COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2010-CR **Cir. Ct. No. 2009CF3910**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RACHEL GORDON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DAVID A. HANSHER and JEFFREY A. KREMERS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Rachel Gordon appeals the judgment entered on her guilty pleas to one count of operating a motor vehicle after revocation and one count of operating a motor vehicle while under the influence of an intoxicant, as a

fifth offense. *See* WIS. STAT. §§ 343.44(1)(b), 346.63(1)(a). She also appeals the orders denying her postconviction motion for plea withdrawal and the motion for reconsideration that followed. Gordon claims that she did not enter her guilty pleas knowingly, voluntarily, and intelligently. Because Gordon does not allege that she did not know or understand information that should have been provided at the plea colloquy and because her postconviction motion presents only conclusory allegations, we affirm.

BACKGROUND

¶2 Gordon pled guilty to one count of operating a motor vehicle after revocation and one count of operating a motor vehicle while under the influence of an intoxicant, as a fifth offense. On the count of operating a motor vehicle while under the influence of an intoxicant, the court sentenced Gordon to three years of initial confinement followed by three years of extended supervision. On the count of operating a motor vehicle after revocation, the court sentenced Gordon to six months in the House of Correction, to run concurrently with the other sentence.

¶3 After sentencing, Gordon filed a postconviction motion asserting that her pleas were not knowingly, voluntarily, and intelligently entered into. She sought plea withdrawal.[1] The circuit court denied Gordon's motion without a hearing and she sought reconsideration.[2] The circuit court denied this motion as well.

[1] In her motion, Gordon further asserted that she was entitled to plea withdrawal based on the incompetency of her trial lawyer. She does not pursue this claim on appeal.

[2] The Honorable David A. Hansher presided over the plea proceedings, entered the judgment of conviction, and issued the written order denying Gordon's motion for (continued)

DISCUSSION

A. Adequacy of plea colloquy under *Bangert* and its progeny.

¶4 We first address whether the circuit court properly exercised its discretion in denying Gordon's motion for plea withdrawal based on what she contends was an inadequate plea colloquy. To withdraw a guilty plea after sentencing, the defendant must establish by clear and convincing evidence that withdrawal is necessary to avoid manifest injustice. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698, 708 (1998). A plea which is not knowingly, voluntarily, or intelligently entered into is a manifest injustice. ***Id.***, 219 Wis. 2d at 636, 579 N.W.2d at 708.

¶5 Before accepting a plea, the circuit court is required to address the defendant personally and undertake the thorough examination outlined in ***State v. Bangert***, 131 Wis. 2d 246, 267–272, 389 N.W.2d 12, 23–25 (1986). The plea proceeding must also comply with the requirements of WIS. STAT. § 971.08. A defendant is entitled to an evidentiary hearing to withdraw a guilty plea upon: (1) a *prima facie* showing of a violation of § 971.08(1) or other court-mandated duties that points to passages or gaps in the plea hearing transcript; *and* (2) an allegation that the defendant did not know or understand information that should have been provided at the plea hearing. ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 619, 716 N.W.2d 906, 918. Whether Gordon has established a *prima facie* violation of statutory or other duties is a question of law that we review *de novo*. *See* ***Brown***, 2006 WI 100, ¶21, 293 Wis. 2d at 612, 716 N.W.2d at 914.

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reconsideration after her postconviction motion was denied. The Honorable Jeffrey A. Kremers issued the written order denying Gordon's postconviction motion for plea withdrawal.

¶6 Gordon contends the plea colloquy was deficient in the following regards:

- There is no reference to the guilty plea questionnaire and waiver of rights form that was filed with the court. As a result, Gordon submits that she was never informed by the court that she would be giving up certain constitutional rights. Namely, while she was told that she had the right to remain silent, Gordon asserts that the court failed to inform her that her silence could not be used against her at trial. Next, Gordon claims that the court failed to advise her that she had the right to use subpoenas to require witnesses to come to court and testify for her at trial.

- Although the court knew her age and that she had a high school diploma, Gordon claims that it failed to ask any other questions regarding her ability to understand the nature of the proceedings at that point. Specifically, the court did not ask her if she was currently receiving treatment for mental illness or disorder nor did it ask whether she had alcohol, medications, or drugs during the twenty-four hours preceding the plea hearing.

¶7 We conclude that even if the plea colloquy was deficient in these regards, Gordon is not entitled to an evidentiary hearing because she has not satisfied the second part of the two-part inquiry: she does not allege that she did not know or understand information that should have been provided at the plea colloquy. *See* ***id.***, 2006 WI 100, ¶39, 293 Wis. 2d at 619, 716 N.W.2d at 918. Thus, Gordon is not entitled to a ***Bangert*** evidentiary hearing. *See* ***Brown***, 2006 WI 100, ¶63, 293 Wis. 2d at 629, 716 N.W.2d at 923 ("[I]f the defendant is

unwilling or unable to assert a lack of understanding about some aspect of the plea process, there is no point in holding a hearing."); *see also* ***id.***, 2006 WI 100, ¶63, 293 Wis. 2d at 629, 716 N.W.2d at 924 ("In the absence of a claim by the defendant that he lacked understanding with regard to the plea, any shortcoming in the plea colloquy is harmless.").

B. Plea infirmity under *Nelson/Bentley* line of cases.

¶8 Gordon further contends that factors extrinsic to the colloquy—that she tested positive for cocaine shortly after the plea hearing—rendered her plea infirm. Gordon asserts that by testing positive for cocaine, it shows that she was "out of control" and could not have understood what was happening.

¶9 A claim that a plea is infirm for reasons outside of the record invokes the authority of ***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). *See* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 384–385, 734 N.W.2d 48, 65. A ***Nelson/Bentley*** motion for plea withdrawal, "must meet a higher standard for pleading than a ***Bangert*** motion." ***Howell***, 2007 WI 75, ¶75, 301 Wis. 2d at 385, 734 N.W.2d at 66. The motion "must allege sufficient, nonconclusory facts ... that, if true, would entitle [the defendant] to relief." ***Id.***, 2007 WI 75, ¶76, 301 Wis. 2d at 386, 734 N.W.2d at 66. "[I]f the defendant fails to allege sufficient facts ... or presents only conclusionary [*sic*] allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court may deny the motion without a hearing. ***Id.***, 2007 WI 75, ¶75, 301 Wis. 2d at 385, 734 N.W.2d at 66. The burden is on the defendant to show the plea was invalid. *See* ***State v. Hampton***, 2004 WI 107, ¶63, 274 Wis. 2d 379, 408, 683 N.W.2d 14, 28.

¶10 Gordon has not satisfied her burden. As the circuit court wrote in its order denying Gordon's motion for reconsideration:

> In this instance, the defendant's motion alleges only that there was cocaine in her system at the time she entered her guilty pleas. There is no allegation or affidavit from the defendant regarding the amount of cocaine that was detected in her system after she entered her pleas or that it affected her understanding of the plea proceedings. A defendant may not rely upon conclusory and insufficient allegations to obtain relief. *See* ***State v. Allen***, [2004 WI 106, ¶21,] 274 Wis. 2d 568, 584[, 682 N.W.2d 433, 441].

¶11 We agree with the circuit court's assessment that Gordon's motion, on its face, presents only conclusory allegations. *See generally* ***Howell***, 2007 WI 75, ¶78, 301 Wis. 2d at 388, 734 N.W.2d at 67 (Although a reviewing court independently determines as a matter of law whether a motion to withdraw a guilty plea is sufficient, it benefits from the analysis of the circuit court.). Consequently, the court properly exercised its discretion in denying Gordon's motion without a hearing.[3]

[3] The court ordered that Gordon be tested for drugs following the plea hearing. A review of the Record reveals that this was done as the court was in the process of determining whether to take Gordon into custody or continue her bail. The court noted that Gordon was taken into custody a few weeks prior to the plea hearing after testing positive for the presence of alcohol and cocaine. The court further referenced violation reports it had received indicating that Gordon had poor attendance at supervision appointments. Gordon's trial attorney subsequently offered that Gordon could "be tested now and come back in 15 minutes." After being informed that she tested positive for cocaine, Gordon did not return, and shortly thereafter, was found outside the courthouse and was taken into custody.

Contrary to Gordon's representations in her brief, there is nothing in the Record to indicate that the court thought Gordon was under the influence of drugs or alcohol when it accepted her plea. Indeed, in both its order denying Gordon's motion for plea withdrawal and the subsequent order denying her motion for reconsideration, the court stated that there was nothing about her responses during the plea colloquy that gave the court the impression that Gordon was impaired or unable to understand the proceedings.

By the Court.—Judgment and orders affirmed.

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