restitution, § 814.76(15). Those surcharges are customarily cited in the judgment of conviction’s financial obligation section, not as a description of the offense.

Ms. Arndt was convicted of disorderly conduct. Similar to restitution and the ignition interlock surcharge, the domestic abuse surcharge was a collateral consequence of her conviction and not an independent offense. *See State v. Neis*, 2010 WI App 120, ¶ 15, 329 Wis.2d 270, 789 N.W.2d 754

(unpublished).² The judgment reflecting the domestic abuse surcharge as a description of her offense and not a financial obligation is likely a clerical error. But it is a clerical error that prejudices Ms. Arndt because potential employers are more likely to assume she was convicted of domestic abuse and deny her employment if the surcharge remains in the description of the offense. *See Cree, Inc. v. Labor & Industry Review Comm'n*, 2022 WI 15, ¶ 41, 400 Wis. 2d 827, 970 N.W.2d 837 (exception to statute prohibiting employment discrimination on the basis of an applicant's conviction record allows employer to deny employment to applicant with conviction for domestic abuse). The postconviction court's refusal to correct this clerical error was an erroneous exercise of discretion.

² Pursuant to Wis. Stat. § 809.23(3), Ms. Arndt cites this unpublished case for its persuasive authority.

CONCLUSION

Caroline Arndt asks the Court to reverse the postconviction court's order denying her postconviction motion to withdraw her plea and to remand to the circuit court for an evidentiary hearing.

She also asks the Court to reverse the postconviction court's order denying her motion to reconsider amending the judgment of conviction and to remand to the circuit court with directions to move the citation to the domestic abuse surcharge from the description of the offense to the financial obligations resulting from the offense.

Dated this 9th day of June, 2022.

Respectfully submitted,

Electronically signed by

Brian P. Mullins

BRIAN P. MULLINS

Assistant State Public Defender

State Bar No. 1026891

Office of the State Public Defender

735 N. Water Street - Suite 912

Milwaukee, WI 53202-4116

(414) 227-4805

mullinsb@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/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 3,350 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 rules 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 or 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 this 9th day of June, 2022.

Signed:

Electronically signed by

Brian P. Mullins

BRIAN P. MULLINS

Assistant State Public Defender