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November 28, 2017

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

2016AP2139-CR State of Wisconsin v. Willie J. McElroy (L.C. # 2013CF4088)

Before Brennan, P.J., Kessler and Brash, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Willie J. McElroy appeals the judgment convicting him of second-degree reckless homicide. *See* WIS. STAT. § 940.06(1) (2013-14).[1] He also appeals the order denying his

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

postconviction motion.[2] Based on our review of the record and the briefs, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Background

McElroy was originally charged with first-degree reckless homicide (delivery of drugs-Len Bias law) for delivery of a fatal dose of heroin.[3] On the day he was to go to trial, pursuant to plea negotiations, the charge was reduced to second-degree reckless homicide and McElroy pled guilty. In exchange, the State agreed that it would not make a recommendation at McElroy's sentencing.

The circuit court sentenced McElroy to fifteen years of imprisonment.

Postconviction, McElroy's appointed postconviction/appellate counsel filed a no-merit appeal. This court subsequently issued an order requesting a supplemental report on various issues. Alternatively, we advised that if postconviction/appellate counsel concluded the issues

[2] The Honorable Jeffrey A. Wagner presided over the plea proceedings and issued the order denying McElroy's postconviction motion. The Honorable Timothy G. Dugan sentenced McElroy.

[3] The complaint reported the victim's cause of death as acute heroin and alcohol intoxication.

Our supreme court discussed the underlying policy of the Len Bias law in ***State v. Patterson***, 2010 WI 130, ¶37, 329 Wis. 2d 599, 790 N.W.2d 909:

> First-degree reckless homicide by delivery of a controlled substance was created as a specific type of criminal homicide to prosecute anyone who provides a fatal dose of a controlled substance. The legislature developed this law, often referred to as the Len Bias law, in the wake of the tragic death of a University of Maryland basketball star by the same name from a cocaine overdose.

(Citation omitted.)

identified in our order—or any other issues—were arguably meritorious, he could move to voluntarily dismiss the no-merit appeal.

Postconviction/appellate counsel took the latter approach and filed a postconviction motion on McElroy's behalf. In the postconviction motion, McElroy argued that the plea colloquy was inadequate and that trial counsel was ineffective for not "properly preparing" him for the plea and for not "insur[ing] that a proper record was made at the plea hearing." The circuit court denied McElroy's motion without a hearing.

Discussion

A defendant who seeks to withdraw his or her plea after sentencing—as McElroy does here—must prove by "clear and convincing evidence" that withdrawal is necessary to correct a "'manifest injustice.'" ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted); *see also* ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. Two routes are available.

The defendant may establish a manifest injustice by showing the plea was not entered knowingly, intelligently, and voluntarily. ***Taylor***, 347 Wis. 2d 30, ¶49. This showing requires the defendant to make a prima facie case that the plea colloquy failed to comply with WIS. STAT. § 971.08 or other mandatory procedures. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Section 971.08(1)(a) requires, among other things, that circuit courts "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Additionally, the defendant must "allege[] that he in fact did not know or understand the information which should have been provided at the plea hearing[.]" ***Bangert***, 131 Wis. 2d at 274.

If the defendant does these things, the court holds a hearing where the burden shifts to the State to prove by clear and convincing evidence that the plea was nonetheless knowing, intelligent, and voluntary. *See* ***State v. Brown***, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906.

Alternatively, he or she may argue that the plea is infirm under ***Bentley*** and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), based upon "some factor extrinsic to the plea colloquy"—like ineffective assistance of counsel. *See* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48.

We will address each route in turn.

A. Adequacy of plea colloquy under *Bangert* line of cases

"This court decides whether a postconviction motion to withdraw a guilty or no contest plea under ***Bangert*** entitles a defendant to an evidentiary hearing independently of the circuit court … but benefiting from [its] analys[i]s." *See* ***Howell***, 301 Wis. 2d 350, ¶30; *see also* ***Brown***, 293 Wis. 2d 594, ¶21.

The crux of McElroy's argument in his postconviction motion relating to the alleged ***Bangert*** violation is the following statement: "The plea transcript is certainly most brief and does raise questions as to what Mr. McElroy truly understood and most importantly what it was that he did to satisfy the elements of the offense to which he pled." (Record citation omitted.) In the postconviction motion, McElroy additionally takes issue with the manner in which the circuit court questioned him during the plea hearing and asserts "there was confusion and mis[]understanding which took place earlier in Mr. McElroy's case," which meant that he "needed additional consideration in the plea process not less."

McElroy's claim of a ***Bangert*** violation was insufficient. First, McElroy failed to make a prima facie showing that the circuit court violated WIS. STAT. § 971.08(1)(a). During the plea hearing, the circuit court advised McElroy of the elements of second-degree reckless homicide and asked McElroy to confirm that he understood them in the following exchange:

> THE COURT: You understand you are going to be waiving your rights to a trial by jury, and all twelve jurors must agree unanimously as to a verdict. That means they must all agree as to the elements of the offense unanimously. *That you caused the death of the victim of the offense. That you caused the death by criminally reckless conduct. Which means that that conduct created a risk of death or great bodily harm to another person. And the risk of death or great bodily harm was [un]reasonable and substantial. And that you were aware that your conduct created the unreasonable risk—a substantial risk of death or great bodily harm.*
>
> Do you understand that?
>
> [McElroy]: Yes.

(Emphasis added.)

Additionally, during the plea hearing, the circuit court referenced the guilty plea questionnaire/waiver of rights form that McElroy had signed. *See* ***State v. Trochinski***, 2002 WI 56, ¶21, 253 Wis. 2d 38, 644 N.W.2d 891 (explaining that a circuit court may fulfill its requirement to ascertain the defendant's understanding of the nature of the charge by: (1) summarizing the elements from the jury instruction or statute; (2) asking the defendant's attorney whether he explained the elements; or (3) referring to other evidence such as the plea questionnaire). As to the elements of second-degree reckless homicide, the form provided: "These elements have been explained to me by my attorney or are as follows[.]" The jury instruction for second-degree reckless homicide was attached to the form, and McElroy's trial counsel indicated on the form that he had discussed the document and attachments. McElroy

also signed the form, indicating: "I have reviewed and understand this entire document and any attachments."

During the plea hearing, the circuit court specifically asked McElroy if there was anything he did not understand by pleading guilty. McElroy's answer was "[n]o." We conclude that he has not made a prima facie showing that his plea was accepted without the circuit court's conformance to WIS. STAT. § 971.08 or other mandatory procedures.

Next, in denying McElroy's postconviction motion, the circuit court found that McElroy did "nothing more than conclusorily state that his understanding of the elements and charges may be in question. He [did] not state what he did not understand about any of them." We agree with the circuit court that McElroy did not satisfy the second prong of the ***Bangert*** standard; i.e., the motion failed to include a *non-conclusory* allegation that McElroy did not know or understand information that should have been provided at the plea hearing. *See* ***Bangert***, 131 Wis. 2d at 274.

B. Plea infirmity under *Nelson*/*Bentley* line of cases

For a defendant to be entitled to an evidentiary hearing pursuant to ***Nelson***/***Bentley***, he or she must allege "'facts that, if true, would entitle the defendant to relief.'" *See* ***State v. McDougle***, 2013 WI App 43, ¶12, 347 Wis. 2d 302, 830 N.W.2d 243 (citation omitted). No hearing is required if the motion does not raise sufficient material facts, the allegations are merely conclusory, or if the record conclusively shows the defendant is not entitled to relief. *See* ***id.*** Whether a postconviction motion contains allegations of material fact sufficient to entitle a defendant to a hearing presents a question of law for our independent review. *See* ***id.***

McElroy's only *specific* allegation in his postconviction motion as to the ineffective assistance of trial counsel is the following sentence: "Trial counsel, in this case, failed in his duties of properly preparing Mr. McElroy for his plea and to insure that a proper record was made at the plea hearing." This vague allegation, wholly unsupported by facts, was insufficient to warrant an evidentiary hearing.

McElroy asserts that "[h]ad a hearing been allowed, a more complete record would be before the [c]ourts and would have assisted the [c]ourts to better understand whether counsel's conduct was deficient and whether this prejudiced … McElroy." In making this assertion, McElroy puts the cart before the horse. "A ***Nelson*/*Bentley*** hearing is an evidentiary hearing in which a defendant is permitted to *prove* a claim that his attorney was constitutionally ineffective, producing a manifest injustice. It is not a fishing expedition to try to discover error." *See* ***State v. Burton***, 2013 WI 61, ¶7, 349 Wis. 2d 1, 832 N.W.2d 611 (emphasis added).

The circuit court properly denied McElroy's motion without a hearing.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals