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March 19, 2014

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

2013AP1021-CR State of Wisconsin v. Cristian X. Sanchez (L.C. #2012CF49)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Cristian X. Sanchez appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erred in denying his motion to withdraw his no contest plea. He further contends that the court erred in denying his request for resentencing before a different judge. Based on 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).¹ We affirm the judgment and order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

Sanchez was convicted following a no contest plea of battery by a prisoner, as a repeater. During the plea colloquy, the circuit court failed to inform Sanchez that the victim's lack of consent was an element of the crime. During the subsequent sentencing, the court imposed a sentence of four years of initial confinement and four years of extended supervision. The extended supervision portion of the sentence exceeded the statutory maximum by one year. *See* WIS. STAT. §§ 940.20(1) and 973.01(2)(d)5.

After sentencing, Sanchez filed a postconviction motion seeking withdrawal of his no contest plea or resentencing before a different judge. The motion alleged that Sanchez did not know that the State was required to prove that the victim did not consent to the battery. It also alleged that the extended supervision portion of his sentence exceeded the statutory maximum.

The circuit court held a hearing on Sanchez's motion. At that hearing, the State presented testimony from Sanchez's trial counsel who recalled telling Sanchez multiple times that one of the elements of the crime was that Sanchez caused bodily harm to the victim without the victim's consent. In addition, the State presented a plea questionnaire form from Sanchez's previous battery by a prisoner conviction two years earlier. Attached to the form was the applicable jury instruction, which spelled out the lack of consent element.

Ultimately, the circuit court denied withdrawal of Sanchez's no contest plea, finding that he understood the elements the State had to prove and was advised of them. The court also denied the request for resentencing before a different judge. The court acknowledged that it had imposed too much extended supervision and explained that it would reduce the number from four years to three years, as that was consistent with its original sentencing intent. The court then signed an order denying the postconviction motion. This appeal follows.

On appeal, Sanchez first contends that the circuit court erred in denying his motion to withdraw his no contest plea. Specifically, he asserts that the State failed to meet its burden of proving that his plea was knowing, intelligent, and voluntary.

A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. *See State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. “One way for a defendant to meet this burden is to show that he [or she] did not knowingly, intelligently, and voluntarily enter the plea.” *Id.* A defendant who demonstrates that the plea was not knowingly, intelligently, and voluntarily entered may withdraw that plea as a matter of right. *Id.*, ¶19.

To ensure that pleas are knowing, intelligent, and voluntary, circuit courts must engage defendants in adequate plea colloquies that comply with WIS. STAT. § 971.08 and case law. *See Brown*, 293 Wis. 2d 594, ¶35. Where, as here, a defendant shows that the plea was deficient, the burden shifts to the State to show by clear and convincing evidence that the plea was knowing, intelligent, and voluntary despite the inadequacy of the colloquy. *Id.*, ¶40.

When reviewing a decision on a motion to withdraw a plea, this court accepts the circuit court’s findings of evidentiary or historical fact unless they are clearly erroneous. *Id.*, ¶19. However, whether a plea was knowingly, intelligently, and voluntarily entered is a question of constitutional fact that this court reviews independently. *Id.*

Upon review of the record, we conclude that the circuit court properly denied Sanchez’s motion to withdraw his no contest plea. As noted, the State relied on two pieces of evidence to show Sanchez’s knowledge and understanding of the nature of the charge against him: (1) the testimony of Sanchez’s defense counsel, who unequivocally stated that he had explained the

nonconsent element on multiple occasions and (2) a plea agreement form (and attached jury instruction) from two years earlier involving the same crime. We view this evidence as sufficient to establish that Sanchez's plea was knowing, intelligent, and voluntary despite the inadequacy of the colloquy.

Sanchez next contends that the circuit court erred in denying his request for resentencing before a different judge. Sanchez maintains that he was entitled to such relief to correct his sentence which was in excess of the statutory maximum.

Again, we conclude that the circuit court properly denied Sanchez's request. There is no dispute that the extended supervision portion of Sanchez's original sentence exceeded the statutory maximum by one year. However, the circuit court corrected the error and explained its reason for the revised sentence at the hearing denying Sanchez's motion. Although Sanchez believes that he is entitled to resentencing before a different judge, he provides no authority for this proposition. Accordingly, we decline to discuss the issue further. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (1992) (court of appeals need not consider undeveloped arguments).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals