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

2017AP1749-CR State of Wisconsin v. Jose Luis Salazar (L.C. # 2015CF2126)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Jose Luis Salazar appeals from a judgment convicting him on his guilty pleas of two counts of first-degree sexual assault of a child under thirteen. Salazar also appeals from a circuit court order denying his postconviction motion seeking plea withdrawal because he claimed he did not understand the maximum penalty for one of the first-degree sexual assault offenses.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the circuit court's denial of the postconviction plea withdrawal motion without an evidentiary hearing.

Postsentencing, a defendant bears the burden of showing a manifest injustice necessitating plea withdrawal. ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. The circuit court's alleged failure to fulfill one of its duties at the plea colloquy can be the basis for a ***Bangert***[2] plea withdrawal motion. ***Taylor***, 347 Wis. 2d 30, ¶32. However, in order to obtain an evidentiary hearing on such a motion, the motion must make a prima facie showing from the plea hearing transcript that the circuit court violated a plea colloquy duty and "allege that the defendant did not, in fact, know or understand information that should have been provided during the plea colloquy." ***Id.*** (citation omitted). In order to have an evidentiary hearing, the defect must be other than "insubstantial." *See* ***id.***, ¶39. An insubstantial defect or deviation from the circuit court's duties at a plea colloquy does not require an evidentiary hearing if the plea was entered knowingly, intelligently and voluntarily. ***Id.*** Plea withdrawal is discretionary with the circuit court. ***Id.***, ¶9.

We turn to the merits of this appeal.[3] Salazar sought plea withdrawal because the circuit court did not accurately advise him of the maximum penalty for one of two counts of first-degree

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

[2] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

[3] The State argues that Salazar waived his post-sentencing plea withdrawal motion because he did not seek pre-sentencing plea withdrawal due to an allegedly defective plea colloquy. We have decided to address the merits of the plea withdrawal motion, and we do not address the State's waiver claim.

sexual assault of a child. Salazar further claimed that he did not understand the maximum penalty. First-degree sexual assault of a child, a Class B felony, WIS. STAT. § 948.02(1)(e) (2013-14), is punishable by a maximum of sixty years of imprisonment (maximum forty years of initial confinement and maximum twenty years of extended supervision). WIS. STAT. § 939.50(3)(b) (2013-14); WIS. STAT. § 973.01(2)(b)1. & (2)(d)1. (2013-14).

During the plea colloquy, the circuit court erroneously described the maximum penalty for one of the first-degree sexual assault offenses as forty years (twenty years of initial confinement and twenty years of extended supervision). However, the court correctly described (1) the maximum sixty-year penalty for the other first-degree sexual assault offense and (2) Salazar's total exposure for both counts (120 years or eighty years of initial confinement and forty years of extended supervision). During the plea colloquy, Salazar stated that he understood both the sixty-year penalty for first-degree sexual assault of a child and the 120-year cumulative penalty for both first-degree sexual assault offenses. Salazar also confirmed that he had reviewed the plea questionnaire with his counsel and understood everything on that document.

One of the circuit court's duties at the plea colloquy is to "[e]stablish the defendant's understanding of the … range of punishments to which he is subjecting himself by entering a plea." ***Taylor***, 347 Wis. 2d 30, ¶31 (citation omitted). It is clear from the plea colloquy that the circuit court did not correctly describe the penalty for one of the first-degree sexual assault offenses.

As in ***Taylor***, Salazar's plea withdrawal motion was denied without an evidentiary hearing. ***Id.***, ¶20. As in ***Taylor***, Salazar was informed during the plea colloquy that he faced a lesser penalty than he actually faced. ***Id.***, ¶28. As in ***Taylor***, the record in this case is replete

with evidence that Salazar knew the penalties he faced as a result of his guilty pleas. ***Id.***, ¶35. The record reveals the following: the circuit court's misstatement during the plea colloquy about the penalty for one count of first-degree sexual assault of a child, a correct statement of the penalty as to an identical second charge, Salazar's plea questionnaire which states the correct penalty for both counts, and Salazar's affirmations during the plea colloquy that he understood the plea questionnaire and the maximum penalties he faced as a result of his guilty pleas. Salazar's counsel also affirmed that he was satisfied that Salazar understood the maximum penalties.

To conclude that Salazar was not aware of the penalties he faced at the time he pled guilty, we would have to assume that the record contains misrepresentations by counsel and Salazar and that the plea-related documents in the record and the transcript of the plea colloquy do not say what they say relating to the maximum potential penalties. *See* ***id.***, ¶39. "'We do not embrace a formalistic application of the ***Bangert*** requirements that would result in the abjuring of a defendant's representations in open court for insubstantial defects.'" ***Taylor***, 347 Wis. 2d 30, ¶39 (citation omitted). The record supports a "reasonable conclusion" that Salazar understood the penalties he faced. We observe that Salazar's total sentence of thirty-five years[4] did not exceed even the exposure arising from the circuit court's misstatement (100 years). *See* ***Taylor***, 347 Wis. 2d 30, ¶45 (Taylor received a six-year sentence, consistent with the erroneous advisement during the plea colloquy; Taylor actually faced eight years). The insubstantial defect

[4] The circuit court sentenced Salazar to concurrent sentences of thirty-five years: twenty years of initial confinement and fifteen years of extended supervision.

during Salazar's plea colloquy does not undermine the record which demonstrates that Salazar's guilty pleas were knowingly, intelligently, and voluntarily entered. ***Taylor***, 347 Wis. 2d 30, ¶39.

We affirm the circuit court's discretionary denial of Salazar's plea withdrawal motion without an evidentiary hearing.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are 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