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March 14, 2018

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

2016AP1666 State of Wisconsin v. Paul Adams (L.C. #2008CF992)

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

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).

Paul Adams, pro se, appeals an order that denied his postconviction motion seeking an evidentiary hearing and to withdraw his no-contest plea to fifth-offense operating a motor vehicle while intoxicated (OWI). Upon reviewing the briefs and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(2015-16).[1] We affirm.

A store's surveillance video showed a Ford Explorer park in the fire lane and a man exit the driver's door and enter the store. Adams was seen entering the store, sticking a bottle of vodka in his pants, and trying to leave without paying. He had the vehicle's keys in his hand. A police officer reviewed the video with the store manager. Evidence pointed to Adams being the owner and sole driver of the Explorer. His blood alcohol level was 0.256. Adams was charged with OWI (5th or 6th), operating with a prohibited alcohol concentration (PAC) (5th or 6th), and retail theft. The store apparently never produced the video for further inspection. Adams later asserted his innocence.

The day before the scheduled trial, Adams withdrew his speedy-trial request, indicated his intent to enter a plea, and asked to adjourn the plea and sentencing hearing, as he had "quite a bit of documentation" he wanted to present at sentencing. The court stated it was "not inclined to adjourn the trial … in anticipation of a plea" but that it instead would take the plea that day but put off sentencing. The court granted counsel's request for "five minutes" to discuss the plea with Adams while it attended to another matter.

Adams pled no contest to the OWI. The State agreed to dismiss the PAC and to dismiss and read in the theft charge and charges from two other cases. Postconviction, Adams filed a motion under WIS. STAT. § 974.06. He requested an evidentiary hearing on his claims that the circuit court interfered in plea negotiations by "ordering" him to plead; the State failed to

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

preserve and disclose the surveillance video; the plea colloquy was inadequate; and his attorney was ineffective. The court denied the motion without a hearing.[2] Adams appeals.

A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the movant to relief. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion alleges sufficient facts, the court must hold a hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not or presents only conclusory allegations, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may grant or deny a hearing, a decision we review under the deferential erroneous exercise of discretion standard. ***Id.*** Whether the motion on its face alleges sufficient material facts that, if true, would warrant the requested relief is a question of law we review de novo. ***Id.***

Adams claims his plea was not voluntary as he never participated in plea negotiations before the hearing, and the court "ordered" him to plead. The record shows otherwise. Adams wrote a letter days earlier referring to the State's written plea offer. He waived his speedy-trial demand as he intended to plead. Adams was willing to admit to the crime he now claims he is innocent of to obtain the benefits of the plea agreement. An otherwise valid plea is not involuntary because it is motivated by the defendant's desire for a lesser penalty due to fewer charges. *See* ***Armstrong v. State***, 55 Wis. 2d 282, 288, 198 N.W.2d 357 (1972).

[2] As this court does not find facts, we think the better practice is for a circuit court to exercise its discretion to hold an evidentiary hearing when credibility is at issue. Our supreme court has ruled that the determination can be made from the record. *See* ***State v. Hendricks***, 2018 WI 15, ¶29, ___ Wis. 2d ___ ___ N.W.2d ___. We are bound by that decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

Adams also contends the plea colloquy was defective. He claims the court (1) did not fully comply with WIS. STAT. § 971.08; (2) did not ask if counsel explained the nature of the charge to him; (3) did not summarize the OWI elements as they applied to the facts of his case; (4) did not state his maximum exposure; (5) failed to ascertain his guilt, as no one saw him drive the vehicle; and (6) said his ability to drive was "materially impaired," rather than simply "impaired." *See* WIS JI—CRIMINAL 2600, 2663. His arguments fail.

First, Adams' WIS. STAT. § 974.06 claims are limited to jurisdictional and constitutional matters, *see* ***State v. Carter***, 131 Wis. 2d 69, 81, 389 N.W.2d 1 (1986), so his WIS. STAT. § 971.08 claim is not before us. Second, this is not Adams' first go-round with an OWI charge. The offense consists of just two elements: driving or operating a motor vehicle, and doing so while under the influence of an intoxicant. WIS. STAT. § 346.63(1)(a); ***State v. McAllister***, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982). Defense counsel told the court he explained the elements to Adams, Adams understood them, and Adams initialed the separate elements sheet.

Third, while a court must establish a defendant's understanding of the range of punishments he or she faces by entering a plea, the court's failure to comply with its prescribed duties is not a per se due process violation, as the defendant may have learned the plea's implications from another source. ***State v. Chamblis***, 2015 WI 53, ¶26, 362 Wis. 2d 370, 864 N.W.2d 806. "The entire record is fair game" in assessing whether a defendant understood the nature of the charge. ***State v. Hendricks***, 2018 WI 15, ¶29, ___ Wis. 2d ___, ___ N.W.2d ___.

Adams' lawyer confirmed to the court that Adams understood the constitutional rights he was waiving; the elements of the crime; the effect of read-ins; the maximum penalty and that the court could impose it; and available defenses. Adams did not dispute this representation. We

will not indulge in a game of "Gotcha" now. The totality of the circumstances satisfies us Adams' plea was knowing and intelligent. *See* ***Chamblis***, 362 Wis. 2d 370, ¶26.

Fourth, Adams' complaint that the State's case was built wholly on circumstantial evidence goes nowhere. A conviction may be supported solely by circumstantial evidence. ***State v. Mertes***, 2008 WI App 179, ¶11, 315 Wis. 2d 756, 762 N.W.2d 813.

Adams next contends the State violated its duty to disclose the surveillance video under WIS. STAT. § 971.23(1)(g). He cannot raise statutory claims in a WIS. STAT. § 974.06 motion. Further, Adams made no showing the video was exculpatory. Even if it was, "due process does not require the disclosure of material exculpatory impeachment information before a defendant enters into a plea bargain." ***State v. Harris***, 2004 WI 64, ¶17, 272 Wis. 2d 80, 680 N.W.2d 737. The State had no obligation to provide Adams with a recording not in its possession. Adams also complains that he was unaware the court could have helped him obtain the video. We will not address this undeveloped argument. *See* ***Clean Wis., Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768.

Finally, Adams contends defense counsel was ineffective, primarily by urging Adams to plead despite his protestations of innocence and failing to move to compel production of the videotape. These aggregate deficiencies, Adams contends, prejudiced him. *See* ***State v. Thiel***, 2003 WI 111, ¶58, 264 Wis. 2d 571, 665 N.W.2d 305. For the reasons already stated, this claim, too, lacks merit and we discuss it no further.

Adams' claim that he did not grasp the nature of the charge and pled only through coercion is belied by the record, which establishes his full understanding. His motion thus failed on its face to allege sufficient material facts that, if true, would warrant relief. The circuit court

properly exercised its discretion in denying Adams' request for plea withdrawal without an evidentiary hearing.

Upon the foregoing reasons,

IT IS ORDERED that the order 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.

Sheila T. Reiff
Clerk of Court of Appeals