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DISTRICT I

December 5, 2013

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

2012AP1832-CR State of Wisconsin v. Wendell T. Evans (L.C. #2010CF627)
2012AP1833-CR State of Wisconsin v. Wendell T. Evans (L.C. #2010CF3184)

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

On the basis of his no-contest pleas, Wendell T. Evans was convicted of two counts of burglary of an occupied dwelling (home invasion), one count of burglary of an unoccupied dwelling, three counts of theft from a person, one count of second-degree reckless injury, and one count of attempted theft from a person, all as a repeater. Evans appeals from an order of the circuit court that denied, without a hearing, his postconviction motion to withdraw his pleas.[1]

[1] Evans appeals from both the judgments of conviction and from the order denying postconviction relief. This decision reverses only the order and remands the matter for further proceedings.

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 (2011-12).[2] We conclude that the cumulative effect of the alleged errors is too great to disregard. We therefore summarily reverse the order appealed from and remand these matters to the circuit court for further proceedings.

BACKGROUND

Evans was originally charged with ten offenses in two cases: four counts of theft from a person, three counts of burglary of an unoccupied dwelling, two counts of robbery, and one count of attempted theft from a person, all as a repeater. When Evans declined to enter a plea agreement with the State, it filed an amended information to cover both cases, charging Evans with eleven offenses: four counts of theft from a person, two counts of false imprisonment, two counts of burglary of an occupied dwelling (home invasion), one count of burglary of an unoccupied dwelling, one count of attempted theft from a person, and one count of second-degree reckless injury, all as a repeater.

Evans ultimately entered no-contest pleas to eight of the eleven charges, supposedly based on assurances from trial counsel that the State would recommend thirty-to-forty years' initial confinement even though the express terms of the plea agreement left the State free to argue an appropriate sentence. In a sentencing memorandum, the State recommended sixty-three years' initial confinement and twelve years' extended supervision. Trial counsel advocated for a sentence with thirty to forty years' initial confinement. The circuit court sentenced Evans to an

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

aggregate thirty-four years' initial confinement and ten years' extended supervision, consecutive to any other sentences then being served.[3]

Evans filed a postconviction motion, seeking to withdraw his pleas. He asserted that his plea was not knowing, intelligent, or voluntary because he did not fully understand the terms of the plea agreement, trial counsel was ineffective for failing to accurately communicate the terms of the plea offer, and trial counsel was ineffective for failing to move for Evans' plea withdrawal prior to sentencing, when the burden was lower. Evans also claimed a defect in the plea colloquy, asserting that the circuit court had not advised him of the correct maximum penalties on most of the charges.

The circuit court denied the motion without a hearing. It concluded that Evans suffered no prejudice from counsel's errors because the thirty-four years' initial confinement he received was within the range he had expected the State to recommend. It also concluded the magnitude of the misstatements on the sentences was "insubstantial" and "immaterial." Additional facts will be discussed herein as necessary.

DISCUSSION

"A defendant seeking to withdraw a guilty [or no-contest] plea after sentencing must show that refusal would cause 'manifest injustice.'" ***State v. Lichty***, 2012 WI App 126, ¶8, 344 Wis. 2d 733, 823 N.W.2d 830 (citation omitted). One way of demonstrating manifest injustice is by showing the defendant did not knowingly, intelligently, or voluntarily enter his plea. *See*

[3] For fifty-one-year-old Evans, whose probation in another case was revoked as a result of the charges in these cases, this is effectively a life sentence.

State v. Brown, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A plea that is not knowing, intelligent, or voluntary may be withdrawn as a matter of right because it violates due process. *See* ***id.***, ¶19.

There are various ways in which a plea might be rendered unknowing, unintelligent, or involuntary. To that end, Evans' postconviction motion is a dual purpose motion. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. It invokes both the ***Nelson/Bentley***[4] line of cases by claiming ineffective assistance of trial counsel as well as the ***Bangert***[5] line of cases by alleging a defect in the plea colloquy. *See* ***State v. Burton***, 2013 WI 61, ¶5, 349 Wis. 2d 1, 832 N.W.2d 611.

There are slightly different pleading standards for each type of claim. *See* ***id.***, ¶41. In a ***Nelson/Bentley*** motion, a defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion suffices, the circuit court must hold an evidentiary hearing; otherwise, the circuit court has the discretion to grant or deny a hearing. *See* ***id.*** A defendant raising a ***Bangert*** issue must allege: (1) deficiencies in the plea colloquy constituting a violation of WIS. STAT. § 971.08 or other mandatory duties and (2) that the defendant did not know or understand the information that should have been provided at the plea hearing. ***Burton***, 349 Wis. 2d 1, ¶39. Sufficiency of the pleadings is a question of law that we review *de novo*. ***Id.***, ¶¶38-39.

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

[5] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

We first discuss Evans' ***Bangert*** claim. Evans alleged that he was misinformed of the applicable maximum penalties by the circuit court, contrary to the requirements of WIS. STAT. § 971.08(1)(a) and ***State v. Bangert***, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986). Evans further alleged that at the time he entered his plea, "he did not otherwise know or understand the correct maximum penalty."

Specifically, Evans pointed out that the circuit court had grouped all three burglary charges together and advised him that they each carried a maximum penalty of twenty-one years' imprisonment, broken down as thirteen and one-half years' initial confinement and seven and one-half years' extended supervision. For the two home invasions, that maximum was accurate, though the correct bifurcation was as sixteen years' initial confinement and five years' extended supervision. The third burglary count, however, involved an unoccupied dwelling, so its maximum penalty was eighteen and one-half years' imprisonment: thirteen and one-half years' initial confinement and five years' extended supervision. Thus, the circuit court *overstated* the maximum total term of imprisonment by two and one-half years, while understating initial confinement by five years and overstating extended supervision by seven and one-half years.[6]

Evans also alleged that the circuit court neglected to appropriately caution him about the potential $25,000 fine on four counts, while overstating the fine for the attempted theft count.[7]

[6] The State included a chart in its appendix in an attempt to summarize the alleged errors. The chart lists the "advised maximum" penalties correctly, though its arithmetic is slightly off. The State calculated that the circuit court had advised Evans of a maximum possible 127.5 years' imprisonment. However, the circuit court's comments indicated Evans faced 132.5 years' imprisonment. The actual maximum was 130 years.

[7] Curiously, Evans' motion does not appear to note the overstatement of the fine on the third burglary charge. It is a lower felony class, subject to only a $25,000 fine, not a $50,000 fine like the home invasions. *See* WIS. STAT. §§ 943.10(1m)(a) & 939.50(3)(f).

Ultimately, the circuit court cautioned Evans abut $150,000 in potential fines when he really faced up to $237,500.[8]

Based on those allegations, Evans appears to have made the necessary *prima facie* showing to earn a hearing on his ***Bangert*** motion. *See* ***State v. Cross***, 2010 WI 70, ¶¶19-20, 326 Wis. 2d 492, 786 N.W.2d 64. At an evidentiary hearing on a ***Bangert*** motion, the burden shifts to the State to show that, colloquy deficiencies notwithstanding, the defendant's plea was nevertheless knowing, intelligent, and voluntary. *See* ***Cross***, 326 Wis. 2d 492, ¶20. However, recent cases from the supreme court suggest that a mere misstatement or mistake regarding the range of potential penalties will not necessarily constitute a WIS. STAT. § 971.08 violation for ***Bangert*** motion purposes. The State relies on these cases to suggest there was no ***Bangert*** violation here.

In ***Cross***, the supreme court concluded that "where a defendant is told that he faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law," there is no ***Bangert*** violation. *See* ***Cross***, 326 Wis. 2d 492, ¶4. Cross's potential sentence had been overstated by ten years. *See* ***id.***, ¶41. In ***State v. Taylor***, the supreme court dealt with a potential sentence understated by two years, but concluded that the plea was knowing, intelligent, and voluntary because the record showed that Taylor was well aware of the

[8] Counts 1 and 3, burglary of an occupied dwelling (home invasion), are Class E felonies with a potential maximum fine of $50,000 each. *See* WIS. STAT. §§ 943.10(2)(e) & 939.50(3)(e). Count 5, burglary of an unoccupied dwelling, is a Class F felony with a potential maximum fine of $25,000. *See* WIS. STAT. §§ 943.10(1m)(a) & 939.50(3)(f). Count 9, second-degree reckless injury, is also a Class F felony. *See* WIS. STAT. § 940.23(2)(a). Counts 6, 7, and 8, theft from a person, are Class G felonies with a potential maximum fine of $25,000 each. *See* WIS. STAT. §§ 943.20(1)(a), (3)(e) & 939.50(3)(g). Count 11, attempted theft from a person, is also a Class G felony, but its penalties are half that of the completed crime, so the maximum potential fine is $12,500. *See* ***id.***; *see also* WIS. STAT. § 939.32(1), (1g)(a).

maximum penalty. *See* ***id.***, 2013 WI 34, ¶¶1-2, 8, 347 Wis. 2d 30, 829 N.W.2d 482. Additionally, this court has held that a circuit court need not, in advising a defendant of the possible range of punishments, break the potential sentence down into the initial confinement and extended supervision terms. *See* ***State v. Sutton***, 2006 WI App 118, ¶24, 294 Wis. 2d 330, 718 N.W.2d 146.

Evans' case, however, does not neatly fit under ***Cross***, ***Taylor***, or ***Sutton***. When the circuit court started its colloquy, it told Evans the burglaries were punishable by up to fifteen years' imprisonment each, and Evans confirmed his understanding, even though that penalty was incorrect. Aside from still grouping all three burglaries together, the circuit court omitted the repeater penalty enhancer, resulting in a fourteen-and-one-half-year understatement of the penalties. The circuit court moved on and started discussing the theft charges, but realized its mistake and went back to the burglaries. When it told Evans that the penalty for each burglary was now twenty-one years, Evans again said he understood. However, this still resulted in a two-and-one-half-year overstatement of the maximum penalty.

Sutton notwithstanding, it seems that if the circuit court chooses to break down sentences into their respective initial confinement and extended supervision terms, it should have to do so accurately. Here, the circuit court ultimately understated initial confinement by five years and overstated extended supervision by seven and one-half years. Thus, unlike ***Cross***, we do not have a mere two-and-one-half-year overstatement of the possible penalties; rather, we have an initial understatement and then an overstatement of the total penalty, plus an understatement on one portion of the sentence and an overstatement on the other. Further, even if a net two-and-one-half-year overstatement would not constitute a ***Bangert*** violation based on the holding in ***Cross***, there is still the issue of the $87,500 *understatement* of the potential fines. The circuit

court deemed the difference "immaterial" because Evans could not pay $150,000 or $237,500. However, we cannot subscribe to this logic for ***Bangert***/WIS. STAT. § 971.08 purposes: Evans also cannot logically serve a maximum sentence of 130 years, but he must still be adequately advised of, and could be ordered to serve, that potential maximum.

Also, unlike in ***Taylor***, the record does not clearly indicate that Evans understood the potential maximums. As noted, Evans said he understood that his burglaries carried a potential maximum of fifteen years, but then moments later said he understood the possible sentence was twenty-one years. This understanding is inconsistent, particularly given that neither was the correct sentence for the third burglary. The State points out that Evans received a copy of the amended information and acknowledged on the plea questionnaire that he had read the complaint, both of which contained the maximum penalties. But Evans was not present at the hearing when the amended information was filed, and we do not know when or whether Evans received his own copy to review—the State's record citation is only to the amended information itself. The original complaints are largely irrelevant because the charges differ from the information: the three burglaries were all originally the lower class and they lack the reckless injury charge entirely. Further, we note that the plea questionnaire form does not have the penalties listed in the space provided; it indicates only that the penalties were discussed with counsel.

Standing alone, any one of these errors—overstating the total possible imprisonment, understating the total possible fines, misstating the penalty for a single count, incorrectly bifurcating the sentence during the colloquy, or providing two different possible maximum sentences for a set of charges—might not concern us. But "[t]he cumulative effect of several errors may, in certain instances, undermine a reviewing court's confidence in the outcome of a

proceeding." ***State v. Harris***, 2008 WI 15, ¶110, 307 Wis. 2d 555, 745 N.W.2d 397. Here, the combined errors leave us with concerns about the adequacy of the plea colloquy relative to Evans' due process right to enter a knowing, intelligent, and voluntary plea. He is, therefore, entitled to an evidentiary hearing on his ***Bangert*** issue.[9]

Evans also alleged, in the ***Nelson/Bentley*** line of cases, ineffective assistance of trial counsel. We use a two-part test for ineffective-assistance claims. ***Allen***, 274 Wis. 2d 568, ¶26. A defendant must show that the attorney's performance was deficient and that the deficiency was prejudicial. *See* ***id.*** An attorney's performance is deficient if he or she "'made errors so serious that counsel was not functioning as'" constitutionally guaranteed counsel. *See* ***id.*** (citation omitted). "Prejudice" is "'a reasonable probability that, but for counsel's error, the result of the proceeding could have been different.'" ***Id.*** (citation omitted). In our current context, this means that the defendant must allege "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted). "A movant must prevail on both parts of the test to be afforded relief." ***Allen***, 274 Wis. 2d 568, ¶26.

Evans' first allegation against trial counsel is that she was ineffective for failing to properly advise him of the terms of the plea bargain because she "repeatedly assured Mr. Evans … that although technically the state would be free to recommend any sentence, the state would indeed be requesting 30-40 years confinement." The State contends that Evans failed to

[9] It is, of course, entirely possible that the evidentiary hearing will produce facts that allow the State to satisfactorily demonstrate that Evans' plea was knowing, intelligent, and voluntary despite the errors in the colloquy process. *See* ***State v. Cross***, 2010 WI 70, ¶20, 326 Wis. 2d 492, 786 N.W.2d 64.

sufficiently allege prejudice: while he claimed that he would not have entered his pleas had counsel not assured him that the State's recommendation would be thirty-to-forty years' initial confinement, the State notes that Evans "must do more than merely allege that he would have pled differently; such an allegation must be supported by objectively factual assertions." *See* ***Bentley***, 201 Wis. 2d at 313.

The circuit court, though, rejected the claim on its merits, concluding that Evans suffered no prejudice. First, it noted that the thirty-four years of initial confinement imposed was within the thirty- to forty-year range that Evans expected the State to recommend. Second, the circuit court determined that the record "shows conclusively" that Evans understood the State was free to argue because "[h]is lawyer told me as much." Finally, the circuit court concluded that any misunderstanding stems from counsel predicting what the State would do, and that the "[t]he source of his surprise … was that he and his lawyer convinced themselves … that the State probably would make the same recommendation it had offered earlier in the case." Thus, it denied a hearing on the motion. *See* ***Allen***, 274 Wis. 2d 568, ¶9 (circuit court may deny motion if record conclusively demonstrates defendant is not entitled to relief).

We respectfully disagree with the circuit court. First, the thirty-four-year term imposed was imposed in light of a sixty-three-year recommendation. It is legitimate for Evans to wonder whether his sentence would have been lighter had the State only recommended forty years' imprisonment—indeed, during the plea colloquy, the circuit court noted that the parties' recommendations, though not determinative, "give a framework for the [sentencing] arguments."

Second, the circuit court relies on a portion of the plea colloquy to show Evans' "understanding" that the State was free to argue. We think that portion shows the opposite. In

discussing the plea agreement during the colloquy, the State noted, "All parties will be free to argue for the appropriate sentence." The circuit court clarified that "the State is not making a promise about what recommendation it makes," then asked Evans' attorney if that was a correct statement. She responded, "Yes. I did tell him that they would be free to argue whatever they wanted, but they're not making a recommendation. But ultimately the decision is up to you."

The circuit court then addressed Evans to caution him that the court was ultimately responsible for deciding the sentence: the State might recommend life imprisonment, or two years of consecutive time, or thirteen years of concurrent time, but the sentence would ultimately be up to the court and "based on the facts." Evans said he understood that, but the State then interjected, "Just so that everybody in the room is clear, the State is free to recommend up to the maximum sentence on all counts for which the defendant is convicted."

The circuit court indicated that was its understanding and inquired of trial counsel whether it was hers. The transcript reveals the following exchange then occurred:

> [DEFENSE COUNSEL]: I don't think my client is still clear that--
>
> THE COURT: Mr. Evans, you want to ask [counsel] a question? Okay, sure. Let's go off the record.
>
> (Attorney … and the defendant conferring off the record).
>
> [DEFENSE COUNSEL]: He just said he understands, Your Honor.

It thus appears that Evans was troubled by the State's insistence that it could recommend up to the maximum and sought clarification. While counsel subsequently asserted Evans' understanding that the State was free to argue, Evans' postconviction motion alleged that his attorney reassured him during the off-the-record consultation that despite the State's representations, it was nevertheless going to recommend thirty-to-forty years. We further note

that despite Evans' confusion, the circuit court never confirmed with Evans personally whether he understood the terms of the plea agreement but, rather, relied solely on counsel's representations.

Third, we do not think that counsel's reassurances, based on the current record, amount to a mere prediction. This is not a case, for instance, where counsel suggested to her client the sentence she thought the court would likely impose, or where counsel predicted that the plea would result in leniency from the court. Approximately two weeks prior to the plea date, counsel had sent Evans a letter stating, in part, that the assistant district attorney "stated if you Plead Out (although all deals are off the table), he still may be willing to recommend 30-40 yrs Initial Confinement." On its face, this appears to be more than a mere prediction of what might happen if Evans entered a plea.[10] In any event, it seems that if Evans convinced himself of anything, it was based expressly on trial counsel's representations of the State's offer.

Indeed, after the State provided counsel with a copy of its sentencing memorandum, in which it recommended sixty-three years' initial confinement, counsel wrote back, stating that Evans' "understanding of his plea agreement was the State would recommend 30-40 years" and requesting clarification. Coupling both of counsel's letters with Evans' allegations of counsel's repeated representations to him, we think counsel gave Evans more than an "'incorrect prediction'" or "'[m]istaken estimate'" of the possible sentence. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272 (citations omitted).

[10] We express no opinion on whether counsel accurately represented the assistant district attorney's position to Evans.

We agree with the State that the allegation of prejudice is weak: the claim is simply that he would not have entered the plea and that the prejudice suffered "is evident in the fact that he entered his unknowing plea in exchange for incorrect information regarding the plea offer." It does not allege why Evans would not have entered the plea had he been given the correct information. *See* ***Bentley***, 201 Wis. 2d at 312. However, when this matter is reviewed with the other ineffective-assistance claim, we think a ***Machner***[11] hearing is warranted.

Evans' other ineffective-assistance claim is that counsel was ineffective because she failed to seek plea withdrawal prior to sentencing, when the burden of persuasion was lower. The circuit court concluded that Evans had not shown a likelihood of a different result. Again, we respectfully disagree.

When Evans learned what the State's sentence recommendation was actually going to be, he asked trial counsel to seek plea withdrawal. She indicated that the withdrawal motion could be pursued postconviction, and did not discuss a presentencing withdrawal motion with him. This caused him to lose the benefit of a lower burden of persuasion: a plea withdrawal motion filed prior to sentencing requires only a fair and just reason for plea withdrawal, as opposed to a manifest injustice. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 287, 592 N.W.2d 220 (1999). Evans' postconviction motion contends that he did not truly understand the plea agreement; failure to understand the consequences of a plea is, in fact, a fair and just reason for plea withdrawal. *See* ***State v. Harvey***, 2006 WI App 26, ¶25, 289 Wis. 2d 222, 710 N.W.2d 482; *see also* ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). Evans' motion, which alleges he would

[11] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

have been able to prevail on that lower standard and alleges the facts relevant to that lower standard, thus alleges sufficient material facts which, if true, would entitle Evans to relief. Accordingly, we conclude that the motion was sufficiently pled to warrant a hearing on this ineffective-assistance claim, plus the directly related issue of counsel's advice regarding the plea itself.

These matters are therefore remanded to the circuit court to conduct a postconviction evidentiary hearing regarding the alleged ***Bangert*** violation and the claims of ineffective assistance of trial counsel.

IT IS ORDERED that the order is summarily reversed and the causes remanded for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals