



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT I**

March 14, 2023

To:

Hon. Michelle Ackerman Havas  
Circuit Court Judge  
Electronic Notice

Hon. Mark A. Sanders  
Circuit Court Judge  
Electronic Notice

Anna Hodges  
Clerk of Circuit Court  
Milwaukee County Safety Building  
Electronic Notice

Jeffrey W. Jensen  
Electronic Notice

Lisa E.F. Kumfer  
Electronic Notice

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

---

2022AP288-CR

State of Wisconsin v. Darius Darnell Moffett (L.C. # 2016CF3932)

Before Brash, C.J., Donald, P.J., and White, 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).**

Darius Darnell Moffett appeals a judgment of conviction entered upon his guilty pleas to operating a motor vehicle without owner's consent, burglary, and bail jumping, all as a habitual offender. He also appeals an order denying his postconviction motion to withdraw his guilty pleas. The issue is whether the circuit court erroneously rejected his claim that he was entitled to plea withdrawal because the State failed to provide him with certain GPS data prior to his pleas.

Based upon the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> We summarily affirm.

The State alleged in a criminal complaint that on the morning of August 19, 2016, A.W. and M.W. awoke in their Wauwatosa home to discover horizontal and vertical cuts in several of their window screens. Items, including car keys, were missing from the home, and M.W.'s 2013 blue Honda Accord with Marquette University custom license plates was no longer parked in the driveway. Surveillance video from a neighboring home recorded the car leaving the driveway that morning at 4:30 a.m.

On August 22, 2016, Wauwatosa law enforcement officers saw M.W.'s blue Honda parked in Milwaukee on North 35th Street, behind the home of Moffett's girlfriend. Detectives learned that a Department of Corrections agent was expecting Moffett for a supervision appointment the next day. On August 23, 2016, the detectives conducted surveillance outside the agent's office building. They saw Moffett, wearing a black and red shirt, leave the agent's building and walk to a parking lot where he got into the driver's seat of M.W.'s blue Honda and drove away.

Also on August 23, 2016, M.A. and her two housemates awoke in their Wauwatosa home and discovered horizontal and vertical cuts in a window screen of the residence. Items, including M.A.'s checkbook, driver's license, and car keys, were missing from the home, and M.A. subsequently discovered that her Chevrolet Malibu had been taken from its parking space.<sup>2</sup> Two

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

<sup>2</sup> The State alleged in the criminal complaint that M.A.'s car was taken on August 24, 2016, but in a later information the State alleged that the date in question was actually August 23, 2016.

citizen witnesses told police that a man in a black and red sweatshirt had arrived in the area in a blue Honda Accord with Marquette University custom license plates, and a third citizen witness said that a man wearing a black and red sweatshirt got into the Malibu and drove it away.

Police in Milwaukee subsequently observed M.W.'s blue Honda parked in the 1300 block of North 44th Street early in the morning of August 24, 2016. At approximately 3:00 a.m., Matthew Knight, a Milwaukee County investigator on foot patrol in plain clothes, next observed Moffett crossing Juneau Avenue on 44th Street and walking towards the Honda. Moffett was wearing a red and black sweatshirt. Knight saw Moffett drive the Honda, stop in the 1100 block of North 44th Street, enter a yard, and then reemerge carrying items that he placed in the Honda. Next, Knight watched Moffett drive the Honda before parking it on 44th Street across from an address in the 4300 block of West Martin Drive. After Moffett got out of the Honda, a detective stepped forward from a concealed spot and identified himself. Moffett fled. A second detective took him into custody on a rooftop in the 1100 block of North 43rd Street. The key to M.W.'s blue Honda was in Moffett's pocket at the time of the arrest.

Police spoke to residents in the neighborhood of North 43rd street and determined that A.B., K.S., and K.D. had heard a commotion while in their home in the 4300 block of West Martin Drive shortly before officers arrested Moffett. The three citizens also discovered that a window screen in their residence had been cut horizontally and vertically and a number of items that had been in the residence earlier that evening were no longer there.

A search of the blue Honda subsequent to Moffett's arrest uncovered items missing from the home on West Martin Drive as well as items missing from M.A.'s home in Wauwatosa, including the key fob for M.A.'s Chevrolet Malibu. Additional investigation revealed that, at the

time of the arrest, Moffett was out of custody on bond in another criminal case and that he had a prior felony conviction.

The State charged Moffett with six felonies, the first three of which were allegations of operating a motor vehicle without owner's consent: counts one and three arose from his alleged operation of M.W.'s blue Honda on August 23, 2016, and August 24, 2016, respectively; count two arose from his alleged operation of the Chevrolet Malibu on August 23, 2016. The State also charged Moffett with three offenses arising from his alleged conduct on and around West Martin Drive: burglary (count four); bail jumping (count five); and obstructing an officer (count six). As to each of the six counts, the State alleged that Moffett was a habitual offender.

Moffett resolved the charges with a plea agreement. Pursuant to its terms, he pled guilty as charged to counts one, four, and five. The remaining charges in this matter were dismissed and read in for sentencing purposes, as were two charges pending in a separate criminal case.

At sentencing, the prosecutor's remarks included a disclosure that at some point—apparently in the evening of August 23, 2016—Wauwatosa police placed a GPS device on M.W.'s stolen blue Honda and thereafter tracked the vehicle until Moffett's arrest on August 24, 2016. There is no dispute that the State had not previously disclosed this information to Moffett or to his trial counsel.

Moffett's postconviction counsel subsequently attempted to obtain additional information about the GPS tracking device and the data it generated. The parties agree that the State was unable to provide any information because the Wauwatosa police had not preserved the data.

Moffett moved to withdraw his guilty pleas, alleging, as relevant here, that he did not enter them knowingly because the State had failed to produce exculpatory GPS evidence. He contended that the GPS data “would have been exculpatory as to the burglary charge; that is, the information would have shown that he did not enter the neighborhood where the burglary occurred until shortly before he was arrested such that there was insufficient time to commit the burglary before the officers observed him.” He further alleged that, “had he known of the existence of the GPS evidence, he would not have entered his guilty pleas.”

The circuit court conducted a hearing on Moffett’s claim.<sup>3</sup> At the hearing, Moffett testified that he decided to plead guilty because:

I didn’t have [any evidence] to prove my versions of events[,] where I was and what was happenin[g] that night, like -- like the time and ... where I came from and to [sic] how long I was there that night when I -- when I pulled up in that -- on that block.

He explained that he had wanted to assert his innocence as to all of the crimes, but he was afraid that the jury would not believe his testimony “because it was all [his] word against the police.” Moffett suggested, however, that he might have had an alibi:

some people like earlier in the time, I think it was from like 11 until like almost 3:50, 3:45 ... but ... it was really just my mama and ... she [saw] what time I came home, but she – she really didn’t remember like a concrete exact time and that was the main thing.

Moffett went on to testify that the lack of the GPS data affected his decision to plead guilty because the GPS data “had [his] time on it,” and “would have established where [he was]

---

<sup>3</sup> The hearing followed an earlier appeal, *State v. Moffett*, No. 2020AP395-CR, unpublished slip op. (WI App July 20, 2021), in which we concluded that Moffett was entitled to an evidentiary hearing on his motion for plea withdrawal. *See id.*, ¶1.

at the time the burglary was committed [.]”<sup>4</sup> In sum, he asserted that GPS data would have shown how long he was in the neighborhood prior to his arrest and, he believed, would have demonstrated that he was “not in that neighborhood long enough to have committed th[e] burglary.”

On cross-examination, Moffett admitted that he had been walking in the area of 44th and Juneau Avenue at approximately 3:00 a.m. on August 24, 2016, and he said that he recalled exchanging a wordless greeting at that time with another pedestrian. He further acknowledged that when police tried to arrest him that night, he fled. He admitted that he had the key to the blue Honda in his pocket when he was apprehended and that he had been driving the blue Honda that day.

Knight was the only other person to testify at the postconviction hearing. He said that in August 2016, he was participating in an investigation of burglaries in Wauwatosa. He further said that, sometime in the early morning hours of August 24, 2016, he was sent to the area of 44th and Juneau, where police had detected the presence of a target vehicle, a 2013 Honda Accord outfitted with a GPS tracking device. Knight described the area as a largely residential part of Milwaukee that did not have any twenty-four-hour businesses open in the early morning. Knight said that he had been on foot patrol for a period of time when he saw Moffett at approximately 3:00 a.m. walking towards the stolen 2013 blue Honda that was parked on the street. Knight testified that the two men exchanged a nod before Knight moved to a spot where

---

<sup>4</sup> Moffett acknowledged that his plea agreement involved dismissals of some charges that did not turn on his location at the time of the burglary, but he explained that those charges were not part of his calculus in accepting the agreement because he believed that he could have prevailed on those dismissed counts at trial.

he was hidden and could maintain surveillance. He next saw a car's headlights illuminate and the car begin to move. He was able to observe that the car was the blue Honda and that Moffett was driving it.

Knight said that he watched Moffett stop the blue Honda near the corner of 44th and Juneau Avenue and leave the car with the engine running and the door open. Knight watched Moffett enter a gangway between two houses, at which point Knight lost sight of Moffett. Shortly thereafter, Knight saw Moffett re-emerge from the gangway carrying an armful of items, place them in the Honda, and drive it away. Knight notified other officers in the area regarding his observations.

The circuit court found that both Moffett and Knight testified credibly. As to Moffett, the circuit court believed his testimony that he would not have pled guilty if he had received exculpatory GPS evidence from the State during pretrial proceedings. The circuit court went on to find, however, that, based on Knight's credible testimony, the "GPS device would not have shown what the defense wanted it to show." Instead, the circuit court found that the GPS data would have corroborated Knight's testimony about the location and movements of the blue Honda on the morning of August 24, 2016. The circuit court therefore found that, even if Moffett had received the GPS data before he pled guilty, "he would not have acted any differently than he did" and would have entered guilty pleas. In light of those findings, the circuit court denied the postconviction motion. Moffett appeals.

We begin our analysis with a summary of the procedural posture of this matter and the standard of review. Moffett brought his motion for plea withdrawal pursuant to *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50

(1996). A defendant seeks relief under *Nelson/Bentley* when the defendant pursues plea withdrawal for reasons that are outside the record of the plea colloquy. See *State v. Basley*, 2006 WI App 253, ¶4, 298 Wis. 2d 232, 726 N.W.2d 671.

Under *Nelson/Bentley*, a defendant seeking plea withdrawal after sentencing must show by clear and convincing evidence that the plea represents a manifest injustice. See *State v. Brown*, 2006 WI 100, ¶¶18, 42, 293 Wis. 2d 594, 716 N.W.2d 906. One way that a defendant may meet that burden is “by showing that [the] guilty plea was not made knowingly, intelligently, and voluntarily.” *State v. Hoppe*, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794. When a defendant alleges that his or her plea was not knowing, intelligent, and voluntary, the defendant raises a question of constitutional fact. See *id.*, ¶61. On appeal, “[w]e accept the [circuit] court’s findings of historical and evidentiary fact unless they are clearly erroneous.” *Id.* Moreover, the circuit court “is the ultimate arbiter of the credibility of witnesses[.]” *State v. Bermudez*, 221 Wis. 2d 338, 346, 585 N.W.2d 628 (Ct. App. 1998). However, we determine independently whether the facts found by the circuit court “demonstrate that the defendant’s plea was knowing, intelligent, and voluntary.” *Hoppe*, 317 Wis. 2d 161, ¶61.

In this case, Moffett alleged that the data generated by the GPS device placed on M.W.’s stolen blue Honda would have been exculpatory because the evidence would have shown that he was not in the West Martin Drive area long enough on August 24, 2016, to commit the burglary there; and he further alleged that he would not have entered his guilty pleas had he known about exculpatory evidence generated by the GPS device. Thus, as both parties expressly agree, the specifics of Moffett’s claim, coupled with the unavailability of the GPS data, required the circuit court to determine “what the GPS evidence would have shown; and then to assess the effect that this information would have had on Moffett’s decision to plead guilty.”



The circuit court found that the GPS evidence would not have been exculpatory. The circuit court reached this conclusion because the circuit court found Knight to be credible. It believed his testimony regarding his observations of the blue Honda and its location and movements on August 24, 2016. The circuit court also believed Knight's testimony regarding his observations of Moffett in and around the blue Honda that morning. Because the circuit court believed Knight's testimony, the circuit court found that the GPS data would have corroborated that testimony and thus would have been inculpatory, not exculpatory. The circuit court therefore also found that the GPS data would not have altered Moffett's decision to forgo a trial and plead guilty. These findings of fact are supported by the testimony and thus are not clearly erroneous. *See id.*, ¶65.

In response, Moffett asserts that Knight's testimony does not support the circuit court's findings because, "[a]s Knight admitted, he never saw Moffett enter the house that was burglarized. Thus, the timeline that the GPS evidence would have established ... could have allowed Moffett to argue that he was not on the scene long enough to go into the house." We are not persuaded. The parties agree that police placed a GPS device on the stolen blue Honda, not on Moffett himself. Knight testified about the location and movements of the blue Honda at the time that he observed Moffett in the area of the West Martin Drive burglary on the night it occurred. The circuit court found that the GPS data would have confirmed Knight's inculpatory testimony and thus would have been at least equally inculpatory. Moffett's speculative contention that the GPS data might have shown something different that would have been somehow exculpatory is defeated by the circuit court's finding that Knight testified accurately about the Honda's movements. *See State v. Brooks*, 2020 WI 60, ¶20, 392 Wis. 2d 402, 944 N.W.2d 832 (citation omitted) ("This court does not resolve cases on the basis of speculation....

We resolve this case on the basis of the record before us and the circuit court’s findings of fact based on that record.”).

Moffett also at times appears to reframe his appellate argument as a claim that he is entitled to plea withdrawal regardless of whether the GPS device would have provided exculpatory information. Specifically, he argues that “he did not know about the GPS evidence at the time he entered his guilty plea[s],” and therefore, his pleas were “not knowingly entered.” Moffett’s effort to reframe his argument in this way does not assist him. While Moffett has identified something that he did not know at the time of his guilty pleas, that alone is insufficient to warrant plea withdrawal. Moffett must establish that the knowledge he lacked would have affected his pleas. As our supreme court has explained, “[t]he defendant must prove the linkage between his plea[s] and the purported defect. The defendant’s proof must add up to manifest injustice.” *State v. Hampton*, 2004 WI 107, ¶63, 274 Wis. 2d 379, 683 N.W.2d 14.

Here, Moffett did not prove a linkage between his decision to plead guilty and his ignorance of the fact that police had placed a GPS device on the stolen blue Honda. Rather, Moffett linked his decision to plead guilty to the lack of exculpatory GPS data supporting a timeline that showed he “had not been in the area long enough to have committed the burglary.” The circuit court found, however, that the GPS device would not have provided such an exculpatory timeline. Instead, the circuit court found that the GPS data would have shown that the blue Honda was in the area of the West Martin Drive burglary for at least as long as Knight described in his testimony—a period during which Knight observed Moffett: walking in the area of the Honda; driving the Honda; stopping it near the burgled home; approaching that home; and then walking away with his arms full of items that he stashed in the Honda. Because the circuit court thus found that the missing evidence from the GPS device was inculpatory, Moffett failed

to show that he would have pleaded differently if he had received the evidence. Accordingly, Moffett failed to demonstrate that his lack of knowledge regarding the missing evidence constituted a manifest injustice warranting plea withdrawal. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction 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*