OFFICE OF THE CLERK
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

October 5, 2016

To:

Hon. Kenneth W. Forbeck
Circuit Court Judge
51 S. Main Street
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Gina Frances Bosben
Frances Bosben Law Office
520 University Ave #145
Madison, WI 53703-1982

Perry L. Folts
Deputy Dist. Atty.
51 S. Main St.
Janesville, WI 53545

Robert Probst
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2015AP1522-CR State of Wisconsin v. Jonathon F. Lincoln (L.C. # 2012CF278)

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

Jonathon Lincoln appeals a criminal judgment of conviction and an order that denied his postconviction motion for plea withdrawal without an evidentiary hearing. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm for the reasons discussed below.

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

A defendant who asserts that the circuit court did not follow the procedures outlined in WIS. STAT. § 971.08 or comply with other mandated duties at the plea colloquy (i.e., a ***Bangert*** violation), and further alleges that he or she did not understand the omitted information, is entitled to a hearing on his or her plea withdrawal motion. ***State v. Hampton***, 2004 WI 107, ¶¶56-65, 274 Wis. 2d 379, 683 N.W.2d 14; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). No hearing is required when the defendant presents only conclusory allegations, or when the record conclusively demonstrates that the defendant is not entitled to relief as a matter of law. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

Lincoln's plea withdrawal motion first claims that the circuit court did not "confirm with Mr. Lincoln that he [knew] there [was] a mandatory minimum sentence of 5 years" on the charge to which Lincoln entered his plea. However, the transcript of the plea hearing shows that—after defense counsel had stated the presumptive mandatory minimum on the record as part of the recitation of the plea agreement—the circuit court asked Lincoln whether he understood what his attorney had just said, and Lincoln provided an affirmative response to the circuit court's inquiry. In addition, the record includes a signed plea questionnaire that accurately states the presumptive minimum sentence. A circuit court is permitted to incorporate a plea questionnaire into its plea colloquy and to rely upon it as evidence that a plea was knowingly made. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We therefore conclude that the record establishes as a matter of law that the circuit court satisfied its obligation under WIS. STAT. § 971.08(1)(a) to address the defendant personally and determine that the plea was being made with an understanding of the potential punishment.

The second claim in Lincoln's plea withdrawal motion is that the circuit court "simply [made] a perfunctory inquiry" about Lincoln's understanding that he would be waiving

constitutional rights by entering a plea, without stating what each of the individual constitutional rights was or inquiring if Lincoln understood these rights. However, the plea questionnaire Lincoln signed set forth each of the constitutional rights that Lincoln would be waiving, and Lincoln advised the court that he and counsel had gone over his plea, the consequences of his plea, and the rights he would be giving up. As we have already noted, ***Moederndorfer*** allows a circuit court to incorporate a plea questionnaire into its colloquy.

To the extent Lincoln argues that the circuit court relied too much upon the plea questionnaire, we note that the circuit court had already rescheduled a potential plea hearing date to allow Lincoln additional time to go over the elements of the charge and the ramifications of the plea. Counsel then advised the court at the beginning of the plea hearing that he had in fact taken additional time to talk to Lincoln and his parents about the elements of the offense and the plea questionnaire, and that they were ready to proceed. In this context, we are satisfied that heavy reliance upon the plea questionnaire was justified. We therefore conclude that the record establishes as a matter of law that the circuit court satisfied its obligation under ***State v. Brown***, 2006 WI 100, ¶29, 293 Wis. 2d 594, 716 N.W.2d 906, to verify that Lincoln had been informed of his constitutional rights and understood them.

The third claim in Lincoln's plea withdrawal motion is that the circuit court failed to establish a factual basis for the plea because it "ask[ed] the prosecutor if the complaint would serve as a factual basis, but made no inquiry with Mr. Lincoln as to the factual basis." However, the circuit court did not need to ask whether Lincoln acknowledged that the complaint could serve as a factual basis, because the transcript of the plea hearing shows that the circuit court paused during the proceedings to read the complaint itself. *See* ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363 (factual basis can be established by inferences drawn from the

complaint *or* facts admitted to by the defendant). The complaint, which outlined a sting operation in which an undercover officer had engaged in online conversations with Lincoln while posing as an eleven-year-old girl, produced more than sufficient evidence to satisfy the elements of the charged offense, as well as two dismissed charges that were read in. We therefore conclude that the record establishes as a matter of law that the circuit court satisfied its obligation under WIS. STAT. § 971.08(1)(b) to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged."

The fourth claim in Lincoln's plea withdrawal motion is that the circuit court "simply state[d] that [it was] dismissing and reading in counts two and three for the purposes of sentencing" without advising Lincoln that the read-in charges would be "deemed admitted" for sentencing purposes. However, in ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, the Wisconsin Supreme Court explicitly directed circuit courts to *avoid* telling defendants that reading in offenses results in an admission of guilt, because that is not an accurate statement of the law. Rather, a defendant should be advised that the circuit court may *consider* read-in charges when imposing sentence without increasing the maximum penalty for the charged offense(s)—which is exactly what the plea questionnaire stated. ***Id.*** Therefore, Lincoln's allegation that he did not understand that he was "admitting guilt" to the dismissed charges by having them read in does not show a misunderstanding of the law or provide any basis to conclude that Lincoln's plea was unknowingly entered.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals