COURT OF APPEALS DECISION DATED AND FILED

March 8, 2011

A. John Voelker
Acting 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 No. 2010AP143

Cir. Ct. No. 1997CF973910

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDDIE D. NASH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Freddie J. Nash, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 motion. Nash challenges the circuit court's failure, during the original plea colloquy, to advise him that it was not bound by

the plea bargain. The circuit court denied the motion, citing a lack of prejudice. We agree that denying the motion was proper and, accordingly, we affirm.

¶2 In 1997, Nash was charged with first-degree reckless homicide with use of a dangerous weapon, as a party to the crime; second-degree recklessly endangering safety with use of a dangerous weapon; and possession of a firearm by a felon, all as a habitual offender. In exchange for his guilty pleas to the homicide and the possession charges, the State agreed to dismiss the endangering charge and the habituality enhancer. The State also agreed not to recommend any specific sentence. Nash was sentenced to the maximum possible forty-seven years' imprisonment.

¶3 After postconviction counsel failed to seek relief on his behalf, Nash petitioned this court for a writ of *habeas corpus*, and his direct appeal rights were reinstated. New postconviction counsel filed a motion to withdraw the plea or, alternatively, for sentence modification, arguing that trial counsel was ineffective for failing to pursue two suppression motions that had been filed but not decided prior to Nash entering his plea. After an evidentiary hearing, the circuit court rejected the postconviction motion. We affirmed. Nash's second *habeas corpus* petition was denied.

¶4 In November 2009, Nash filed the underlying WIS. STAT. § 974.06 motion, seeking to withdraw his plea. He alleged that postconviction counsel had "fail[ed] to identify the court's duty to advise the defendant personally on the record that it is not bound by the terms of the negotiated plea agreement prior to the entry of the plea as required under the purview of 971.08, stats[.]" (Emphasis in original.) More specifically, Nash alleged that because of the circuit court's failure to advise him that it was not bound by the plea bargain, he was unaware

that the maximum possible penalty he faced was forty-seven years' imprisonment. The circuit court denied the § 974.06 motion, noting that there was no prejudice from counsel's failure to raise the issue, because the State had not made any sentencing recommendation that the sentencing court had rejected. Nash appeals, raising three issues.

¶5 First, Nash alleges that the circuit court never told him that it "had a statutory obligation to set his parole eligibility date." The State argues that this issue was not raised in the postconviction motion and, therefore, should not be addressed on appeal. Nash responds that his postconviction motion argued he was unaware of the direct consequences of his plea and, accordingly, he sufficiently raised the issue. However, we agree with the State. Nash's claim that he did not understand the direct consequences of his plea is too vague to sufficiently raise the parole issue. *See* ***State v. Caban***, 210 Wis. 2d 597, 606, 563 N.W.2d 501, 505 (1997) (motions must state grounds for relief with particularity). Issues raised for the first time on appeal will not be considered.[1] *See* ***id.***, 210 Wis. 2d at 604, 563 N.W.2d at 505.

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[1] In his reply brief, Nash asks us to remand the matter under WIS. STAT. § 808.075 if we deem the parole issue was not sufficiently raised. Remand is not necessary.

Under WIS. STAT. § 304.06(1)(b) (1997–98), the parole commission was authorized to parole an inmate after he or she had served the greater of six months or twenty-five percent of the sentence, subject to certain exceptions. One exception was WIS. STAT. § 973.0135 (1997–98), which required the court to determine a parole eligibility date when sentencing a "prior offender" for a "serious felony." The court could specify either the statutory eligibility date under § 304.06(1)(b), or it could specify a date between the statutory date and two-thirds of the sentence. *See* WIS. STAT. § 973.0135(2)(a)–(b) (1997–98).

During the plea colloquy, the circuit court asked Nash whether he understood that it could set an eligibility date greater than the statutory date, up to two-thirds of the sentence. Nash confirmed that he understood. Assuming without deciding that the circuit court had an obligation to advise Nash it would set a parole eligibility date, we conclude the circuit court's admonition here was sufficient.

¶6 Nash also alleges that the circuit court failed to personally inform him that he faced a maximum possible forty-seven years' imprisonment. This is incorrect. The circuit court advised Nash of the maximum possible term of imprisonment for each count—forty years for the homicide, five additional years for using a dangerous weapon, and two years for possessing the weapon. Nash confirmed he understood each maximum. The State subsequently specified that the total was forty-seven years, but this interjection does not undermine the circuit court's colloquy.

¶7 Nash's main complaint is that that the circuit court originally failed to advise him that it was not bound by any plea bargain, as required by ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 390, 683 N.W.2d 14, 19, and ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 24–25, 203 N.W.2d 638, 641–642 (1973) ("'If 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.'") (quoted source omitted). Specifically, Nash's postconviction motion alleged that he "did not enter his plea voluntarily with the knowledge that the sentence of 47 years could be imposed, … because the circuit court did not advise the defendant personally on the record, that it was not bound by the terms of the plea agreement[.]"

¶8 Nash's postconviction motion is a WIS. STAT. § 974.06 motion. That statute requires all grounds for relief to be raised in an original, supplemental or amended motion or appeal, unless sufficient reason exists for not raising the grounds previously. *See* WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994). It appears that, in anticipation that this procedural bar would be invoked against him because of his

prior postconviction motion and appeal, Nash alleged that postconviction counsel was ineffective for failing to notice and raise the issue of the defective plea colloquy. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (1996) (ineffective assistance of postconviction counsel may constitute "sufficient reason"). To demonstrate ineffective assistance, Nash must show that counsel's failure to raise the defective plea was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶9 We will assume without deciding that postconviction counsel performed deficiently by not raising an issue of the circuit court's omission of a mandatory duty. However, the circuit court ruled there was no prejudice because the State had not made a sentencing recommendation upon which Nash relied and from which the circuit court deviated. However, sentencing concessions are not necessarily the only component of a plea bargain—charge concessions also trigger the circuit court's obligation to advise the defendant that the circuit court is not bound by the bargain. *See* ***White***, 57 Wis. 2d at 24, 203 N.W.2d at 642.[2] Nevertheless, the same logic would extend to charge concessions in this case—the circuit court dismissed the endangering safety charge and the habituality enhancers, thereby honoring concessions for which Nash bargained and creating no prejudice.

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[2] From the phrase, "If 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[,]" Nash highlights the phrase "seek charge" and contends that the State did in fact "seek charge" of his case. It appears Nash reads this language to mean something akin to the State seeking to be *in* charge of a plea hearing.

¶10 We also conclude that Nash fails to show prejudice because he fails to demonstrate any lack of understanding.[3] To be entitled to an evidentiary hearing under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), which is applied in a direct postconviction proceeding when a defendant seeks plea withdrawal based on a defective plea colloquy, Nash would have to show not only a violation of the WIS. STAT. § 971.08 or court-mandated duties, but also that he failed to understand the information omitted from the colloquy, *see* ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26.[4]

¶11 Here, Nash fails to meet the second ***Bangert*** prong—he does not allege that he failed to understand the circuit court could reject the plea bargain.[5] Rather, he claims that the defective colloquy left him unaware that the maximum penalty he faced was forty-seven years. As we have seen, however, Nash personally acknowledged the maximum penalties during the colloquy, and the State agreed to no sentencing recommendation that Nash might have expected as his maximum penalty. Accordingly, we must assume that Nash knew the circuit court was free to reject the plea bargain, in which case postconviction counsel

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[3] The circuit court, in its order rejecting Nash's motion, stated that "very liberally construed, [the motion] could reasonably reflect that he did not understand that the court was not bound by the plea agreement." We respectfully disagree with the circuit court's conclusion in this regard, for reasons stated in the main text.

[4] We observe that Nash cannot use a WIS. STAT. § 974.06 motion to seek plea withdrawal based solely on the circuit court's failure to comply with colloquy obligations imposed by WIS. STAT. § 971.08 or court rule. *See* ***State v. Carter***, 131 Wis. 2d 69, 81, 389 N.W.2d 1, 5–6 (1986). Section 974.06 allows a defendant to seek relief for constitutional and jurisdictional issues—a statutory violation is neither. *See* ***ibid.*** Instead, we construe the motion as generally alleging that Nash's plea was not knowing, intelligent, and voluntary, rendering it constitutionally invalid. *See, e.g.,* ***State v. Bartelt***, 112 Wis. 2d 467, 478, 334 N.W.2d 91, 96 (1983).

[5] Indeed, this admonition is listed in the plea questionnaire that Nash signed.

could not have filed a ***Bangert*** plea withdrawal motion in good faith.[6] Counsel is not ineffective for failing to pursue meritless issues. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235, 246–247 (1987). We conclude the circuit court here properly denied Nash's WIS. STAT. § 974.06 motion.

By the Court.—Order affirmed.

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

[6] Nash also has not alleged, had he known the circuit court would be free to reject the plea bargain, that he would not have entered a plea and instead would have insisted on going to trial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54 (1996) (standard for plea withdrawal motion when defendant alleges factors extrinsic to plea colloquy adversely impacted understanding).