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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

January 28, 2014

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
215 South Hamilton, Br.15, Rm. 7107
Madison, WI 53703

Sandra L. Tarver
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Cody Wagner
P. O. Box 1436
Madison, WI 53701-1436

Shelly J. Rusch
Assistant District Attorney
215 S. Hamilton St., Room 3000
Madison, WI 53703-3297

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

2012AP1699-CR State of Wisconsin v. Gloria E. Evans (L.C. # 2011CF310)
2012AP1700-CR State of Wisconsin v. Gloria E. Evans (L.C. # 2011CF818)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Gloria Evans appeals from judgments of conviction entered on her no-contest pleas and an order denying her postconviction motion to withdraw her plea. She argues that she is entitled to an evidentiary hearing on her ***Bangert***[1] motion because it makes a prima facie showing that

[1] ***State v. Bangert***, 131 Wis. 2d 246, 271-75, 389 N.W.2d 12 (1986), summarizes the trial court's duties designed to ensure that a defendant's guilty or no-contest plea is knowing, intelligent, and voluntary. If the trial court fails at one of the duties, it is called a ***Bangert*** violation and a motion raising the alleged error is called a ***Bangert*** motion. ***State v. Cross***, 2010 WI 70, ¶19, 326 Wis. 2d 492, 786 N.W.2d 64.

the trial court failed to fulfill its duty to ask her if any promises had been made to induce her 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(1) (2011-12).[2] We conclude an evidentiary hearing was not required because there was no defect in the plea colloquy and affirm the judgments and order.

During a plea hearing the trial court has the duty to ascertain whether any promises were made to the defendant in connection with the anticipated plea. ***State v. Bangert***, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986). An evidentiary hearing must be held on a motion to withdraw a plea if the motion establishes a prima facie violation of the court's duties and alleges "that the defendant did not know or understand the information that should have been provided at the plea hearing." ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. Whether a postconviction motion establishes a violation of the court's mandatory duties is a question of law which we review de novo. ***Id.***, ¶21.

Evans's postconviction motion indicates that at the plea hearing there was no discussion between the trial court and Evans of any promises in connection with her plea, and her motion claims that the trial court failed to ascertain whether any promises were made to Evans. Her supporting affidavit states that her trial attorney told her the worst case scenario under the plea agreement was that she would receive five years in prison, that she took this as a promise that she would not receive more than five years in prison if she accepted the agreement, and that she

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

would not have pled guilty if her attorney had not promised that she would receive no more than five years in prison.

At the start of the plea hearing, the trial court specifically obtained Evans's confirmation that there was no offer of any kind by the prosecution to induce the plea and that the parties would be discussing a sentencing recommendation after preparation of the presentence investigation report. Next the court went over the maximum penalty for the three crimes to which Evans pled no-contest and obtained Evans's confirmation that the court was not bound by any recommendations and that Evans faced the maximum penalties.[3] The court referred to the plea questionnaire and waiver of rights forms that Evans executed for both cases. Evans confirmed that she had gone through the forms in their entirety before signing them and that she understood everything on the forms. The questionnaire form includes a defendant's acknowledgement that: "I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." Evans signed her name below that declaration on two forms. At the conclusion of the plea colloquy, the trial court found that based on its observations of Evans, "as well as her having gone through the plea questionnaire," Evans's plea was knowing, voluntary, and intelligent.

In addition to ascertaining Evans's understanding of the exchange of promises under the plea agreement, the trial court utilized the plea questionnaire form to ascertain her understanding that there were no other promises. The trial court's incorporation of the plea questionnaire was

[3] The maximum terms Evans faced on the charges were fourteen years for theft of over $10,000 by false representation as a repeater, two years for misdemeanor theft as a repeater, and six years for felony bail jumping. Four other charges were dismissed as read-ins.

proper because the trial court did not entirely rely on the questionnaire as a substitute for a substantive in-court plea colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794 (trial court may, in its discretion, use the plea questionnaire when discharging its plea colloquy duties but the plea colloquy may not be reduced to determining whether the defendant has read and filled out the form).

Our supreme court rejects a "formalistic application of the ***Bangert*** requirements that would result in the abjuring of a defendant's representations in open court for insubstantial defects" and recognizes that "requiring an evidentiary hearing for every small deviation from the circuit court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights." ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64. The court could reasonably rely on the plea questionnaire as Evans's representation that no promises other than those contained in the plea agreement induced her plea. During the colloquy Evans acknowledged that she actually faced the maximum number of years and that the trial court was not bound by any recommendation. The protection of Evans's constitutional rights did not demand that the trial court make a specific inquiry as to whether trial counsel had promised a certain sentence.

Evans did not make a prima facie showing that the plea colloquy was deficient, or in other words, showed a "***Bangert*** violation."

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals