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DISTRICT I/IV

December 16, 2015

To:

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Circuit Court Judge
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Wauwatosa, WI 53226

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

2015AP248-CR State of Wisconsin v. Mark Anthony Paur (L.C. # 2013CF591)

Before Lundsten, Sherman and Blanchard, JJ.

Mark Anthony Paur appeals a judgment of conviction for felony retail theft and an order denying his postconviction motion for plea withdrawal without a hearing.[1] Based upon our

[1] The Honorable Charles F. Kahn, Jr., presided over the plea and sentencing proceeding. The Honorable M. Joseph Donald issued the order denying Paur's postconviction motion.

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[2] We summarily affirm.

Paur pled guilty to one count of felony retail theft and was sentenced to prison. Paur then filed a postconviction motion to withdraw his plea under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), arguing that the plea colloquy was deficient because the circuit court did not advise him that the State would have to prove the value of the property to the jury and that Paur was therefore unaware of the possible defenses to the charge. The circuit court denied the motion without a hearing.

Paur argues that he is entitled to a hearing on his postconviction motion because he identified a defect in the plea colloquy and alleged that he did not understand the information that should have been provided. *See* ***State v. Howell***, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48 (a motion for plea withdrawal requires an evidentiary hearing if the motion makes a prima facie showing that the plea colloquy was deficient and alleges that the defendant did not in fact know or understand the information that should have been provided). Paur concedes that the value of the property is not an element of felony theft, but points out that the value must be determined by the jury to establish the applicable penalty range. *See* ***Heyroth v. State***, 275 Wis. 104, 107-09, 81 N.W.2d 56 (1957). Paur argues that the court was required to establish that Paur understood that the State would be required to prove the value of the property at trial to ensure that Paur fully understood the nature of the charge and potential penalties. *See* WIS. STAT. § 971.08(1)(a).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The State responds that the court was not required to establish Paur's understanding that the value of the property was a jury question. The State then contends that, even if it was required to do so, the court did ensure that Paur understood that the jury would determine the value of the property at trial before the court accepted Paur's plea.

We assume, without deciding, that the circuit court was required to advise Paur during the plea colloquy that the State would have to prove the value of the property to the jury. We conclude that there is no plea colloquy defect because the court did, in fact, address the fact that the charge required that the property value was more than $500 and that the State would have to prove that charge beyond a reasonable doubt at trial.[3]

At the plea hearing, the court told Paur that he was charged with retail theft of "merchandise that has a retail value of more that $500." The court described the potential punishments Paur faced based on that offense. The court also explained that Paur could not be found guilty of felony retail theft at trial unless the State presented evidence to the jury that convinced each juror beyond a reasonable doubt that Paur had done what the State had accused him of doing.

[3] The State sets forth its understanding that Paur's argument is limited to seeking plea withdrawal based on a defect in the plea colloquy under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), rather than including an argument that facts outside the plea colloquy rendered Paur's plea unknowing under ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. The State asserts that, were Paur to argue that he is entitled to plea withdrawal under ***Howell***, that argument would fail because the record establishes that Paur did, in fact, understand the information he claims he did not understand. *See* ***Howell***, 301 Wis. 2d 350, ¶¶76-77. Paur has declined to file a reply brief, but, in his statement that no reply brief will be filed, relies on his brief-in-chief and contends that evidence extrinsic to the plea colloquy is appropriate to consider, and should be considered, at a motion hearing. We conclude that, to the extent Paur argues for plea withdrawal under ***Howell***, that argument is insufficiently developed to warrant further consideration.

Thus, during the plea colloquy, the court ensured that Paur understood that he had the right to a trial at which the State would have the burden to prove to the jury that Paur had intentionally hidden retail merchandise with a value of more than $500.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals