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DISTRICT I

October 31, 2019

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

2019AP392-CR State of Wisconsin v. Robert Hurt, Jr. (L.C. # 2016CF2503)

Before Brash, P.J., Kessler and Dugan, 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).

Robert Hurt, Jr., appeals from a judgment convicting him of five offenses. Hurt also appeals from an order denying his postconviction motion to vacate the judgment. 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 (2017-18).[1] The judgment and order are summarily affirmed.

Police executed a search warrant on Hurt's home and recovered significant amounts of heroin, cocaine, marijuana, drug paraphernalia, firearms, and cash. The State charged Hurt with one count of possession with intent to deliver more than fifty grams of heroin as a second or subsequent offense, possession with intent to deliver between fifteen and forty grams of cocaine as a second or subsequent offense, and three counts of possession of a firearm by a felon, all as a repeater.

On the morning of trial, Hurt submitted a plea questionnaire and waiver of rights form. The circuit court began a plea colloquy. When Hurt told the court he had not discussed possible prison with his attorney, the court gave them time for discussion. When the court asked Hurt how he wanted to plead, Hurt did not answer. The court offered Hurt more time to talk to counsel, but Hurt said it would just be the same result. The court was reluctant to accept any pleas if Hurt did not understand and feel comfortable with the decision to plead guilty, so the court briefly recessed the case. When the matter reconvened, and the court asked Hurt if the complaint was true, Hurt said no. When asked if he committed the alleged offenses, Hurt said no. The court adjourned the matter until the afternoon, stating it did not "accept pleas from people who do not believe they're responsible for what they're pleading to." After the recess, Hurt was still undecided about how to proceed, so the court determined the matter would proceed to trial the following day.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The next day, defense counsel told the court that Hurt had indicated a desire to enter a plea, but was now uncertain. The court suggested that "maybe the best thing would be to have the trial and let the jury hear the evidence and they can make a determination as they see fit." A jury was eventually selected, but the case was continued due to the late hour.

The next morning, after the jurors were given preliminary instructions, defense counsel requested a sidebar. The court sent the jury out. Defense counsel told the court that Hurt was "interested in entering a plea at this point." Defense counsel then asked, "Is that correct, Mr. Hurt?" Hurt responded, "Yes. He -- he feel that I guess we can't win, so I'm -- [.]"

The court interjected, telling Hurt that if he was uncomfortable acknowledging his guilt, they should continue with the trial, because the court would only accept his pleas if he felt that he was guilty. After another break, counsel explained that Hurt understood the rights he would be giving up with his pleas, but Hurt disputed some of the facts in the complaint. Counsel suggested that the court might want "to inquire the facts Mr. Hurt would rely upon to support his plea." Counsel then summarized the facts to which Hurt would admit.

The court explained all of Hurt's trial rights, which Hurt acknowledged. The court told Hurt that his attorney "is saying you understand your right to a trial, but you would rather enter a plea today where you would acknowledge responsibility for these things you're charged with, rather than have the jury make that determination." It asked Hurt, "Is that what you want to do today?" Hurt answered, "Yes." The court then went through each of the facts defense counsel had summarized, and Hurt agreed with each one. The court then asked Hurt, "Is this why you would like to enter a guilty plea today?" Hurt again answered, "Yes."

The court reminded Hurt that they "could go ahead with the trial and have the jury decide these issues." Hurt said he understood. The court then asked Hurt, "Are you admitting to these offenses because you believe you are guilty of these offenses?" Hurt responded, "Yes." The court noted that the matter was in its third day, so Hurt "had to think about this a long time." It asked Hurt whether, "[h]aving all of that time to think about it, are you comfortable with the decision that you are making at this moment?" Hurt answered, "Yes."

The court then conducted a plea colloquy. *See* WIS. STAT. § 971.08; *see also* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. To aid the colloquy, the court utilized the plea questionnaire form that had been submitted two days earlier; the form indicated that Hurt would be pleading guilty to the five offenses and the State would dismiss all penalty enhancers. During the colloquy, however, the court never directly asked Hurt, "How do you plead?" so Hurt never expressly stated, "Guilty." The court later imposed sentences totaling thirteen years' initial confinement and seven years' extended supervision.

Hurt filed a postconviction motion to vacate the judgment of conviction, asserting that because the court never directly inquired what pleas he was entering, he "never tendered a guilty plea to any of the counts" and his conviction must be vacated.[2] The court denied the motion, concluding that the matter was controlled by ***State v. Burns***, 226 Wis. 2d 762, 594 N.W.2d 799 (1999), and that "the only possible inference from the totality of the facts and circumstances of this record is that the defendant intended to plead guilty to the five charges." Hurt appeals.

[2] We note that because Hurt's contention is that he never actually entered valid guilty pleas, the motion was not a motion for plea withdrawal.

We agree with the circuit court that this matter is controlled by ***Burns***. There, the supreme court considered whether WIS. STAT. § 972.13(1),[3] which states in relevant part that "[a] judgment of conviction shall be entered upon … a plea of guilty[,]" requires a defendant to "expressly and personally articulate a plea of guilty or no contest on the record in open court in order for a judgment of conviction to be entered on the plea." *See* ***Burns***, 226 Wis. 2d at 763-64. The supreme court "urge[d] circuit courts to follow the usual and strongly preferred practice of asking defendants directly and personally in open court and on the record how they plead to the charged offenses and of entering the pleas on the record." ***Id.*** at 765-66. This practice involves the circuit court asking a defendant "how do you plead?" and eliciting a response of "guilty" or "no contest." ***Id.*** at 774. However, the supreme court ultimately held "that the magic words 'I plead [guilty]' are not necessarily required for a valid conviction" under § 972.13(1), provided that "the only inference possible from the totality of the facts and circumstances in the record is that the defendant intended to plead no contest (or guilty, as the case may be)." ***Burns***, 226 Wis. 2d at 774.

On appeal, Hurt argues that the record "fails to demonstrate that the only inference that may be drawn is that [he] intended to plead guilty." He notes that the case had been called for trial and a jury picked, and a plea rejected once before. He also argues that at the second plea hearing, "it was defense counsel who told the court that Hurt intended to plead guilty" and that Hurt did not "ratify what his attorney told the court." Thus, Hurt asserts, this case "does not even appear to be a close case. This is not at all like ***Burns***."

[3] The 1993-94 version of WIS. STAT. § 972.13(1) considered in ***State v. Burns***, 226 Wis. 2d 762, 763, 594 N.W.2d 799 (1999), is identical to the 2017-18 version of § 972.13(1).

We agree that this does not even appear to be a close case and that this case is not at all like ***Burns***. However, that is because the record here even more strongly supports a single inference that Hurt intended to plead guilty.

In ***Burns***, the circuit court did not mention that the proposed plea would be a no-contest plea. ***Id.*** at 769. It never asked Burns how he pled or whether counsel's statement that Burns wanted to plead was correct. ***Id.*** It was also indisputable that no one ever said on the record that Burns was in fact pleading no contest to the charged offense. ***Id.***

Here, after defense counsel told the circuit court that Hurt was "interested in entering a plea," counsel asked, "Is that correct, Mr. Hurt?" Hurt then ratified counsel's answer by saying, "Yes." Though Hurt began to equivocate in his follow-up statement, the court told Hurt that it would only accept a plea if Hurt felt he was guilty. The court then explained to Hurt that defense counsel was saying that Hurt understood he could have a trial but would "rather enter a plea today where [Hurt] would acknowledge responsibility[,]" and it asked Hurt if that was what he wanted to do. Hurt said yes. After reviewing the facts that Hurt would agree to, the court asked if that was why Hurt wanted to enter guilty pleas. Hurt said yes. The court confirmed that Hurt understood he could still have a jury trial, then inquired whether Hurt was admitting these offenses because he believed he was guilty of them. Hurt answered yes.

It is true that Hurt was initially uncertain whether he wanted to proceed with a plea and that the plea process had at least one false start. However, given the entirety of the record, it is clear that Hurt resolved his doubts and made the decision to enter guilty pleas. Indeed, when we review the circuit court's thorough questioning, clearly designed to ensure Hurt was ready to

enter his pleas, there is no other inference to be drawn but that Hurt clearly indicated that he wanted to plead guilty to the charges.

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.

Sheila T. Reiff
Clerk of Court of Appeals