COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2005AP1306-CR
2005AP1307-CR

Cir. Ct. Nos. 2002CF375
2002CF542

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYON P. CIBRARIO,

DEFENDANT-APPELLANT.

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

Before Brown, Nettesheim and Anderson, JJ.

¶1 NETTESHEIM, J. Bryon P. Cibrario appeals from a judgment of conviction and from an order denying his postconviction motion seeking to

withdraw his guilty pleas. Cibrario argues that the trial court's plea colloquy was defective because the court failed to personally inform him that it was not bound by the terms of the plea agreement. Cibrario contends that he would not have entered his pleas had he known that the court was not so bound.

¶2 We reject Cibrario's argument because it is premised entirely on the sentencing aspects of the case, but the plea agreement contained no sentencing concessions by the State. Thus, the trial court was not obligated to inform Cibrario that it was not bound by something the State had not promised. We affirm the judgment and order.

FACTS AND PROCEDURAL HISTORY

¶3 Cibrario was charged with possession of child pornography, repeated acts of sexual assault of a child, second-degree sexual assault of a child and child enticement. Pursuant to a plea agreement, Cibrario pled guilty to one count of possession of child pornography in violation of WIS. STAT. § 948.12 (2001-02),[1] one count of repeated acts of sexual assault of a child in violation of WIS. STAT. § 948.025, and one count of second-degree sexual assault of a child in violation of WIS. STAT. § 948.02(2). In exchange for his pleas, the State agreed to dismiss and read in the child enticement charge and to not issue additional child pornography charges. The State made no sentencing concessions or promises to Cibrario under the plea agreement. To the contrary, both Cibrario and the State were free to make whatever sentence recommendations each deemed appropriate.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 During the plea colloquy, the trial court explained each of the charges to Cibrario and advised him of the maximum penalties that each charge carried. However, at no time did the court inform Cibrario that it was not bound by the terms of the plea agreement. After confirming that Cibrario understood the charges, the possible penalties and the terms of the plea agreement, the trial court accepted Cibrario's guilty pleas. The court then sentenced Cibrario to an indeterminate sentence not to exceed thirteen years for repeated sexual assault of a child; a bifurcated sentence of twenty years' confinement and ten years of extended supervision for second-degree sexual assault of a child, to run concurrently; and a bifurcated sentence of two years' confinement and two years of extended supervision for possession of child pornography, also to run concurrently.

¶5 Cibrario appealed and his counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2003-04). However, we rejected the no-merit report. We noted that under ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, "a circuit court must advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and, concomitantly, ascertain whether the defendant understands this information." Our rejection order contemplated that ***Hampton*** might be a bright-line rule. Our order said, "[G]iven the absolute quality of the above rule from ***Hampton*** … we cannot say that a ***Hampton*** challenge in the circuit court, which would appear to be a question of first impression, would be without any arguable merit." Cibrario then moved for postconviction relief on the grounds that his plea colloquy was defective because the trial court failed to personally inform him that it was not bound by the terms of the plea agreement. At the hearing on the

motion, the trial court denied the motion without taking any evidence. Cibrario appeals.

STANDARD OF REVIEW

¶6 Whether a defendant's postconviction motion alleges facts sufficient to require a hearing for the relief requested presents a mixed standard of review. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *See* ***id.*** at 310. This is a question of law that we review de novo. ***Id.*** If the motion raises such facts, the trial court has no discretion and must hold an evidentiary hearing. ***Id.*** However, if the motion does not raise facts sufficient to entitle the defendant to relief, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to grant or deny a hearing. *See* ***id.*** at 309-10.

DISCUSSION

¶7 Cibrario's postconviction motion recited, and the State concedes, that the trial court did not personally advise Cibrario that the court was not bound by the terms of the plea agreement. If the inquiry were limited to just the four corners of Cibrario's motion, the trial court erred as a matter of law by declining to conduct an evidentiary hearing on the motion. *See* ***id***. at 310. However, the inquiry also takes in the full record of the trial court proceedings. As we have noted, if the record conclusively demonstrates that Cibrario is not entitled to relief, the trial court may, in the proper exercise of discretion, decline to hold a hearing. *See* ***id***. at 309-10. It is on this prong of the inquiry that we decide this case.

¶8 The paramount principle at a plea hearing is that a guilty plea must be knowingly, voluntarily, and intelligently entered. ***Hampton***, 274 Wis. 2d 379, ¶21. As part of this process in a plea agreement setting, ***Hampton*** requires that when a trial court discovers that "the prosecuting attorney has agreed to seek charge *or sentence* concessions which must be approved by the court, *the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court.*" ***Id***., ¶32 (first emphasis added; citation omitted).

¶9 Cibrario argues that his plea colloquy was defective because the trial court did not personally inform him that it was not bound by the terms of his plea agreement pursuant to ***Hampton*** and, as such, he should be permitted to withdraw his pleas.

¶10 In ***Hampton***, the defendant had entered into a plea agreement by which he would enter an ***Alford*** plea[2] in exchange for the prosecutor's sentencing recommendations. ***Hampton***, 274 Wis. 2d 379, ¶12. During the plea colloquy, the trial court failed to inform Hampton that it could choose not to follow the prosecutor's recommendations. ***Id***., ¶15. Later, at sentencing, the court, in fact, imposed a longer sentence than the prosecutor had recommended. *See* ***id***., ¶17. Postconviction, Hampton sought to withdraw his ***Alford*** plea, but the trial court denied the motion without an evidentiary hearing. ***Hampton***, 274 Wis. 2d 379, ¶18. On appeal, the supreme court held that the trial court's failure to advise Hampton that the court was not bound by the State's sentencing recommendation

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

was fatal to the plea agreement and the court remanded the matter for an evidentiary hearing on Hampton's plea withdrawal motion. ***Id***., ¶73.

¶11 However, this case is factually distinct from ***Hampton***. In his affidavit in support of his postconviction motion for plea withdrawal, Cibrario states that "[h]e would not have entered his plea in this case but would have proceeded to trial if he had known that the court could, in fact, impose [the maximum penalties for the crimes he was pleading to]." Thus, Cibrario's motion was directly linked to the sentence imposed by the trial court. However, as we have noted, the State made no sentencing concessions or sentencing recommendations under the plea agreement in this case. Instead, both Cibrario and the State were each free to make their own sentencing recommendations—a privilege each party would have been entitled to absent a plea agreement. Moreover, the trial court properly advised Cibrario of the maximum potential penalties.

¶12 By its own words, ***Hampton*** requires only that a trial court advise a defendant that the court is not bound by the terms of the plea agreement where "the prosecuting attorney has agreed to seek charge or sentence concessions *which must be approved by the court*." ***Id.***, ¶32 (emphasis added). Unlike ***Hampton***, here the State made no sentencing concessions. Thus, there was nothing for the trial court to approve. The plea-taking process is designed to assure that a plea is knowingly, voluntarily, and intelligently entered. ***Id.***, ¶21. Cibrario would have us read ***Hampton*** to require a trial court to advise a defendant that the court is not bound by any promises the State has *not* made. Such a reading would invite confusion instead of understanding on the part of a defendant.

¶13 In summary, we hold that ***Hampton*** does not apply where the grounds for plea withdrawal are not premised upon any provisions of the plea agreement.[3] We affirm the judgment and the order denying Cibrario's motion to withdraw his guilty pleas.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

[3] If Cibrario's argument traveled to a provision of the plea agreement that required the approval of the trial court, he might have an argument that the trial court erred under ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14. That would then require us to address the State's alternative argument that any error was harmless. However, given Cibrario's challenge to the trial court's sentence, and given that the State made no sentencing promises or concessions under the agreement, we see no error in the first instance.