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**DISTRICT II**

November 22, 2023

*To*:

Hon. Timothy D. Boyle
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Dustin C. Haskell
Electronic Notice

Christine A. Remington
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

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2023AP183-CR State of Wisconsin v. Donterious L. Robb (L.C. #2019CF890)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Donterious L. Robb appeals from a judgment of conviction and an order of the circuit court denying without an evidentiary hearing his postconviction motion to withdraw his pleas. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] For the following reasons, we agree with Robb that the court erred in denying his motion without an evidentiary hearing, and we reverse and remand for the court to hold such a hearing.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Robb was charged with one count of armed robbery with threat of force, one count of robbery of a financial institution, and three counts of kidnapping. On August 14, 2020, he pled no contest to armed robbery and guilty to robbery of a financial institution and one of the kidnapping counts. Following sentencing, he filed a postconviction motion to withdraw his pleas on the basis that (1) the circuit court failed to ask him at the plea hearing whether any promises were made to him and (2) he was induced to enter his pleas based on a promise made by his counsel that the court would sentence him to no more than ten years of confinement time. The court denied his motion without an evidentiary hearing, and he appeals.

To withdraw a plea postsentencing, a defendant must establish by clear and convincing evidence that failure to allow plea withdrawal "will result in a manifest injustice." ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. One way to show a manifest injustice will result is to demonstrate that the plea was not knowing, intelligent or voluntary, as is required by due process. ***Id.***, ¶¶30, 48-49.

To the end of ensuring a plea is knowing, intelligent and voluntary, "[d]uring the course of a plea hearing, the [circuit] court must address the defendant personally" and, among other things, "[a]scertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea." ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. A court's failure to determine whether any promises were made, however, will necessitate an evidentiary hearing only if a defendant's postconviction motion alleges an improper promise in fact was made which induced him or her to enter a plea. ***State v. Hoppe***, 2009 WI 41, ¶¶19-20, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 829 n.2, 416 N.W.2d 627 (Ct. App. 1987). Whether the motion alleges sufficient facts to

require an evidentiary hearing is a question of law we review de novo. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

A review of the plea hearing transcript in this case shows that the circuit court never inquired of Robb "whether any promises … were made in connection with [his] anticipated plea[s]." *See* ***Brown***, 293 Wis. 2d 594, ¶35. Thus, the plea colloquy was defective in this regard. Additionally, Robb alleged in his postconviction motion that counsel told him counsel "was on good terms with the judge" and "*assured* [him] that the ultimate sentence *would be* no longer than 10 years in confinement if he accepted the plea." (Emphases added.) The motion continued:

> Trial counsel offered this assurance as a *guarantee*, not an educated guess about what the sentence might be. Mr. Robb—who had no prior criminal record—alleges that he *believed* his attorney's assurance and *accepted the plea on that basis*.
>
> Thus, Mr. Robb entered his plea with a misunderstanding of the consequences of his plea. His attorney wrongly assured him that the judge would impose a sentence no longer than 10 years in confinement, and the court failed to ascertain whether any such promises had been made in connection with his plea.

(Emphases added.) Because Robb's postconviction motion showed the defect in the plea hearing and satisfactorily alleged he was induced to plead by an improper promise, the court was required to hold an evidentiary hearing "at which the state is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." *See* ***id.***, ¶40.

The State does not dispute that in accepting Robb's pleas, the circuit court failed to directly ask him whether any promises were made to him in connection with them. Yet, it does not concede the colloquy was defective; instead, it asserts the court "*did* ascertain whether any

promises, agreements, or threats were made" because it "asked Robb whether any one was forcing him to enter his pleas," to which Robb answered, "No," and because Robb acknowledged reviewing and signing the plea questionnaire and waiver of rights form and understanding the information therein, which information included a statement that "[n]o promises have been made to me other than those contained in the plea agreement." (Emphasis added.)

The State's position does not carry the day. First, whether anyone was "forcing" or coercing Robb to enter his pleas does not address whether any "promises" were made to him in connection with them. Second, our supreme court has stated that a plea questionnaire and waiver of rights form does not substitute for an in-court colloquy. ***Hoppe***, 317 Wis. 2d 161, ¶31. "[T]he plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in ***Brown***," ***Hoppe***, 317 Wis. 2d 161, ¶31, which duties include inquiring as to whether any promises were made in connection with the defendant's plea, ***Brown***, 293 Wis. 2d 594, ¶35.

As we observed in ***State v. Dawson***, 2004 WI App 173, ¶25, 276 Wis. 2d 418, 688 N.W.2d 12, a plea would not be knowing and voluntary if it was "induced by the promise of a possible future benefit that could never be conferred." Here, Robb has alleged his counsel promised/"guarantee[d]" him the circuit court would sentence him to no more than ten years of confinement time if he accepted the pleas—a promise that was beyond counsel's power to make. While it remains to be seen whether in fact such a false promise was made and induced Robb to enter his pleas, at least at this stage of the postconviction proceedings, Robb has made the necessary showing and allegations to entitle him to an evidentiary hearing on his motion.

IT IS ORDERED that the judgment and the order of the circuit court is reversed and cause remanded for further proceedings. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*
*Clerk of Court of Appeals*