COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP723
2007AP724

Cir. Ct. Nos. 2002CF207
2002AP252

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON T. PROCKNOW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Jason Procknow appeals an order denying WIS. STAT. § 974.06 (2005-06)[1] relief from two felony convictions. Procknow entered guilty pleas to uttering a forgery and eluding an officer, both as a repeat offender. His postconviction motion alleged that he entered his pleas without an adequate plea colloquy and received ineffective assistance from counsel. He also alleged that the trial court erroneously exercised its sentencing discretion. The trial court denied the motion without a hearing, resulting in this appeal. We reverse in part and affirm in part, and remand for a hearing on Procknow's claim that he did not enter a knowing plea because the plea colloquy was inadequate.

A KNOWING AND VOLUNTARY PLEA

¶2 At Procknow's plea hearing the trial court informed Procknow of the elements of the charges against him and the maximum penalties that applied. The trial court did not advise Procknow, during the colloquy, that it was not bound by the plea agreement, or that he was waiving the constitutional rights associated with going to trial. The court also failed to inquire whether any threats, or promises other than contained in the plea bargain, induced his pleas, although Procknow signed a standard plea questionnaire acknowledging that he understood all of the consequences of his plea. The court's colloquy with Procknow contains the following exchange:

> THE COURT: Okay. Mr. Procknow, I've had – been provided by your attorney with a plea questionnaire and waiver of rights form. Did you sign both of these forms today?
>
> THE DEFENDANT: Yes, I did.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> THE COURT: Did you go over both of these forms in their entirety with Mr. Wright?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And I can see from your questionnaire form that you've completed high school and have three years of college, right?
>
> THE DEFNDANT: Yes.
>
> THE COURT: So you have no difficulty reading or writing the English language?
>
> THE DEFEDANT: No.

The court made no further inquiry into Procknow's understanding of the questionnaire. Procknow's postconviction motion alleged that the omissions in the plea colloquy caused him to enter unknowing and involuntary pleas, notwithstanding the fact that the plea questionnaire supplied the missing information.

¶3 ***State v. Bangert***, 131 Wis. 2d 246, 248 N.W.2d 425 (1986), "requires that the plea colloquy establish the defendant's understanding of the nature of the charges, the range of penalties, the constitutional rights being waived, and other essential information on the record." ***State v. Brown***, 2006 WI 100, ¶52, 293 Wis. 2d 594, 716 N.W.2d 906. If a defendant makes a prima facie showing that the plea colloquy did not satisfy ***Bangert***, and alleges that he or she did not know or understand information that should have been provided at the colloquy, the court must hold an evidentiary hearing where the State may show that the defendant's plea was knowing, voluntary, and intelligent, notwithstanding the ***Bangert*** violation. ***Bangert***, 131 Wis. 2d at 274. However, ***Bangert*** does not mandate that the court must personally explain the required information to the defendant. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987). The court may also establish the defendant's understanding by

reference to a plea questionnaire that contains the information required for a knowing and intelligent plea. ***Id.*** In order to do so the court must make a record "that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one." ***Id.*** at 828; ***State v. Hoppe***, 2008 WI App 89, ¶15, ___ Wis. 2d ___, 754 N.W.2d 203 (a plea questionnaire does not eliminate the court's need to make a record that the defendant understands that by entering a plea, he or she waives all of the constitutional rights detailed on the form).

¶4 Here, the State contends that the court satisfied ***Bangert*** in its dialogue with Procknow concerning the plea questionnaire. We disagree. The court's inquiries merely established that Procknow reviewed the form "in its entirety" with counsel, signed it, and had sufficient education to presumably understand the information it contained. The court did not make the requisite record that Procknow had understood the constitutional rights detailed on the form and that he was waiving those rights by entering guilty pleas to the charges. This colloquy is even less compliant with ***Bangert***'s requirements than the colloquy we found inadequate in ***State v. Hansen***, 168 Wis. 2d 749, 485 N.W.2d 74 (Ct. App. 1992). In ***Hansen***, the circuit court did inquire as to whether the defendant understood the plea questionnaire after going over it with his counsel, but the court failed to discuss the constitutional rights which the defendant was waiving and failed to ascertain that the defendant understood that he was waiving those rights by entering a no contest plea. ***Id***. at 755-56.

¶5 We also observe that the circuit court failed to ascertain whether Procknow understood that the court was not bound by the terms of a plea agreement, either by reference to a plea questionnaire or otherwise. *See* ***State v. Hampton***, 2004 WI 107, ¶¶2, 42, 274 Wis. 2d 379, 683 N.W.2d 14.

¶6 We therefore conclude that Procknow has established a prima facie case that the plea colloquy did not meet the ***Bangert*** requirements. The trial court must therefore hold an evidentiary hearing to allow the State to prove a knowing and intelligent plea, notwithstanding the omissions in the plea colloquy.

INEFFECTIVE ASSISTANCE

¶7 No hearing is necessary on a claim of ineffective assistance if it is presented in conclusory fashion, or if the record conclusively shows that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To avoid dismissal as conclusory, the postconviction motion must set forth with specificity both the deficient performance and the prejudice components of the claim. ***Id.*** at 313-18.

¶8 Counsel for Procknow negotiated a plea bargain under which the prosecutor agreed to recommend concurrent terms of seven years' initial confinement and six years of extended supervision, and Procknow could ask for one year less of initial confinement. However, the maximum prison term for eluding an officer, as a repeater, is nine years. Consequently, Procknow alleged that counsel ineffectively represented him by negotiating for an excessive sentence recommendation. We agree that counsel, at a minimum, should have realized the error, and performed deficiently by not doing so. But a defendant claiming ineffective representation must prove prejudice as well as deficient performance. ***Strickland v. Washington***, 466 U.S. 668 (1984). The record conclusively shows that Procknow was not prejudiced by the excessive recommendations because the trial court was aware of the maximum for eluding, and imposed a sentence within the permitted statutory range. Additionally, all parties were aware that the

sentence had no practical effect because it was concurrent to the longer sentence imposed for the forgery.

¶9 Procknow also alleged that counsel induced his plea by erroneously stating that the maximum he faced for eluding was fifteen years. In support of his allegation he offered a letter counsel wrote him in which counsel warned of a fifteen-year sentence at a minimum. However, counsel was plainly referring to the consequences if he went to trial and was convicted on all counts, including the twenty-two forgery counts then pending. No other interpretation of counsel's warning is reasonably available.

¶10 Procknow also claims that counsel inadequately investigated an alibi defense and did not advise him of the time limits of a plea offer that was subsequently withdrawn. Neither claim was presented with sufficient specificity. Procknow offered no proof that his alleged alibi witnesses could provide material exculpatory evidence, nor that he suffered any prejudice when the State withdrew the plea offer, because the subsequent offer Procknow accepted was the same but for a minor change in the prosecutor's sentencing recommendation, which the court did not follow in any event.

SENTENCING DISCRETION

¶11 Procknow contends that the trial court erroneously exercised its sentencing discretion by failing to adequately explain its reasons. Challenges to the trial court's sentencing discretion are not permitted under WIS. STAT. § 974.06. *See* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978).

By the Court.—Order affirmed in part, reversed in part and cause remanded.

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