

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 Nos. 2008AP1032-CR
2008AP1033-CR**

**Cir. Ct. Nos. 2006CF287
2007CF154**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOLLIS M. JOHNSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Hollis M. Johnson appeals from judgments of conviction entered upon his no contest plea, for possession of cocaine with intent to deliver and resisting or obstructing an officer. He also appeals from orders

denying a postconviction motion to withdraw his plea. Johnson asserts his “serious mental deficits” made his plea unknowing and involuntary. We reject his arguments and affirm.

BACKGROUND

¶2 In Fond du Lac County case No. 2006CF287, Johnson was charged with disorderly conduct, battery as party to a crime, resisting or obstructing an officer, and criminal damage to property. In Fond du Lac County case No. 2007CF154, Johnson was charged with possession with intent to deliver more than forty grams of cocaine, maintaining a drug trafficking place, and two counts of misdemeanor bail jumping. Following various procedural events, a plea hearing for both cases was set. In exchange for a no contest plea to the obstructing and possession charges, the State would seek to dismiss and read in the remaining charges. A presentence investigation would be requested and both sides would be free to argue the disposition. After a colloquy, the court accepted Johnson’s plea and found him guilty.

¶3 At sentencing, the court imposed nine months in jail, consecutive to any other sentence, on the obstructing charge. On the possession charge, the court sentenced Johnson to five years’ initial confinement and five years’ extended supervision. Johnson moved for postconviction relief, seeking to withdraw his plea and claiming he was not aware of the elements of the offenses, the ramifications of the plea, the constitutional rights he was surrendering, and other collateral consequences.¹ He complained counsel did not adequately explain what

¹ The motion also alleged ineffective assistance of counsel, but that issue is not raised on appeal.

was going on during the plea process and the trial court failed to adequately set forth the elements of his offenses. In short, Johnson claimed that because of his “intellectual impediments,” his plea was not knowing, intelligent, and voluntary.

¶4 The court held an evidentiary hearing. Trial counsel testified first, explaining what he did to explain the plea, the charges and their elements, and possible defenses to Johnson. Counsel also testified that, based on his interactions with Johnson, he had no idea Johnson had any learning deficits or difficulty understanding the proceedings.

¶5 Johnson then presented testimony from a high school teacher and a counselor, both of whom testified about Johnson’s low IQ and comprehension issues. The teacher indicated that Johnson read at about a third-grade level. She stated he had difficulty with complex concepts and often needed those concepts broken down into smaller elements, with much repetition, before he could truly comprehend. She also opined that an attorney would probably not be able to do a very good job explaining complicated legal concepts to Johnson the way a specially trained educator would.

¶6 Johnson testified as well, contradicting his attorney’s testimony as to the amount of time counsel spent with him and what they discussed. Ultimately, the court denied the withdrawal motion, stating, “I find that the defense hasn’t shown, clearly and convincingly, that the plea wasn’t voluntarily and knowingly entered. I think that, in fact, Mr. Johnson did understand, that he understood the charges, he understood the penalties.... I’m going to deny the request to withdraw the plea.”

DISCUSSION

¶7 For a plea to be withdrawn after sentencing, withdrawal must be necessary to correct a manifest injustice. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A plea that is not knowing, intelligent, and voluntary is a manifest injustice. *Id.*

¶8 Johnson attempts to show his withdrawal motion is covered by *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Under *Bangert*, if a defendant makes a prima facie showing that the plea was not knowing, intelligent, and voluntary, the burden shifts to the State to show that the plea was nevertheless valid. *Id.* at 274. However, *Bangert* applies only when the plea's infirmity is a result of the court's failure to follow WIS. STAT. § 971.08 (2007-08)² or other mandatory procedures during the plea colloquy.

¶9 The court is required to ascertain a defendant's understanding of the nature of the charges, the range of penalties, and the constitutional rights being waived by a plea. *Brown*, 293 Wis. 2d 594, ¶52. There are multiple ways to do so, and Johnson does not now claim that the court neglected this general duty. He asserts, however, that a trial court is required to engage in the "necessary extra effort" of "evaluat[ing] the effects of a person's developmental disability...." See *State v. Salentine*, 206 Wis. 2d 419, 432, 557 N.W.2d 439 (Ct. App. 1996).

¶10 *Salentine* does not impose such a duty. The case acknowledges that while developmental disabilities may prevent a person from understanding legal

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

proceedings, not every person with a disability is incapable of comprehension. Thus, when a developmental disability becomes an issue, the court must inquire whether that disability “has materially affected the case.” *Id. Salentine* does not require this inquiry to be part of the plea colloquy.³

¶11 This case is therefore not governed by *Bangert* but by the *Nelson/Bentley*⁴ line of cases. The significance of the distinction is in the burden of proof. Under *Bangert*, once the defendant shows the colloquy is insufficient, the burden shifts to the State to show the plea was still knowing, intelligent, and voluntary. Under *Nelson/Bentley*, the defendant must show, by clear and convincing evidence, that the plea represents a manifest injustice. *Brown*, 293 Wis. 2d 594, ¶42.

¶12 Johnson’s sole basis for arguing that his plea was invalid is that he claims his limited intellectual capacity kept him from fully understanding the consequences of his plea. The trial court, however, concluded otherwise. The court started by rejecting the teacher’s testimony that the attorney likely could not have adequately explained complex concepts to Johnson. Specifically, the court noted that during the plea colloquy, he asked Johnson to explain what he did to constitute obstruction. Johnson replied that he had given the officer a false name.

³ *Salentine* did acknowledge that “a trial court’s failure to comprehensively evaluate the effects of a person’s developmental disability could be grounds for concluding that his or her plea is invalid....” *State v. Salentine*, 206 Wis. 2d 419, 431-32, 557 N.W.2d 439 (Ct. App. 1996). This statement is *dicta* and does not impose a new obligation for courts engaged in a plea colloquy. Further, a court cannot evaluate a disability of which it is not aware. Nothing in the present record indicates Johnson ever indicated a developmental disability or comprehension issues at any time prior to the postconviction proceedings.

⁴ *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

The court stated that if Johnson could not understand the concepts of elements or obstruction, he would not have been able to answer the court's inquiry.

¶13 The court also found that trial counsel met with and adequately explained the elements to Johnson, and concluded that Johnson was aware of what he was agreeing to by entering a plea. Indeed, on cross-examination, Johnson admitted that he had talked with his attorney about the evidence, knew he did not want a trial, knew he would probably lose at trial, and talked to his attorney about getting the best deal possible.

¶14 The court also noted, tangentially, that Johnson had multiple juvenile offenses which resulted in pleas, although the court was reluctant to weigh those heavily without knowing more about the pleas. The record reflects that Johnson also had at least one prior adult offense, wherein he was represented by counsel and which resulted in probation following entry of a plea. This case therefore does not represent Johnson's first trip through the justice system. *See Salentine*, 206 Wis. 2d at 430-31 ("Perhaps the best indication that Salentine understood the ramifications of his plea, and that his disability was not a legitimate reason to withdraw it, was the State's evidence of how Salentine had previously submitted pleas to other criminal charges.").

¶15 The trial court made a factual determination that counsel adequately explained the proceedings to Johnson and that Johnson's learning disability did not hinder him from understanding the consequences of his plea. There is adequate evidence in the record to support the trial court's conclusions; they are not clearly erroneous. *See State v. Lackershire*, 2007 WI 74, ¶24, 301 Wis. 2d 418, 734 N.W.2d 23. Given those factual determinations, Johnson's

plea was knowing, intelligent, and voluntary, and the court properly denied his withdrawal motion.

By the Court.—Judgments and orders affirmed.

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

