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July 18, 2018

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

2017AP1820-CR	State of Wisconsin v. Matthew J. Koldos (L.C. # 2014CF266)
2017AP1821-CR	State of Wisconsin v. Matthew J. Koldos (L.C. # 2014CF321)
2017AP1822-CR	State of Wisconsin v. Matthew J. Koldos (L.C. # 2014CF343)

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).

Matthew J. Koldos appeals from an order denying his postconviction motions alleging that his no contest pleas were not made knowingly, intelligently, and voluntarily. Based upon our review of the briefs and record, we conclude at conference that these consolidated cases are

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the denial of Koldos' motions. He failed to allege that he did not know or understand the information that should have been provided to him at the plea hearing and to show that his counsel's alleged ineffective assistance prejudiced him with respect to his pleas.

BACKGROUND

In April 2013, S.L.B. reported to police she had been defrauded by her friend, Koldos. According to S.L.B., Koldos stole $2000 from her PayPal account, obtained and used a credit card in her name without her permission, and stole $7500 entrusted to him for allegedly guaranteed investments. Additional investigation revealed he had similarly defrauded others. The State charged Koldos with one count of misleading statements or omissions in connection with securities trading, one count of identity theft, and eight counts of theft by false representation (case No. 2014CF266).

During the investigation, police discovered computer hard drives that showed Koldos had been nonconsensually recording sexual encounters with women. The State charged Koldos with nine counts of capturing an image of nudity without consent (case No. 2014CF321).

Police also discovered Koldos had posed as a female agent named "Alyssa Rose" on Facebook to recruit girls for modeling. As the agent, Koldos had asked a sixteen-year-old girl for, and received, sexually explicit images. The State charged Koldos with three counts of possession of child pornography (case No. 2014CF343).

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

The parties reached a plea agreement. Koldos pled no contest to all twenty-two charges of the three cases. In exchange, the State agreed not to charge additional referrals in each case, planning instead to read them in at sentencing.

At the plea hearing, the circuit court reviewed the plea questionnaire signed by Koldos. That form stated that Koldos was twenty-nine years old, understood the English language, understood the charges to which he was pleading, was not receiving treatment for a mental illness or disorder, and had not had any alcohol, medications, or drugs within the last twenty-four hours. It also indicated that Koldos understood the consequences of the read-in offenses. Read-in sheets for two of the three cases were attached, as were jury instructions for all but one of the charges.

During the plea colloquy, the circuit court asked Koldos whether he reviewed the attached jury instructions with his attorney. Koldos responded, "Yes, sir." The court asked whether he understood the instructions, to which Koldos replied, "Yes." The court also asked if he had any questions about the instructions, and Koldos said, "No." After concluding that the no contest pleas were knowing, intelligent, and voluntary, the court accepted them. The court sentenced Koldos to twelve years' initial confinement and twelve years' extended supervision.

Koldos filed two postconviction motions for plea withdrawal, one under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and the other under ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).[2] His ***Bangert*** motion alleged several defects in the plea colloquy: the

[2] The latter motion cited to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), but is also commonly referred to as a ***Bentley*** motion based on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

court did not (1) establish that Koldos understood the elements of the offenses, (2) assess his capacity to understand the issues, and (3) inform him of the consequences of the uncharged read-in offenses. His ***Bentley*** motion asserted his counsel was ineffective: counsel did not adequately (1) investigate the sex tapes and child pornography images, (2) advise Koldos of the elements of the offenses, and (3) discern and explain the nature of the uncharged read-in offenses.

At the evidentiary hearing on the motions, Koldos' trial counsel testified that he reviewed the elements of the offenses with Koldos before the plea hearing date. He also reviewed the jury instructions attached to the plea questionnaire with Koldos on the morning of the hearing. According to his counsel, Koldos never indicated that he did not understand what the State would have to prove. When asked whether Koldos ever suggested that he did not understand what was going on in his case, counsel testified, "[N]o, and actually to the contrary," Koldos "was actively involved in his defense." Counsel further testified that he reviewed the plea agreement with Koldos, including the types of uncharged offenses that the State would read in and their consequences. Counsel acknowledged that he did not review the sex tapes and child pornography images, believing it was sufficient to have reviewed the pertinent allegations with Koldos and receiving Koldos' confirmation that they were accurate.

Koldos testified he had fourteen years of schooling, he was able to read and understand the police reports, and he was aware of the nature of the evidence the State had against him. As for the elements of the offenses, Koldos recalls going over with counsel the jury instructions attached to the plea questionnaire, but did not recall going over a particular form for one of the charges. Regarding the sex tapes and images, Koldos reviewed the police reports of those crimes with counsel, acknowledging he told counsel he committed the offenses and possessed the

images described in the reports. As to the read-in offenses, Koldos understood the State agreed not to bring additional charges, and the court could consider the facts of those offenses, but could not sentence him for them. He was aware the uncharged offenses included additional counts of capturing an image of nudity without consent, but could not recall if he understood the uncharged offenses included additional counts of child pornography.

The court denied Koldos' motions, concluding the State proved by clear and convincing evidence that Koldos entered knowing, intelligent, and voluntary pleas, and the performance by Koldos' counsel was neither deficient nor prejudicial. The court found that the testimony "established that [Koldos] knew what he was doing in entering his plea" and also indicated Koldos' testimony lacked credibility, twice stating Koldos had a "memory of convenience."[3] Koldos appeals.

DISCUSSION

Whether a no contest plea is knowing, intelligent, and voluntary and whether defense counsel rendered ineffective assistance are questions of constitutional fact. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906; ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. We accept the circuit court's findings of fact unless they are clearly erroneous, while we independently determine whether those facts show a knowing, intelligent, and voluntary plea and whether counsel was ineffective. ***Brown***, 293 Wis. 2d 594, ¶19. The

[3] During his testimony, Koldos conceded his affidavit supporting his motions was untrue when it averred that he spent only about one hour with his counsel before entering no contest pleas. Jail records jogged his recollection that counsel visited Koldos on multiple occasions.

sufficiency of a defendant's allegation that he or she lacked the necessary knowledge or understanding at a plea hearing is a question of law that we review de novo. ***Id.***, ¶21.

When a defendant seeks to withdraw a plea, he must prove by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. ***Id.***, ¶18. One way to meet this burden is to allege defects in the plea colloquy per ***Bangert***. Seeking plea withdrawal under ***Bangert*** places two initial burdens on the defendant. *See* ***Brown***, 293 Wis. 2d 594, ¶¶39-40. First, the defendant must "make a prima facie showing of a violation of [WIS. STAT.] § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript." ***Brown***, 293 Wis. 2d 594, ¶39. Second, he must "allege that [he] did not know or understand the information that should have been provided at the plea hearing." ***Id.*** If the defendant satisfies these obligations, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary, despite an inadequate plea colloquy.[4] ***Id.***, ¶40.

We need not decide whether Koldos meets the first burden—showing a defective colloquy—because he fails to meet the second burden—alleging that he did not know or understand the information that should have been provided at the plea hearing. Koldos asserts the colloquy failed to show that he understood the nature of the charges, failed to show that he had the ability to understand the charges and the rights he was waiving, and failed to address the consequences of the uncharged read-ins. Nowhere, however, does Koldos state that he actually did not understand the charges or consequences of the read-in offenses or that he lacked the

[4] The circuit court did not explicitly determine that Koldos met the two burdens of ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), but held an evidentiary hearing nonetheless.

ability to understand them. Withdrawal of a plea is not an academic exercise; the issue is whether the "plea was knowing, intelligent, and voluntary, not whether the circuit court erred." ***Id.***, ¶63. This is why, before the burden shifts to the State to show a knowing plea under ***Bangert***, courts require a positive statement that the defendant did not understand particular information and that the lack of understanding stemmed from the colloquy defect.[5] ***Brown***, 293 Wis. 2d 594, ¶67.

In addition to his ***Bangert*** motion, Koldos filed a ***Bentley*** motion, challenging his no contest pleas on the ground that he received ineffective assistance of counsel. An ineffective assistance of counsel claim must show that (1) the lawyer's representation was deficient and that (2) the defendant suffered prejudice as a result of that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude that one prong of the test is unproven, we need not address the other. ***Id.*** at 697.

We need not decide whether counsel was deficient as alleged, because Koldos fails to show prejudice resulting from any deficiency. To show prejudice, the defendant must go beyond pointing to an error that conceivably affected the outcome; he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Specific to the context of plea withdrawal, a reasonable probability

[5] Koldos argues the State did not object to the sufficiency of his ***Bangert*** motion in the circuit court and therefore the State has waived the issue. But, as discussed above, a ***Bangert*** challenge only moves forward if the defendant meets his initial burdens and, regardless of whether the State raises the particular point, we will independently review whether the requirements of ***Bangert*** have been met. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute*, WIS. STAT. § 940.225(7) ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.").

must be shown that, absent counsel's mistakes, the defendant would not have pled "guilty and would have insisted on going to trial." ***Bentley***, 201 Wis. 2d at 312 (citation omitted).

Koldos simply has not alleged, much less shown, that he was actually prejudiced by counsel's performance. To be sure, Koldos alleges several errors, but Koldos does not take the next, and crucial, step and allege, much less show, that had counsel not allegedly failed on these points, Koldos would have pled "not guilty" and gone to trial.

Koldos alleges that his counsel's investigation into the charges was inadequate, counsel did not view the subject images or video, and counsel "did nothing to challenge [t]he State's evidence." Critically, however, Koldos does not explain how, had counsel spent more time investigating and viewing all of the State's evidence, anything would have changed and, more specifically, that Koldos would have changed his plea to "not guilty" and insisted on a trial.[6]

Likewise, Koldos alleges that his counsel did not adequately or correctly explain the nature and elements of the charges against him or the consequences of the read-in charges. Missing again, though, is a statement or showing by Koldos that he would have rejected the plea agreement had counsel in fact given him an adequate and correct explanation.

[6] Koldos suggests that, by viewing the videos, counsel "[p]erhaps" would have seen evidence that "might" cause a juror to believe the video was consensual. This suggestion does not support his ineffective assistance claim. First, the suggestion is the epitome of speculation; Koldos himself does not state he has viewed the video and identified exculpatory evidence. Second, even if he identified such evidence, Koldos still does not assert that he would have changed his plea to "not guilty."

Koldos asserts that it is "logical" to conclude that, by allegedly misinforming Koldos about the charges and failing to review the evidence, counsel "has, by those actions, prejudiced [Koldos'] defense." Koldos appears to be reaching for a per se prejudice rule; the alleged failures by counsel themselves are prejudicial. But this is not the law as it pertains to Koldos' alleged deficiencies. ***Strickland*** requires both a deficiency and a prejudicial effect. ***Strickland***, 466 U.S. at 687. Koldos does not cite any authority that would support a presumption of prejudice under these circumstances.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court denying Koldos' postconviction motions 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