STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2023AP001392-CR & 2023AP001393-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK A. WEISS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

Mr. Weiss entered his guilty pleas on December 15, 2020, during the COVID-19 pandemic. He appeared at his plea hearing via Zoom from the Wisconsin Resource Center. The circuit court failed to conduct any colloquy with Mr. Weiss to ensure that he was aware of his right to appear in person and was waiving that right, or that he could see and hear the court and other parties. Postconviction, Mr. Weiss asserted that he did not know he had the right to be physically present in the courtroom for his plea hearing. The circuit court denied Mr. Weiss' motion without a hearing. The court of appeals affirmed, holding that any violation of Mr. Weiss' right to be physically present was harmless.

> Does harmless error apply to violations of a defendant's right to be physically present in the same courtroom as the judge when judgment is pronounced?

The circuit court denied Mr. Weiss's postconviction motion without a hearing, finding that he had no right to be physically present at the time.

The court of appeals affirmed in a summary disposition. It assumed that Mr. Weiss's right to be physically present was violated but held that any error was harmless in this case.

CRITERIA FOR REVIEW

Wisconsin Statute § 971.04(1)(g) "provides a criminal defendant with the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held, if the court accepts the plea and pronounces judgment." *State v. Soto*, 2012 WI 93, ¶2, 343 Wis. 2d 43, 817 N.W.2d 848.

This right is "particularly important to the actual or perceived fairness of the criminal proceedings," and therefore, this Court has held that the right may be waived—through use of a specific colloquy—but not forfeited. *Id.*, ¶¶40-43, 46. Further, the court of appeals has adopted "a *Bangert*-type procedure to assess a defendant's claim that he or she did not validly waive his or her right to be present at a plea hearing," requiring that plea withdrawal be granted unless the state can prove that the defendant knowingly, voluntarily, and intelligently waived his right to be present despite an inadequate waiver colloquy. *State v. Anderson*, 2017 WI App. 17, ¶¶52-54, 374 Wis. 2d 372, 896 N.W.2d 364.

Relying on a case which is factually distinguishable and predates both *Soto* and *Anderson*, the court of appeals found the violation of Mr. Weiss' right to be physically present harmless because there was no reason to believe he would not have entered his plea had he been present in the courtroom at the time of the plea hearing.

No prior opinion from this Court, nor the court of appeals, has held that the harmless error rule applies to violations of a defendant's right to be physically present at his plea hearing, nor what would constitute harmless error if it did. The issue was disputed in *Anderson*, but rather than deciding whether the harmless error rule applied, the court of appeals held that, even assuming it did, the error in that case was harmless. *Anderson*, 2017 WI App. 17, ¶56. Consequently, review is warranted under Wis. Stat. § 809.62(c)&(e).

STATEMENT OF THE CASE AND FACTS

On November 8, 2016, the state filed a criminal complaint in Kenosha County Case 16-CF-1249 charging Mr. Weiss with arson of a building, burglary of a building or dwelling, and two counts of first degree recklessly endangering safety, all as a repeater. (11:1-2).[1] The charges stemmed from an incident on October 8, 2016, in which officers responded to a residential fire where they found Mr. Weiss wandering around. (11:2-3). Mr. Weiss admitted to being at the residence and removing items from the garage. (11:3)

Almost a year later, on October 27, 2017, the state filed a separate complaint charging Mr. Weiss with intentionally contact victim after court order for

[1] Mr. Weiss' cases were consolidated for appeal. Unless otherwise noted, citations are to the record in 2023AP001393-CR.

a felony conviction, as a repeater, in Kenosha County Case 17-CF-1155. (2023AP1392, 1:1). That complaint alleged that Mr. Weiss intentionally violated a court order issued under § 973.049(2) by calling K.W. from the jail. (2023AP1392, 1:1-2).

Both cases experienced delays as Mr. Weiss was evaluated and treated to competency on several occasions. (9; 14; 24; 62; 77; 84; 130; 163; 170).

Eventually, on December 15, 2020, Mr. Weiss resolved these cases by entering into a plea agreement with the state. Specifically, the parties agreed to stipulate that Mr. Weiss was competent and, in exchange for Mr. Weiss' plea to Count 1 in both cases, the remaining charges would be dismissed and the state would recommend concurrent prison. (271:2)(App. 17).

All parties appeared via Zoom for the plea hearing, though the circuit court noted that the courtroom was open. (271:1-2)(App. 16-17). Aside from stating that Mr. Weiss was appearing by Zoom from the Wisconsin Resource Center, the circuit court made no mention of Mr. Weiss' right to appear in person, or the effectiveness of the technology used. (271:1-2)(App. 16-17). Rather, the circuit court accepted the stipulation of the parties, found Mr. Weiss competent, and conducted a plea colloquy. (271:3-13)(App. 18-28). The circuit court ultimately accepted Mr. Weiss' pleas and adjudged him guilty. (271:13)(App. 28).

On February 8, 2021, the circuit court sentenced Mr. Weiss to 7 years of initial confinement and 4 years of extended supervision on the arson charge in 16-CF-1249. (280:1)(App. 10). In 17-CF-1155, the circuit court withheld sentence and placed Mr. Weiss on probation for 2 years, consecutive to his prison sentence. (2023AP1392, 162:1)(App. 12).

Mr. Weiss filed a timely notice of intent to pursue postconviction relief in each case and, on May 24, 2023, through counsel, filed a postconviction motion for plea withdrawal.[2] (241; 343; 2023AP1392, 159). The motion argued that Mr. Weiss did not knowingly and voluntarily waive his right to be physically present during his plea hearing. (343).

After additional briefing by the parties, the circuit court entered a written order denying the postconviction motion without a hearing. (351)(App. 14-15). It found that the statutory right to be present at certain hearings was "actually [a] statutory directive[] under the supervisory control of the supreme court," which was suspended during the pandemic. (351:2)(App. 15). The circuit court further held that, in this case, "there was no violation of the procedures which the supreme court had prescribed." (351:2)(App. 15).

[2] After undersigned counsel was appointed to represent Mr. Weiss, this court extended the deadline to file a postconviction motion in these cases to June 2, 2023. (335; 339).

Mr. Weiss appealed, arguing that the circuit court violated his right to be physically present and, as a result, he was entitled to plea withdrawal.

In a summary disposition, the court of appeals affirmed. *State v. Weiss*, Nos 2023AP1392-CR & 2023AP1393-CR, summary disposition (WI App. May 29, 2024)(App. 3-9). The court of appeals assumed without deciding that the circuit court violated Mr. Weiss' right to be physically present at his plea hearing but concluded that the error was harmless. *Id*. at 1-2. (App. 3-4). Specifically, the court of appeals noted that Mr. Weiss' plea was knowing, intelligent, and voluntary, and there was no indication that he would not have entered his plea if he had been present. *Id*. at 4-6. (App. 6-8).

This petition for review follows.

ARGUMENT

This court should grant review and hold that harmless error does not apply to violations of a defendant's right to be physically present.

Mr. Weiss did not know that he had a right to be physically present in court at the time he entered his guilty pleas in these cases. As a result, he could not have knowingly, intelligently, and voluntarily waived that right. His motion for plea withdrawal should have been granted, or, at the very least, the circuit court should have held a hearing at which the state bore the

burden of proving that, despite the circuit court's failure to conduct a colloquy, Mr. Weiss knowingly waived his right to appear in person.

On appeal, the court of appeals affirmed the circuit court's denial of Mr. Weiss' motion. Without analysis of whether the harmless error rule applies to the situation, the court concluded that any violation of Mr. Weiss's right to be present was harmless. Further, it was harmless, not because the record established that Mr. Weiss knowingly waived his right to be present, but because the record showed that his plea was knowingly made and that there were no grounds to conclude Mr. Weiss would not have entered his pleas had he been present in person.

The court of appeals wrongly concluded that the harmless error rule applies and that the error in this case was harmless. Thus, this court should grant review and hold: 1) that the harmless error rule does not apply to a violation of the defendant's right to be present when judgment is pronounced; or, 2) if the harmless error rule does apply, the error is only harmless if the state is able to show that, despite a deficient colloquy, the defendant knowingly waived his right to be present.[3]

[3] Should the court determine that the harmless error rule, as adopted by the court of appeals, applies, Mr. Weiss also asks that the court review whether the error in this case was harmless.

A. Legal standards.

To obtain plea withdrawal after sentencing a defendant must establish, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *Anderson*, 2017 WI App 17, ¶15. "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" *Id*. (quoted sources omitted). The violation of a defendant's statutory right to be physically present in the courtroom at the time judgment is pronounced constitutes a manifest injustice for which plea withdrawal is required. *Id.*, ¶¶29-59.

Section 971.04(1)(g), Wis. Stats., provides criminal defendants with the right to be physically present at "a plea hearing…during which the defendant enters a plea and the circuit court pronounces judgment in regard to the crime to which the defendant pled." *Anderson*, 2017 WI App 17, ¶29. This Court has found that right to be "particularly important to the actual or perceived fairness of the criminal proceedings," and as such, "if [it] is to be relinquished, it must be done by waiver." *Soto*, 2012 WI 93, ¶¶40, 44.

In order to ensure a valid waiver of the defendant's right to be physically present for a hearing at which judgment will be pronounced, the circuit court must engage in a colloquy with the defendant. *Id*., ¶46. That colloquy must explore the effectiveness of the technology being used and allow

the court to "ascertain, either by personal colloquy or by some other means, whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing." *Id*.

Once a defendant has shown that the circuit court did not engage in a sufficient waiver colloquy, and affirmatively asserts that he did not know or understand he had the right to appear in person for his plea hearing, the burden "shift[s] to the State to prove by clear and convincing evidence that the defendant did, in fact, knowingly, voluntarily, and intelligently waive his or her right to be present." *Anderson*, 2017 WI App 17, ¶53.

B. Harmless error does not apply.

Without any analysis of whether the harmless error rule applies, the court of appeals concluded that any violation of Mr. Weiss' right to be physically present at the plea hearing was harmless. That question, however, is not settled. Because of the nature of the proceeding and rights involved, this Court should grant review and hold that the harmless error rule does not apply to the violation of a defendant's right to be physically present at a plea hearing where judgment is pronounced.

The harmless error rule requires the state to demonstrate, beyond a reasonable doubt, that the error complained of was harmless; that it did not affect "the substantial rights of the party seeking reversal of the judgment." *State v. Harris*, 229 Wis. 2d 832, 840, 601 N.W.2d 682 (Ct. App. 1999)(quoting *State v.*

Mendoza, 227 Wis. 2d 838, 864, 596 N.W.2d 736 (1999)).

In finding that the error in Mr. Weiss' case was harmless, the court of appeals cited *State v. Harris,* in which this Court, without analysis, stated that "[t]he 'harmless error' rule is also applicable to violations of § 971.04(1)." *Harris*, 229 Wis. 2d at 840. (App. 5-6). That case, however, involved the defendant's right to be present during jury selection and did not address the harmless error rule's application beyond those circumstances.

The court of appeals also cited *State v. Peterson*, 220 Wis. 2d 474, 488, 584 N.W.2d 144 (Ct. App. 1998), to support its finding that the error in this case was harmless. (App. 6). In *Peterson*, the court of appeals assumed Peterson had a statutory right to be present when the court addressed jury questions, but found that any violation of that right was harmless under the facts of that case. *Peterson*, 220 Wis. 2d at 487-489. In doing so, however, the court acknowledged that when it comes to the applicability of the harmless error rule, there may be a distinction between the various proceedings at which the defendant has a statutory right to be present. *Id*. at 488. It noted that there is "significant difference between sentencing proceedings...and instructional proceedings," and therefore, "refuse[d] to interpret *Koopmans* as rejecting the harmless error test for all violations of § 971.04." *Id*.

Both of these cases, however, predate *Anderson*, in which the court of appeals recognized the parties' dispute over the applicability of the harmless error rule, but simply assumed without deciding, that the rule applied to violations of the right to be present at a plea hearing. *Anderson*, 2017 WI App 17, ¶56. If these earlier cases had provided a definitive answer to the question, surely the *Anderson* court would have said so at that time.

Therefore, whether the harmless error rule applies to violations of a defendant's statutory right to be physically present in court for his plea hearing is unsettled. There are significant differences between the various proceedings for which defendants have a right to be present, and such differences suggest that application of the harmless error rule is appropriate in some circumstances but not others. *See Peterson*, 220 Wis. 2d at 488. There are real and substantial reasons that the rule should not apply to violations of the right to be in the same courtroom as the presiding judge and parties when a plea is entered and judgment pronounced.

"[O]ne statutory purpose served by the defendant's presence [at the plea hearing] is to permit the circuit court to conduct a colloquy to determine whether there is a sufficient factual basis for the plea and that the defendant is pleading knowingly, intelligently, and voluntarily." *Soto*, 2012 WI 93, ¶24. Another purpose "is to effectively display the State's power," and that power, embodied by the judge, "is

more forcefully exercised when the defendant and the judge are in the same courtroom." *Id*. ¶26.

"Requiring that the defendant be present in the courtroom is guided [] by the belief that a courtroom is a setting epitomizing and guaranteeing 'calmness and solemnity,'...so that a defendant may recognize that he has had access to the judicial process in a criminal proceeding." *Id*., ¶23 (internal citations omitted). Further, "requiring the defendant to make his appearance in a courtroom avoids the potential or perceived problems that can occur when the defendant is located in another facility such as a jail, while the judge, prosecutor, and perhaps even defense counsel are in the courtroom." *Id*, citing Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant,* 78 Tul. L.Rev. 1089 (2004).

The defendant has a meaningful role at his plea hearing which is significantly different than his role during other proceedings, such as jury selection. It is important that the proceeding reflect the seriousness of the rights given up, that the circuit court be able to adequately assess the defendant's demeanor, and that the defendant have easy access to his counsel. Given these considerations, application of the harmless error rule to a violation of the defendant's right to be present at the plea hearing is inappropriate.

C. If the harmless error rule does apply, the error is harmless only if the defendant knowingly waived his right to be present.

Should this Court determine that the harmless error rule does apply to a violation of the defendant's right to be present when judgment is pronounced, it should clarify how that rule applies to such a violation.

The court of appeals found that the error in this case was harmless, incorrectly stating that the state was required to prove that Mr. Weiss' plea was knowingly, intelligently, and voluntarily made, before concluding that "[n]o aspect of the record suggests that Weiss would not have pled guilty if he had attended the plea hearing in person." (App. 6-8). Mr. Weiss, however, requests that this Court adopt a limited harmless error test similar to that applied to *Bangert* claims.

When a *Bangert* claim is made, the harm with which the court is concerned is the unknowing, unintelligent, and involuntary entry of a plea. *See State v. Brown*, 2006 WI 100, ¶23, 63, 293 Wis. 2d 594, 716 N.W.2d 906. Both this Court and the court of appeals have recognized that *Bangert* employs a limited harmless error test—a plea colloquy defect is harmless, and therefore does not warrant plea withdrawal, if the defendant knew the information that was erroneously omitted. *See Id.*, ¶63; *See also Oneida County Department of Social Services v. Therese S.*, 2008 WI App 159, ¶¶18-19, 314 Wis. 2d 493, 762 N.W.2d 122 (finding that

"harmless error analysis is essentially built into the *Bangert* analysis"). There is no requirement that the defendant allege that he would not have entered his plea if he had known the information the court was required to provide.

As explained above, in *Anderson*, the court of appeals adopted a "*Bangert*-type procedure" to assess a defendant's claim that he did not knowingly waive his right to be present. *Anderson*, 2017 WI App 17, ¶54. Under that procedure, once the defendant makes a prima facie case, it is the state's burden to prove that the defendant did, in fact, knowingly, voluntarily, and intelligently waive his right to be present. *Id*., ¶53. The harm at issue here is similar to that at issue in *Bangert* claims—the unknowing, unintelligent, and involuntary waiver of the right to be present. Therefore, a similar limited harmless error test should apply—the error in the waiver colloquy is harmless if the defendant did, in fact, knowingly, voluntarily, and intelligently waive his right to be present.

CONCLUSION

Mr. Weiss respectfully requests that this court grant review, reverse the court of appeals, and hold that the harmless error rule does not apply to violations of a defendant's right to be physically present when judgment is pronounced.

Dated this 27th day of June, 2024.

Respectfully submitted,

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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 3,157 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 27th day of June, 2024.

Signed:

Electronically signed by
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