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DISTRICT II/IV

December 11, 2018

To:

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Circuit Court Judge
Waukesha County Courthouse
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Waukesha, WI 53188

Hon. Michael P. Maxwell
Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2015AP2674-CR State of Wisconsin v. Jason J. Harvestine (L.C. # 2011CF723)

Before Sherman, Kloppenburg and Fitzpatrick, 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).

Jason Harvestine appeals a circuit court judgment convicting him of second-degree child sexual assault. He also appeals the court's order denying postconviction relief.[1] Harvestine argues that he is entitled to an evidentiary hearing on his claim that the circuit court failed to sufficiently ascertain his capacity to enter a plea. 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(1) (2015-16).[2] We affirm.

Harvestine was charged with two counts of sexual assault of a child who has not attained age sixteen in violation of WIS. STAT. § 948.02(2) (2009-10). The State agreed to dismiss one of the counts in exchange for Harvestine's guilty plea to the other count. At the plea hearing, Harvestine submitted a plea questionnaire and waiver of rights form in which he checked boxes indicating that he was receiving treatment for a mental illness or disorder and that he had consumed alcohol, medications, or drugs within the last twenty-four hours. The circuit court accepted Harvestine's guilty plea without asking Harvestine about this information on the plea questionnaire. The court sentenced Harvestine to a thirty-year sentence consisting of fifteen years of initial confinement and fifteen years of extended supervision.

Harvestine filed a postconviction motion seeking plea withdrawal. He argued that the circuit court failed to comply with its duty to determine his capacity to enter a plea, and he requested an evidentiary hearing at which the State would be required to prove that his plea was

[1] The Honorable Patrick C. Haughney presided at Harvestine's plea hearing and sentencing. The Honorable Michael P. Maxwell presided at Harvestine's postconviction motion hearing. Harvestine's appeal was filed as a no-merit appeal but converted to a regular appeal by order of this court dated March 7, 2018.

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

knowing and voluntary. The circuit court denied Harvestine's motion without an evidentiary hearing.

Harvestine renews his same argument on appeal, seeking an evidentiary hearing. To warrant an evidentiary hearing, Harvestine's postconviction motion needed to "(1) 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; and (2) allege that [Harvestine] did not know or understand the information that should have been provided at the plea hearing." *See* ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. Whether Harvestine's motion allegations meet these requirements is a question of law we review de novo. ***Id.***, ¶21.

The circuit court's duty at issue here is the duty to "[d]etermine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the [plea] hearing." *See* ***id.***, ¶35. Harvestine argues that the court failed to comply with this duty when it failed to inquire into Harvestine's mental capacity after Harvestine checked boxes on the plea questionnaire indicating that he was receiving treatment for a mental condition and had consumed alcohol, medications, or drugs. Harvestine also argues that the plea hearing transcript sufficiently shows that he was confused or lacked an understanding of certain issues at the plea hearing. For the following reasons, we reject both arguments.

First, although it would have been preferable for the circuit court to specifically inquire into the information on the plea questionnaire relating to Harvestine's mental state, neither WIS. STAT. § 971.08 nor the case law requires such a specific inquiry. *See* ***Brown***, 293 Wis. 2d 594, ¶35 (summarizing the circuit court's plea colloquy duties); *see also* ***State v. Bangert***, 131 Wis.

2d 246, 261-62, 389 N.W.2d 12 (1986). Harvestine concedes as much in his briefing, stating that he seeks a "new rule of law" that requires a specific inquiry of this nature whenever "there are indications in the plea questionnaire or elsewhere that the defendant has a mental illness or condition."

Second, when we consider the plea transcript as a whole, we are satisfied that the circuit court determined that Harvestine had the capacity to enter a plea. The court conducted a detailed plea colloquy during which it had ample opportunity to listen to and observe Harvestine. Early in the hearing, Harvestine failed to immediately answer some of the circuit court's questions, prompting the court to pause and ask Harvestine whether he was confused. However, when the court followed up with more detailed questions and explanations, Harvestine unequivocally indicated his understanding and did not appear to be confused or lacking capacity to enter a plea. On the contrary, Harvestine provided several detailed and cogent answers to questions regarding the allegations against him. As the hearing proceeded, it became apparent that Harvestine was not confused so much as uncertain whether he wanted to plead guilty, prompting the court to allow a two-hour recess for Harvestine to consult further with his attorney. After the recess, the court questioned Harvestine further, Harvestine answered that he understood each of the court's questions, and Harvestine unequivocally stated his desire to enter a guilty plea.

Third, Harvestine's postconviction motion alleged his lack of understanding based solely on the plea hearing transcript and included no allegation that Harvestine in fact did not know or understand any pertinent information as a result of his mental state. Thus, Harvestine's motion insufficiently alleged a lack of understanding under our pleading standards. As the supreme court stated in ***Brown***, "[a] defendant is not required to submit a sworn affidavit to the court, but he is required to plead in his motion that he did not know or understand some aspect of his plea

that is related to a deficiency in the plea colloquy." ***Brown***, 293 Wis. 2d 594, ¶62. "[I]f the defendant is unwilling or unable to assert a lack of understanding about some aspect of the plea process, there is no point in holding a hearing." ***Id.***, ¶63.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals