COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP188-CR **Cir. Ct. No. 2013CM1802**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD L. WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Donald L. White appeals from a judgment of conviction and an order denying his postconviction motion for an evidentiary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

hearing on his request to withdraw his no contest plea. White asserts that his plea was not knowingly, intelligently, and voluntarily entered because the circuit court's plea colloquy was defective. We hold that White was not entitled to an evidentiary hearing and therefore affirm.

BACKGROUND

¶2 While serving a sentence for a different matter, White was charged with criminal damage to property, WIS. STAT. § 943.01(1), and violating a county penal institution law, WIS. STAT. § 946.73, for having willfully damaged a mattress and pad in his county jail cell. Both charges carried the habitual criminal enhancer. WIS. STAT. § 939.62(1)(a).

¶3 The probable cause section of the complaint detailed that on November 25, 2013, at the Kenosha County Jail, an officer witnessed that White, who was the only occupant in his cell, had torn his cell mattress to pieces. The inside foam was ripped out and spread throughout White's cell. Upon investigation by the Kenosha County Sheriff's Department, the officer confirmed that the mattress was undamaged when inspected prior to being placed in White's cell, that the destruction was a violation of a county jail rule which prohibits damage to Kenosha County property, that Kenosha County did not give permission or consent, and that no one else had access to the cell or mattress.

¶4 White agreed to plead guilty to violating a penal institution law in exchange for dismissal of the other charge and dismissal of a separate pending criminal case. The State also agreed to make no specific sentence recommendation.

¶5 At the plea hearing, the State described the plea proposal to the circuit court. Addressing White, the court asked whether he understood the following: (1) what was being said at the hearing; (2) that, in exchange for his guilty plea to the one charge, the remaining matters would be dismissed with no specific sentence recommendation; (3) that the offense, with the enhancer, for which he was pleading guilty carried a maximum sentence of two years' imprisonment and a $500 fine; (4) that he signed the plea questionnaire and waiver of rights, which states that White read and understood it; (5) that he was charged with willfully damaging a mattress and pad in a county jail cell;[2] and (6) that, if he pled no contest, he would be found guilty without a trial. To each question, White responded affirmatively.

¶6 The circuit court confirmed with White that no one had promised him that he would receive a sentence less than the maximum. The court asked for White's date and city of birth. The court also asked White's counsel if there was any reason that the plea should not be accepted, to which counsel replied, "No." After pleading no contest, White was found guilty and was later sentenced to one year of imprisonment followed by one year of extended supervision.

[2] Specifically, the circuit court stated:

> The charge against you is that on the 25th of November of last year—no, of 2013 at the City of Kenosha in this county, you intentionally violated a lawful rule made pursuant to state law governing penal institutions while you were confined in the Kenosha County Jail by violating Rule 228, which prohibits damage to any property of Kenosha County, and that you willfully damaged a mattress and pad in the cell. Do you understand the charge against you?

White responded, "Yes."

¶7 White filed a postconviction motion seeking withdrawal of his plea based on a legally inadequate plea colloquy. Without a hearing, the circuit court denied the motion, indicating that the colloquy was adequate and that White did not support his motion with an affidavit or other evidence. White appeals.

DISCUSSION

¶8 When seeking to withdraw a guilty plea after sentencing, the defendant must prove that refusing a plea withdrawal would result in "manifest injustice." ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). "A manifest injustice occurs when there has been 'a serious flaw in the fundamental integrity of the plea.'" ***State v. Cross***, 2010 WI 70, ¶42, 326 Wis. 2d 492, 786 N.W.2d 64 (citation omitted). One way to show a manifest injustice is to establish that a guilty or no contest plea was not entered knowingly, intelligently, and voluntarily. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635-36, 579 N.W.2d 698 (1998). A guilty plea that is not knowing, intelligent, and voluntary violates fundamental due process and, therefore, may be withdrawn as a matter of right. ***State v. Finley***, 2016 WI 63, ¶13, 370 Wis. 2d 402, 882 N.W.2d 761.

¶9 To initiate withdrawal of a guilty plea on the grounds that it is unknowing, a defendant must (1) make a prima facie case showing that the circuit court violated WIS. STAT. § 971.08 or other court-mandated duty and (2) allege that the defendant did not in fact know or understand the information that the court should have provided at the plea hearing. ***Bangert***, 131 Wis. 2d at 274; ***State v. Taylor***, 2013 WI 34, ¶32, 347 Wis. 2d 30, 829 N.W.2d 482. If the defendant meets those two requirements, he or she is entitled to an evidentiary hearing (sometimes called a ***Bangert*** hearing) where the burden shifts to the State to prove by clear and convincing evidence that the plea was knowingly, intelligently, and

voluntarily entered, despite the inadequacy of the record at the plea hearing. ***Bangert***, 131 Wis. 2d at 274. The State may use any evidence to show that the defendant had the requisite knowledge and understanding, including but not limited to the entire case record (plea questionnaire and waiver of rights form, documentary evidence, recorded statements, transcripts of prior hearings, etc.), information from prior pleas by the same defendant, and examinations of the defendant and defendant's counsel. ***Id.*** at 274-75; ***State v. Brown***, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906. Absent the showing by the State that the defendant entered the plea knowingly, intelligently, and voluntarily, the defendant is then entitled to withdraw the plea. ***Finley***, 370 Wis. 2d 402, ¶92.

¶10 Whether a plea was entered knowingly, intelligently, and voluntarily presents a question of constitutional fact. ***Bangert***, 131 Wis. 2d at 283. We will accept the circuit court's findings of historical fact unless clearly erroneous. ***State v. Byrge***, 2000 WI 101, ¶55, 237 Wis. 2d 197, 614 N.W.2d 477. However, we review the application of the law to the historical facts de novo. ***Id.*** Whether a defendant has sufficiently shown defects in the plea hearing record and whether a defendant has sufficiently alleged that he or she did not know or understand information that should have been provided at the hearing are questions of law which we review de novo. ***Brown***, 293 Wis. 2d 594, ¶21.

¶11 "Establishment of a factual basis for a plea to the charged crime is separate and distinct from the requirement that the voluntariness of the plea be established to the trial court's satisfaction." ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Where the circuit court has determined that there was a sufficient factual basis for the acceptance of a plea, we will not upset that determination unless it is clearly erroneous. ***Id.***

¶12 White argues that the circuit court erred in its plea colloquy in several respects. He asserts that the court did not sufficiently describe the nature of the charge against him. *See* ***Brown***, 293 Wis. 2d 594, ¶¶46-48 (outlining several methods that a court could use to establish the defendant's understanding of the charges). White further contends that the court did not ascertain his level of education or general comprehension, nor did it inquire as to whether he understood the constitutional rights he was waiving. *See* ***id.***, ¶35 (courts should determine, among other things, the defendant's comprehension level and that the waiver of rights is understood). White also contends that the court failed to determine whether White in fact damaged the jail cell mattress and pad.

¶13 White fails to develop any argument that the circuit court erroneously exercised its discretion in denying his claim that the court failed to determine that there was a factual basis for the plea. *See* ***id.***, ¶35 & n.18 (court must ascertain whether a factual basis exists to support the plea, citing ***Bangert***, 131 Wis. 2d at 262, and WIS. STAT. § 971.08(1)(b)). WISCONSIN STAT. § 946.73 prohibits violation of a state law or any lawful rule made pursuant to state law governing any state or county penal institution while the individual is in the institution. Here, the court identified the elements of the charge and the rule, as well as the factual basis for the charge—willful damage to a mattress and pad in White's cell. The conduct alleged in the complaint and summarized by the court constituted the charged crime. White affirmed that he was pleading to this charge and that he understood all of the above. The court did not erroneously exercise its discretion in denying this challenge.

¶14 White also fails to explain how the circuit court's colloquy regarding the nature of the charge was deficient. The court stated the elements of the charge and the rule White violated, as well as the factual basis—that White willfully

damaged a mattress and pad in his cell. The court did not err in denying an evidentiary hearing as to this alleged defect in the colloquy.[3]

¶15 In addition, and beyond that, we need not decide whether other aspects of the plea hearing colloquy were defective because White does not satisfy the second prong required to warrant a ***Bangert*** hearing, i.e., he must sufficiently allege that he did not in fact know or understand the information that was missing from the plea hearing. ***Brown***, 293 Wis. 2d 594, ¶59. The existence of a colloquy error is not enough. If, despite the error, White's plea was knowing, intelligent, and voluntary, then there is no basis for a plea withdrawal and no need for an evidentiary hearing. ***Brown*** explained why it is necessary for a defendant to sufficiently allege that he did in fact lack certain knowledge or understanding. ***Id.***, ¶¶63-65. The court reasoned as follows:

> [I]f the defendant is unwilling or unable to assert a lack of understanding about some aspect of the plea process, there is no point in holding a hearing. The ultimate issue to be decided at the hearing is whether the defendant's plea was knowing, intelligent, and voluntary, not whether the circuit court erred. The court's error has already been exposed. In the absence of a claim by the defendant that he lacked understanding with regard to the plea, any shortcoming in the plea colloquy is harmless.

Id., ¶63. The court further explained that requiring an allegation of what the defendant did not understand was important so that, in the event that a hearing is

[3] White complains that the circuit court did not advise him that it was not bound by the plea agreement or required to follow the parties' recommendations and could impose the maximum penalty. This undeveloped claim is also without merit. The court accepted the plea agreement, and the State agreed not to make a recommendation. The court told White the maximum penalty he faced, and White agreed that he had not been promised by anyone that he would not be subject to the maximum penalty. The court clearly advised White that he faced the maximum sentence when sentenced by the court. The court did not err in denying this challenge to the plea.

held, the State knows the particular burden of proof it has to meet. ***Id.***, ¶65. It stated as follows:

> A ***Bangert*** evidentiary hearing is not a search for error; it is designed to evaluate the effect of known error on the defendant's plea so that the court can determine whether it must accept the withdrawal of the defendant's plea. The state must be given fair notice of what it must prove.

Brown, 293 Wis. 2d 594, ¶65.

¶16 Although a sworn affidavit is not required to satisfy the second prong, in most cases the motion should allege, with some particularity, the defendant's lack of understanding. ***Id.***, ¶¶62, 67. In this regard, the defendant should (1) state *what* was not understood and (2) explain how the lack of understanding *connects* to the defect. ***Id.***, ¶67.

¶17 White does neither. He simply states that he "did not enter his plea knowingly, voluntarily, and intelligently." This legal conclusion fails to identify *what* about the plea White did not understand. It also fails to *connect* his purported lack of understanding to any alleged defect. More specifically, White fails to allege that, or explain why, despite the fact that the allegedly missing information was all contained in the plea questionnaire which he signed, confirmed in writing he understood, and specifically confirmed at the plea hearing that he understood, he still did not understand that information, particularly given completion of a high school education.[4] He also fails to address how he lacked understanding of the nature of the charge given the information regarding the charged crime and the factual basis set forth in the complaint.

[4] White affirmed in the plea questionnaire that he completed eleven years of school and had a high school diploma or its equivalent.

¶18 In his appellate brief, White contends that his motion alleged that he did not fully understand the rights he was waiving. He points to only one sentence in his motion, where, in discussing the constitutional rights he was waiving, he alleged that "the record does not reflect that he *understood* the rights he was waiving." (Emphasis added.)

¶19 White's single statement is insufficient. White does not state that he, as a matter of fact, lacked understanding of the other allegedly missing information, and even as to the constitutional rights he was waiving, he alleged only that the *record* did not affirmatively reflect that he understood. This is simply a reiteration of the first prong required for a ***Bangert*** hearing—his allegation that the plea hearing record was defective because the circuit court did not explain the constitutional rights White was waiving or adequately ascertain on the record that he understood them. It does nothing to meet the second prong, i.e., that White in fact lacked understanding.

¶20 Moreover, even if White alleged that he in fact lacked an understanding of the constitutional rights he was waiving, he would also have to connect that purported lack of understanding to the defect in the plea colloquy. He fails to do so.

¶21 White argues that his allegation that "the record does not reflect that he understood" the rights he was waiving was sufficient in ***Brown*** and that it should be sufficient here. We disagree.

¶22 It is true that, in ***Brown***, the motion did not directly allege that the defendant's understanding was in fact lacking, using language similar to that used in White's motion. *See* ***Brown***, 293 Wis. 2d 594, ¶61 (the motion stated that the "guilty plea record fails to demonstrate that Mr. Brown actually *understood* the

elements of any of the crimes to which he pled guilty."). ***Brown*** is, however, plainly distinguishable. The defendant in ***Brown*** was illiterate and no plea questionnaire and waiver of rights was used. ***Id.***, ¶¶9, 11. In the motion, defense counsel explained the problem inherent with having an illiterate defendant execute an affidavit and represented to the circuit court that the defendant "appears to understand very little" of what took place at the plea hearing and that his testimony at a ***Bangert*** hearing "will make this clear beyond dispute." ***Brown***, 293 Wis. 2d 594, ¶61 (emphasis omitted). Pointing to the totality of the motion—which included the defendant's illiteracy, the lack of a questionnaire/waiver, and defense counsel essentially representing to the court that the defendant lacked understanding—the ***Brown*** court held that a ***Bangert*** hearing was warranted. ***Brown***, 293 Wis. 2d 594, ¶66; *see also* ***Taylor***, 347 Wis. 2d 30, ¶¶35-39 (when determining whether defendant was entitled to an evidentiary hearing, court considered parts of the record other than the plea hearing). None of those circumstances, however, are present here.

¶23 Moreover, despite its holding that an evidentiary hearing was warranted, the ***Brown*** court noted its concern about the motion's lack of directness and explained that, in "the ordinary case," the defendant should provide more specific allegations as to the lack of understanding, i.e., what was not understood and how the lack of understanding related to a defect. ***Brown***, 293 Wis. 2d 594, ¶¶62, 67. White does not point to any particular or extraordinary circumstances—such as those that existed in ***Brown***—as to why he should be exempt from having to allege that he in fact did not understand "some aspect of his plea that is related to a deficiency in the plea colloquy." ***Id.***, ¶62.

¶24 Accordingly, we affirm the judgment of conviction and the order denying White's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.