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**DISTRICT II**

May 31, 2017

To:

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

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2016AP803-CR

State of Wisconsin v. Darrell R. Bennett, Sr. (L.C. # 2013CF1373)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Darrell R. Bennett, Sr., appeals from a judgment of conviction entered upon his no-contest plea to felony intimidation of a victim. Bennett contends that the circuit court improperly denied his presentence motion for plea withdrawal. 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 (2015-16).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Pursuant to a plea agreement, Bennett pled no contest to intimidating a victim by the use or attempted use of force. Three other charges were dismissed and read in, and the State agreed to make no specific sentencing recommendation. After the plea hearing but prior to sentencing, Bennett indicated to trial counsel that he wanted to withdraw his plea. With the assistance of successor counsel, Bennett filed a plea withdrawal motion asserting that prior to the entry of his plea, trial counsel (1) “applied undue pressure on him to take the plea bargain,” and (2) provided “misleading advice” by telling Bennett “that the plea bargain would likely get better before the time of sentencing.”<sup>2</sup> Following an evidentiary hearing, the circuit court denied the motion. The court withheld sentence and imposed a two-year period of probation. Bennett challenges the denial of his plea withdrawal motion.

A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. *State v. Garcia*, 192 Wis.2d 845, 862, 532 N.W.2d 111 (1995). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea’s consequences, haste and confusion in entering the plea, and coercion by counsel. *State v. Shimek*, 230 Wis.2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). The decision to grant or deny a presentence motion for plea withdrawal is committed to the circuit court’s discretion. *State v. Jenkins*, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

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<sup>2</sup> We refer to the attorney who represented Bennett at the plea hearing and whose performance is challenged in Bennett’s plea withdrawal motion as “trial counsel.” The attorney who subsequently represented Bennett for purposes of pursuing his presentence plea withdrawal motion is referred to as “successor counsel.”

During the plea-taking colloquy, Bennett confirmed that no threats or promises were made to induce his plea, that he had adequate time “to thoroughly discuss” his decision with trial counsel and was satisfied with her representation, and that he was “entering [his] plea knowingly, freely, voluntarily and intelligently.” At the hearing on his plea withdrawal motion, Bennett was unable to recall the details of his discussions with trial counsel or the answers he provided during the course of his plea colloquy.

Trial counsel testified that she and Bennett discussed the plea agreement in depth, that Bennett thought it was in his best interest to take the plea offer and wanted to proceed quickly to expedite his release from custody, and that she never told Bennett negotiations would continue after the plea or that the agreement might improve before sentencing. The circuit court permissibly credited trial counsel’s testimony and found Bennett’s testimony not credible. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (the fact-finding judge is the ultimate arbiter of witness credibility and the weight of testimony). On this record, the circuit court properly determined that Bennett failed to show a fair and just reason supporting plea withdrawal. *See Jenkins*, 303 Wis. 2d 157, ¶34 (“If the circuit court does not believe the defendant’s asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.”) (internal quotations omitted). This is especially true in light of Bennett’s failure to offer a credible explanation for not raising his concerns or asking further questions at the plea hearing. *Id.* at ¶62 (a defendant must explain “why it is fair and just to disregard the solemn answers the defendant gave in the [plea] colloquy”).

Bennett also contends that the circuit court’s plea colloquy failed to comport with the duties outlined in *State v. Bangert*, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986), and that this constitutes a fair and just reason for plea withdrawal. We are not persuaded. First, Bennett

did not allege or argue a *Bangert* violation in the trial court and has forfeited this claim on appeal. See *State v. Dowdy*, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 (“As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal.”). Second, nothing Bennett claims on appeal constitutes a facial defect in the plea colloquy under *Bangert*.<sup>3</sup>

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>3</sup> We similarly reject Bennett’s suggestion that the State somehow breached the plea agreement. Bennett failed to first raise this issue in the circuit court. Additionally, his appellate arguments do not establish the existence of a plea breach.