COURT OF APPEALS DECISION DATED AND FILED

May 31, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2965

Cir. Ct. No. 2003CF5982

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER VELAZQUEZ-PEREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Order reversed and cause remanded with directions*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Alexander Velazquez-Perez appeals from a judgment of conviction and order denying his motion for postconviction relief. The issue is whether the circuit court properly denied his postconviction motion

without a hearing. We conclude that an evidentiary hearing was required, and therefore we reverse the order denying the postconviction motion.[1]

¶2 Velazquez-Perez pled guilty to one count of felony murder while committing armed robbery, and to one count of armed robbery with use of force, for separate incidents.[2] The potential prison sentences were 55 years for the felony murder count and 40 years for the armed robbery count. *See* WIS. STAT. §§ 939.50(3)(c), 940.03, 943.32(2) (2003-04). The court imposed sentences of fifty and twenty years, to be served concurrently. After sentencing, Velazquez-Perez moved to withdraw his pleas. The motion asserted that the pleas were not knowingly and voluntarily entered because he did not properly understand the potential maximum penalty.

¶3 The motion stated that Velazquez-Perez understood the total potential penalty to be only 55 years because: (1) on the day before he entered his pleas he had a discussion with his attorney, without an interpreter, in which his attorney told him the total maximum penalty was that length; (2) on the day of the pleas, before the hearing, Velazquez-Perez conferred with his attorney and reviewed the plea questionnaire using an interpreter, but does not believe the interpreter conveyed the information on it about the maximum penalties; and (3) Velazquez-Perez had difficulty understanding the interpreter during the pre-hearing conference and during the plea hearing, because the interpreter spoke too

[1] Because we reverse the postconviction order and remand for an evidentiary hearing, we do not reach the merits of the judgment of conviction.

[2] We note that the judgment erroneously shows both counts as committed on the same date, October 11, 2003, but it is clear from the complaint and information that the second robbery count actually was charged as occurring on September 28, 2003.

fast and may have been using a different dialect or idiom from that understood by the defendant. The motion further alleged that if he had been aware of the maximum penalty he would not have entered his pleas and would have gone to trial.

¶4 The transcript of the plea hearing shows that the court clearly stated the maximum penalty for each count and asked Velazquez-Perez if he understood the penalty for that count, and that he responded both times affirmatively through the interpreter. The court also clarified, again through the interpreter, that Velazquez-Perez signed the plea questionnaire, and that it was read to him by his attorney through the interpreter.

¶5 Relying on that transcript, the circuit court denied Velazquez-Perez's postconviction motion on the ground that the record conclusively demonstrated that he knowingly, intelligently, and voluntarily pled guilty to both charges, and was apprised of the maximum penalty at the time of his plea. Specifically, the court concluded that the "plea colloquy reveals that the defendant properly answered all of the court's questions, did not express any difficulties understanding the interpreter, and indicated affirmatively that his attorney had read the entire guilty plea questionnaire form to him through an interpreter." The court further concluded that the record demonstrates "he did not have a problem understanding the interpreter," and the court noted that his postconviction motion did not provide "any details" about his claim that the interpreter may have spoken a different dialect, or about "just what he did not understand during the plea hearing."

¶6 On appeal, Velazquez-Perez argues that his motion made sufficient factual allegations to obtain an evidentiary hearing.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

¶7 We conclude that Velazquez-Perez's motion is sufficient to require an evidentiary hearing on his claim that his plea was not entered knowingly, voluntarily, and intelligently because he did not understand the maximum penalty.[3] The motion does not make merely the conclusory allegation that he did not understand the maximum penalty. Instead, the motion makes specific factual allegations about what he actually believed, what the source of the alleged misunderstanding was, and why his understanding was not corrected later. There is nothing inherently incredible about allegations that counsel misstated the maximum penalty or that a defendant might have difficulty understanding an interpreter. If the allegations in Velazquez-Perez's motion are true, he is entitled to relief.

[3] Velazquez-Perez also claims he received ineffective assistance of counsel because his counsel did not correctly advise him on the maximum penalty. If a defendant's plea was entered without correct knowledge of the maximum penalty, it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Byrge***, 2000 WI 101, ¶57, 237 Wis. 2d 197, 614 N.W.2d 477. This is true regardless of whether that lack of understanding was caused by counsel, an interpreter, a defendant's own limited ability, or some combination of these factors. However, it is unnecessary to analyze this claim separately because of our conclusion that Velazquez-Perez is entitled to an evidentiary hearing on the invalid plea claim.

¶8 While it may be, as the circuit court noted, that the postconviction motion did not supply details about the allegation that the interpreter may have used a different dialect or idiom, that absence does not support denial of the motion without a hearing. We note, first, that the allegation about a different dialect is not the only reason Velazquez-Perez alleged that he did not understand the interpreter. The first reason he listed was that the interpreter spoke too fast. It is difficult to imagine what further factual allegation a defendant could make in support of that assertion, other than to allege a specific number of words per minute. This allegation is sufficient, by itself, to warrant an evidentiary hearing.

¶9 As to the claim about a different dialect, we are not aware of any requirement that a defendant plead in advance every piece of evidence that might support every detail of his claim. In a claim involving an interpreter, it might be reasonable for a court to conclude at an evidentiary hearing that a defendant must present specific evidence about the background of the particular interpreter, or perhaps even expert testimony on the subject, although we need not decide any of those issues now. At the pleading stage, however, a defendant may not have access to more-detailed information about the specific dialect that may have been used, or about the background of the interpreter. Velazquez-Perez's dialect claim has made an allegation about his reason for not understanding, not simply a conclusory assertion of non-understanding. Determining whether he can prove that claim is the purpose of the evidentiary hearing.

¶10 Finally, the State notes that Velazquez-Perez's motion does not explain why he did not raise a question about the interpretation during the plea hearing. While that is a reasonable line of cross-examination for the State to pursue at an evidentiary hearing, we do not regard it as a facial deficiency in the motion. A

defendant is not required to plead in advance every answer that he might give to questions that are intended to test his allegations.

¶11 We turn next to the question of whether the record conclusively demonstrates that the defendant is not entitled to relief. "[I]f the [postconviction] motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Allen***, 274 Wis. 2d 568, ¶9.

¶12 Case law has not so far provided a well-developed explanation of the relationship between the test we applied above to determine the facial sufficiency of the motion, and the "record conclusively demonstrates" test. However, we regard the issue of what the "record conclusively demonstrates" as a second stage of the analysis, following review of the face of the motion itself. *See* ***State v. Basley***, 2006 WI App 253, ¶11, 726 N.W.2d 671. In ***Basley***, we addressed the "record conclusively demonstrates" test only after first reviewing the facial sufficiency of the motion. *See* ***id.***.

¶13 One circumstance in which the "record conclusively demonstrates" test is applied is when a motion alleges facts that, if true, would entitle the defendant to relief, but the record conclusively demonstrates that the allegations are *not* true. The circuit court used the test in this manner in the present case. This application of the test raises a question about the level of certainty that is necessary to say that the record conclusively demonstrates the truth or falsity of any particular fact. We regard the phrase "conclusively demonstrates" as meaning that no reasonable fact-finder could find the defendant's allegation to be true, regardless of what evidence might be presented at an evidentiary hearing. This is similar to the test used in

deciding whether a summary judgment motion makes a showing sufficient to obviate the need for a trial on factual issues. *See, e.g.* ***Metropolitan Ventures, LLC v. GEA Associates***, 2006 WI 71, ¶21, 291 Wis. 2d 393, 717 N.W.2d 58 ("[a]n issue of fact is genuine if a reasonable jury could find for the nonmoving party"). This analogy is appropriate because the court conducting a postconviction review of what the record demonstrates is performing a similar function to summary judgment: deciding whether there are factual issues that must be resolved by an evidentiary hearing.

¶14 We now apply that test to the present case. As we discussed above, the facts alleged by Velazquez-Perez regarding his understanding of the maximum penalties would, if true, entitle him to relief. The circuit court concluded that his factual allegation of not understanding the penalty at the time of the plea was not true, based on what the court read in the plea colloquy record. However, we cannot say that the plea colloquy record is sufficiently strong to conclude that no evidence at a hearing could possibly result in a factual finding that Velazquez-Perez did not understand the penalty.

¶15 While the plea record does show an appearance of understanding in the answers conveyed by the interpreter, the record actually contains no direct information about what the interpreter said to Velazquez-Perez during the hearing, or about the speed or dialect used in their exchanges. Nor does the record contain direct information about the content of earlier discussions between Velazquez-Perez and counsel. Without an evidentiary hearing, it is impossible to know whether testimony about those matters would result in a finding that the responses delivered by the interpreter were not accurate reflections of Velazquez-Perez's actual belief at that time.

¶16 In summary, this case is similar to ***Basley***, in which we reversed the circuit court's conclusion that the record of the plea colloquy conclusively demonstrated that the defendant's postconviction allegation of coercion was false: "[W]hen a defendant convicted on a guilty or no contest plea asserts … that the responses given during a plea colloquy were false and the defendant provides non-conclusory information that plausibly explains why the answers were false, the defendant must be given an evidentiary hearing on his or her plea withdrawal motion." ***Basley***, 726 N.W.2d 671, ¶18 (citation omitted).

¶17 Finally, we address an argument that the State made in the context of ineffective assistance of counsel. The State argued that, even if Velazquez-Perez did not correctly understand the maximum penalty, he was not prejudiced by that misunderstanding because he received only a fifty-year sentence, which was within the fifty-five years that he thought was the maximum penalty. However, his actual sentence is irrelevant to his claim that his plea was not entered with knowledge of the maximum penalty. If he did not know the correct penalty at the time of his plea, then the plea and conviction are constitutionally invalid, regardless of whether the actual sentence that was imposed later happened to fall within his mistaken belief about the penalty.

¶18 For the above reasons, we reverse the order denying the defendant's postconviction motion. On remand, the circuit court shall hold an evidentiary hearing and decide the motion.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).