COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1116-CR **Cir. Ct. No. 2007CF9**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT S. POWLESS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Forest County: MARK MANGERSON, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 BLANCHARD, J. During the colloquy at the plea hearing in this case, the circuit court did not personally address Robert Powless to make certain that he understood that the court would not be bound at sentencing by the State's agreement to recommend a sentence of no more than a specified length (agreeing

to "cap" the maximum time that the State could recommend). To address this issue, the court held an evidentiary hearing under ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). At the evidentiary hearing the State had the opportunity to attempt to prove by clear and convincing evidence that, despite the defect in the colloquy, Powless understood at the time he entered his plea that the court's sentence could exceed the State's anticipated recommended "cap."

¶2 At the evidentiary hearing, Powless testified that he assumed at the plea hearing that the court could not sentence above the State's "cap," despite being instructed to the contrary by his attorney and the terms of a plea questionnaire that he read and signed. The court found Powless's testimony on this point to be "incredible," and denied Powless's motion to vacate his plea and reverse his conviction.

¶3 We conclude based on the totality of the record that the circuit court made findings of evidentiary fact that were not clearly erroneous, and that those facts demonstrate that the defendant's plea was entered knowingly, intelligently, and voluntarily. Accordingly, we affirm.

BACKGROUND

Events in Advance of Plea Hearing

¶4 Because they have some bearing on the court's decision challenged on appeal, we include background facts that shed light on opportunities that Powless had in advance of the challenged plea hearing to learn about his legal rights and on the extent of his familiarity with the criminal justice system.

¶5 On January 10, 2007, Powless was charged in a criminal complaint with: one count of sexual assault of a child under the age of sixteen, specifically

sexual intercourse with a fourteen year old; two counts of felony bail jumping, and; two counts of misdemeanor bail jumping.

¶6 On March 28, 2007, Powless appeared for the commencement of an initial appearance, and was specially represented by an attorney. At that hearing, Powless asked the court "if you could possibly lower my bail," so that Powless could "take care of my other warrants in other counties that I haven't yet seen because I've been in Shawano County." When asked about these warrants, Powless replied that there were three warrants from three different Wisconsin counties.

¶7 On April 16, 2007, Powless appeared for a continued initial appearance, this time represented by a different attorney, Jeff Jackomino, who would remain his attorney at least through sentencing. At that time, the court informed Powless that the maximum penalty upon conviction for the sexual assault charge in this case was a fine of $100,000, forty years of confinement, or both.

¶8 On May 3, 2007, Powless appeared for a preliminary hearing that ended up being adjourned, this time specially represented by a partner of Attorney Jackomino. During the course of this hearing, in addressing a bail issue, the district attorney said, "And [Powless] is facing potentially 40 years in this case."

¶9 On May 14, 2007, Powless appeared for the continued preliminary hearing that was again adjourned, this time represented by Attorney Jackomino. During this hearing, the district attorney again made reference to the case involving "a 40-year felony" in connection with bail.

¶10 On May 24, 2007, a preliminary hearing was held, and the court found sufficient evidence to bind the case over for trial.

¶11 On June 6, 2007, Powless appeared for arraignment on an information, this time represented by an attorney filling in for Attorney Jackomino.

¶12 On July 2, 2007, the court scheduled a jury trial for November 30, 2007, after which the parties issued witness subpoenas and filed pretrial motions.

Plea Hearing and Sentencing

¶13 On November 30, 2007, Powless, represented by Attorney Jackomino, entered a plea of guilty to the sexual assault charge. Pursuant to a written plea agreement with the State, the remaining charges were dismissed and a presentence investigation ordered. In addition, the State agreed to "cap" its sentencing recommendation at no more than seven years of initial confinement, followed by five years of extended supervision, consecutive to any sentence Powless was then serving.

¶14 Attorney Jackomino noted that the defense would be "free to argue for whatever sentence we deem appropriate and present any evidence that we would believe would be appropriate and bearing upon [the] sentence [of] Powless." The court asked Powless if he understood that "the maximum punishment available on this offense is a fine up to one hundred thousand dollars and up to 40 years in prison or both," to which the defendant responded yes.

¶15 Powless personally informed the court that Powless had gone through with Attorney Jackomino a plea questionnaire and waiver of rights, which was provided to the court and made part of the record. Powless further told the

court that Powless had read the form, that Powless had an opportunity to ask Jackomino questions about information on the form, and that Powless believed that he understood everything on the form.

¶16 The court observed that Attorney Jackomino had taken "considerable time this morning to go over the plea questionnaire with [Powless], is that correct?" Jackomino responded yes.

¶17 The plea questionnaire form used was an official court form. It bears the signatures of Jackomino and Powless.[1] On the first of its two pages is a section entitled "Understandings," with four bullet points. The second point reads: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: ...." Handwritten in the blank that follows on the form is the following: "$100,000 fine and/or 40 yrs in W[isconsin] S[tate] P[rison]."

¶18 During the plea hearing, Attorney Jackomino told the court that he believed Powless was knowingly waiving his trial rights and entering his plea.

¶19 At the sentencing hearing, the State recommended a sentence matching its "cap": twelve years of imprisonment, consisting of seven years of

[1] Above Powless's signature line is a text block that states in its entirety: "I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney (if represented). I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty."

Above Jackomino's signature line is a text block that states in its entirety: "I am the attorney for the defendant. I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. I saw the defendant sign and date this document."

initial confinement and five years of extended supervision, consecutive to any other sentence. The defense requested a long term of probation and jail, but not prison. The court sentenced Powless to twenty years of imprisonment, consisting of ten years of initial confinement and ten years of extended supervision, consecutive to a pending sentence from a case in another county.

Postconviction Motion, Order Denying Relief, Postconviction Hearing

¶20 In a postconviction motion for plea withdrawal, Powless argued that the court had erred in not personally informing him during the plea colloquy that the court was not bound by the plea agreement, as required under ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, that he did not understand at the time of the plea hearing that the court could impose a sentence above the State's recommendation, and that he would not have entered his guilty plea had he been aware of that fact.

¶21 The court denied the motion without a hearing, based on the use of the plea questionnaire at the plea hearing, and the failure of Powless to submit an affidavit supporting a prima facie case that he did not understand that the court was not bound by the State sentencing recommendation reflected in the plea agreement.

¶22 On appeal of that decision, this court reversed and remanded for an evidentiary hearing as contemplated in ***Bangert***, which calls for such a hearing if a defendant makes a prima facie showing that his or her plea was accepted under circumstances that raise questions about its validity. *See* ***Bangert***, 131 Wis. 2d at 274-75. In the appeal, the State conceded that the circuit court erred under ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794, in finding that use of the plea questionnaire at the hearing was a sufficient basis to deny Powless's

motion for a hearing on the ***Hampton*** question. We noted that the absence of an affidavit should not have prevented Powless from making a prima facie case, based on ***State v. Brown***, 2006 WI 100, ¶62, 293 Wis. 2d 594, 716 N.W.2d 906.

¶23 At the evidentiary hearing following remand, the only witness was Powless, whose testimony included the following. Powless was twenty-one at the time of the plea hearing, and had earned a high school diploma three years earlier, on the ordinary schedule for his age. He could read and write. He was not undergoing any treatment for a mental illness or disorder. His only employment had been a brief job at a Subway fast food outlet during high school.

¶24 Before the plea hearing, Powless had been convicted, each time by way of plea agreements, in two cases, one for possession of a controlled substance and the other for third-degree sexual assault. In each case, he was represented by an attorney (in neither case Attorney Jackomino). In each case, the plea agreement included a sentence recommendation by the prosecutor, which was followed by the court. In each case, he filled out a plea questionnaire. In one of those instances, in Shawano County, he entered pleas to several cases at the same time.

¶25 Powless testified that the day before the plea hearing in this case he learned from Jackomino the terms of the State's offer for a plea agreement. In their discussions on the day of the plea hearing, Jackomino was "very brief and to the point" and "basically just skimmed over" the plea questionnaire with him over the course of five minutes. "There was not a lot of real explaining." Powless could not recall whether Jackomino read to him the provision explaining that the court was not bound by the State's sentencing recommendation, but "[a]pparently if I signed it, he must have read it to me." "That day it was just a blur of words,

you know, like this is the deal and sign this, you know, in order to go through with the deal, basically."

¶26 Asked to give his understanding at the time of the plea hearing about the import of the State's sentencing recommendation in the agreement, Powless testified, "I usually thought they go hand in hand. They've both agreed upon the deal so if a deal was struck, that usually was agreed upon and that that was what was in the best interest of both companies [sic-parties?]." At the time of the plea hearing, he did not believe that the court could impose a sentence exceeding the State "cap."

¶27 Powless testified he learned from the plea questionnaire that he could get the maximum sentence.

¶28 Regarding his understanding as to whether the court had the authority to sentence him to more time than the State's recommended "cap," Powless made various statements. Powless testified that his attorney did not tell him that the court could not exceed the State's "cap," but instead Powless assumed that the court was bound by the State's recommendation. Powless read, with his attorney, the statement included among the bullet point "Understandings" at the bottom of the first page of the plea questionnaire that the court was not bound by the State's recommendation. Powless first testified that there was nothing about the statement in the plea questionnaire that Powless did not understand. Powless then changed his response, to assert that he did not understand this statement when he read it at the time of the plea hearing.

¶29 Asked if Jackomino specifically informed him that the court could impose a greater penalty than that recommended by the State, Powless responded,

"Yes, sir, but my understanding was that it would be inside the plea bargain that was struck." Asked who led him to believe that, Powless responded,

> That was just my understanding. As I said before in previous cases, the judge and the DA agreed upon it and I was explained [sic] that it was a cap off deal which I thought would—they couldn't go my [sic-any?] higher but they could go anywhere in between.

¶30 Asked to elaborate, Powless testified as follows.

> Q. Robert, I want to go back to a question that your attorney was just asking you because I'm not certain I understand your answer. He was asking you about whether Mr. Jackomino had explained to you that the judge was not bound by the recommendation, and you answered something to the effect that you understood the judge could impose a greater penalty?
>
> A. Yes, sir.
>
> Q. Where did you get that understanding from?
>
> A. That he could impose a greater? Well, the way he explained it was that he could go, you know, over what the agreement was, but I misunderstood it as that it was a cap off deal and he could recommend—the total amount was 12 years with seven in and five out, but my understanding—
>
> Q. Who explained that to you though?
>
> A. That's just what I misunderstood, I guess.
>
> Q. Was that through discussion with you and your attorney or was that just something that you had in your own mind?
>
> A. I had it in my own mind.
>
> Q. Okay. So in your mind, you knew the judge could go greater than what was the cap off but you thought this cap off was going to limit the judge is what you're telling me?
>
> A. Yes, sir.

> Q. Did anyone explain to you that this cap off deal that you're referring to limited the state, meaning the district attorney, from asking for more?
>
> A. No, sir.

¶31 Powless testified that if he had known at the time of the plea hearing that the judge was free to disregard the State's sentencing recommendation he would not have entered the plea.[2]

¶32 We save for our discussion below relevant findings and the legal conclusion of the circuit court in denying the motion at the close of the evidentiary hearing.

DISCUSSION

Standard of Review and Legal Standards

¶33 The Supreme Court has summarized the relevant standard of review as follows:

> On appellate review, the issue of whether a plea was knowingly and intelligently entered presents a question of constitutional fact. We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. We review constitutional issues independently of the determinations rendered by the circuit court ....

[2] Powless testified at the evidentiary hearing that he had taken Adderall, the brand name for a psychostimulant medication, in three doses that were spaced by four to five hours, during the twenty-four hours before the plea hearing, in order to get high, and that this drug use affected his ability to understand what was happening at the time of the plea hearing. The circuit court found this testimony to be unreliable and suggestive of manipulation by Powless. In his brief on appeal, Powless appears to disavow any argument that his alleged drug use is relevant to his argument that he should be allowed to withdraw his plea. The State mentions the issue in its brief, but only to note that it does not address the issue on appeal. On this record, we consider the issue undeveloped and ignore it.

State v. Bollig, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199 (citations omitted).

¶34 At a hearing conducted to give the State an opportunity to rebut a prima facie showing that a defendant's plea was not knowing, intelligent, or voluntary, the State carries the burden to prove "by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Hoppe***, 317 Wis. 2d 161, ¶44. If the State fails to carry its burden, the defendant may withdraw the plea as in violation of "'fundamental due process.'" ***Id.*** (citation omitted).

¶35 The State is entitled to argue from "'the totality of the evidence, much of which will be found outside the plea hearing record.'" ***Brown***, 293 Wis. 2d 594, ¶40 (quoting ***Hampton***, 274 Wis. 2d 379, ¶47). "For example, the state may present the testimony of the defendant and defense counsel to establish the defendant's understanding. The [S]tate may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden." ***Brown***, 293 Wis. 2d 594, ¶40 (citation omitted).

Analysis

¶36 Powless argues that the State did not meet its burden because he was the sole witness to testify at the ***Bangert*** hearing, and his testimony was "uncontroverted" that he had, in effect, been "conditioned by his prior experiences in the criminal justice system to expect that the court could not exceed the State's sentencing recommendation." We disagree because the circuit court had before it clear and convincing evidence that Powless was not "conditioned" in this way at

the time of the plea hearing, and that Powless's plea was entered knowingly, intelligently, and voluntarily.

¶37 Our conclusion is based on the following. Powless repeatedly, if inconsistently, testified during the evidentiary hearing that he did in fact understand that he could be sentenced to more time than the State was recommending in the agreement, and that the court was not bound by the State's recommendation. In making its findings following the evidentiary hearing, the court emphasized that Powless acknowledged in his testimony that he understood that the court could in fact impose a sentence beyond the State's "cap," that Jackomino explicitly told Powless this fact before Powless entered his plea, and that the plea questionnaire explicitly reinforced this same idea.

¶38 In addition, Powless's argument on appeal ignores the import of the use and content of the plea questionnaire in this case. Powless testified at the evidentiary hearing that his attorney went over the plea questionnaire with him before the court engaged in a detailed plea colloquy. The plea questionnaire sets forth in plain language in a bullet point that "the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty."

¶39 ***Hampton*** reaffirmed the rule that courts should engage in colloquies with defendants to ascertain that they understand that the terms of plea agreements, including prosecutor recommendations, are not binding on the court. ***Hampton***, 274 Wis. 2d 379, ¶¶38-44. However, while it reaffirmed that courts may not assume that use of a plea questionnaire alone is sufficient, ***Hampton*** did not create a per se rule that the absence of such a colloquy is fatal to a plea, but instead left in place the remedial measure of an evidentiary hearing, as specified in ***Bangert***, for cases such as this. ***Hampton***, 274 Wis. 2d 379, ¶73. In this case,

Powless's own account about his exposure to the content of the plea questionnaire, together with the copy of the questionnaire in the record and the transcript of the plea hearing, support a conclusion that Powless understood that courts have an independent role in sentencing and are not bound by State agreements or recommendations.

¶40 Supporting this conclusion were the facts that Powless's knowledge of English, his literacy, and his experience with the criminal justice system, all appear to have been at least average, if not greater than average, for a defendant in a criminal case. The court noted that Powless's relative sophistication, learned from his experience in the criminal justice system, included correctly using such criminal justice terms as "cap" to refer to a ceiling on the sentencing recommendation that a prosecutor could make.

¶41 At the time of the plea hearing, Powless had on at least two prior occasions entered pleas to criminal charges with assistance of counsel, in each case a different attorney. Powless's argument implies the highly unlikely scenario that two criminal defense attorneys were independently and exceedingly deficient in their performances in representing him. It would have been highly deficient for either attorney to tell Powless, or to allow him to believe, that a court is bound by a State recommendation at sentencing. It is conceivable that one of the two attorneys could have been so thoroughly unprofessional as to have allowed Powless to have an impression about the law completely contrary to one of the most fundamental legal principles of a criminal change of plea hearing; deficient performance unfortunately occurs. That *both* attorneys would be so highly deficient, however, is difficult to imagine. Therefore, it was reasonable for the circuit court to disbelieve Powless's suggestion that his communications with two prior defense attorneys left him with an incorrect understanding of the law so

strong that he could not follow the correct law explained to him at the plea hearing in this case.

¶42 An additional factor is that this is not a case in which a defendant entered a plea swiftly after being charged, while being advised by an attorney he had just met. Powless was represented in this case by the same attorney beginning no later than the April 2007 initial appearance hearing and continuing through trial preparation and the November 2007 plea hearing, and had multiple opportunities to consult with that attorney.

¶43 The only evidence contradicting the court's finding and legal conclusion is a single aspect of Powless's testimony at the evidentiary hearing. This was the vague testimony that Powless had learned, in some unidentified manner, the following during the course of earlier cases in which he had been represented by attorneys: Courts may not sentence criminal defendants to more time than the maximum sentence that the State, at the time of a plea, commits itself to recommending. Powless testified that he continued to hold that false idea at the plea hearing in this case even after he learned precisely the opposite from his attorney in this case. Powless also testified he did not understand the scope of the court's sentencing authority because his consultation with his attorney at the time of the plea was too rushed. The court found this testimony to be "incredible."

¶44 Powless disputes the circuit court's credibility determination. However, "[i]t is for the circuit court, not this court, to determine witness credibility." ***State v. Plank***, 2005 WI App 109, ¶11, 282 Wis. 2d 522, 699 N.W.2d 235 (sustaining circuit court finding that defendant's testimony at ***Bangert*** hearing was "just not believable"). For all of the reasons given above and based on the record, we conclude that the circuit court's findings are not clearly erroneous.

¶45 Therefore, we conclude that, based on the totality of the evidence in the record, the circuit court had before it clear and convincing evidence that Powless's plea was entered knowingly, intelligently, and voluntarily. Accordingly, we affirm.

By the Court.—Order affirmed.

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