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DISTRICT II

April 19, 2023

To:

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Circuit Court Judge
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

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

2021AP1268-CR State of Wisconsin v. Troy Lakendrick Duvall (L.C. #2018CF779)

Before Gundrum, P.J., Grogan and Lazar, 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).

Troy Lakendrick Duvall appeals a judgment convicting him of four felonies and an order denying his postconviction motion for plea withdrawal. He argues, and the State now agrees, that the circuit court erred in denying his postconviction motion without an evidentiary hearing because the motion set forth a prima facie case for plea withdrawal under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). 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 (2021-22).[1] For the reasons that follow, we reverse the order denying Duvall's

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

postconviction motion and remand for an evidentiary ***Bangert*** hearing at which the State carries the burden to show by clear and convincing evidence that despite defects in the plea colloquy, Duvall's pleas were knowing, intelligent, and voluntary.

Duvall and two codefendants were charged with various drug-related offenses in a single Complaint. Six of the Complaint's twenty-one counts named Duvall as the defendant: three counts of conspiracy to deliver cocaine and three counts of conspiracy to maintain a drug-trafficking place. The Complaint also alleged that Duvall was subject to the habitual offender sentence enhancer under WIS. STAT. § 939.62 because he had three prior misdemeanor convictions.

Following bindover, the State filed an Information charging Duvall with the same six offenses as contained in the Complaint. Thereafter, both of Duvall's codefendants entered into plea agreements and were added to the State's witness list in the case against Duvall.

The State filed an Amended Information charging Duvall with twelve offenses. The Amended Information differed from the original as follows: (1) it added six new drug charges, all of which alleged that Duvall acted as a party to the crime under WIS. STAT. § 939.05; (2) it changed the theory of liability for the original six charges by alleging that Duvall acted as a party to the crime under § 939.05, rather than by engaging in a conspiracy to commit the crime under WIS. STAT. § 939.31; and (3) it added an allegation that, in addition to the WIS. STAT. § 939.62 enhancer predicated on his three prior misdemeanors, Duvall was subject to the drug-repeater enhancer set forth in WIS. STAT. § 961.48 (permitting enhanced sentence for second and subsequent drug offenses).

Days before trial, Duvall entered into an agreement with the State and pled no contest to three counts of delivering less than one gram of cocaine as a party to the crime and one count of possessing with the intent to deliver more than forty grams of cocaine as a party to the crime. All four counts alleged that Duvall was subject to the sentence enhancers set forth in both WIS. STAT. §§ 939.62 and 961.48. The circuit court accepted Duvall's pleas, found him guilty, and dismissed but read in the remaining eight counts.

After sentencing, Duvall filed a postconviction motion alleging that he was entitled to plea withdrawal due to two defects in the circuit court's plea colloquy. Specifically, he alleged that the plea-taking court failed to ascertain his understanding of: (1) party-to-a-crime liability; and (2) the maximum sentence he faced given the addition of the WIS. STAT. § 961.48 drug enhancer. The circuit court denied Duvall's postconviction motion without an evidentiary hearing, concluding that despite any defects in the plea colloquy, the Record as a whole demonstrated that Duvall understood the nature of party-to-a-crime liability as well as the enhanced penalties under § 961.48. *See* ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334 ("'[A]n evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts.'" (citation omitted)). Duvall appeals.

A defendant seeking plea withdrawal due to a defective colloquy must demonstrate that the circuit court failed to comply with WIS. STAT. § 971.08 or other mandatory procedures and must allege that he or she did not know or understand the information that should have been provided. *See* ***Bangert***, 131 Wis. 2d at 274-75. Once the defendant has made this prima facie showing, the burden shifts to the State to demonstrate by clear and convincing evidence that despite the deficiency, the defendant otherwise knew or understood the missing information. ***Id.***

As urged by the parties on appeal, we conclude that Duvall's plea withdrawal motion set forth a prima facie case entitling him to an evidentiary ***Bangert*** hearing. *See* ***State v. Brown***, 2006 WI 100, ¶¶20-21, 293 Wis. 2d 594, 716 N.W.2d 906 (whether a plea withdrawal motion is sufficient to require an evidentiary hearing presents a question of law subject to de novo review). The circuit court did not refer to or explain the concept of party-to-a-crime liability when ascertaining Duvall's understanding of the four charges to which he pled, nor did it inform Duvall of the additional imprisonment he faced under WIS. STAT. § 961.48. These constitute defects in the plea-taking colloquy. *See* WIS. STAT. § 971.08(1)(a); ***Brown***, 293 Wis. 2d 594, ¶55 (when defendant is charged as a party to the crime, the definition of party-to-a-crime liability is an essential offense element).

In denying the ***Bangert*** motion, the circuit court determined that the Record as a whole, particularly Duvall's signed plea questionnaire and waiver-of-rights form, showed that Duvall knew and understood both party-to-a-crime liability and the enhanced maximum penalties he faced upon conviction. We disagree.

With regard to party-to-a-crime liability, the circuit court did not discuss it with Duvall, and the plea paperwork neither describes the concept nor attaches the relevant jury instruction. To the extent trial counsel wrote "PTC" on the plea forms and answered "[y]es" when asked if she felt she had "gone over everything with [Duvall] very thoroughly[,]" these Record facts are insufficient to establish Duvall's understanding. Without more, it is speculative to infer both that trial counsel discussed party-to-a-crime liability with Duvall and that her explanation was accurate and sufficient.

As to Duvall's sentencing exposure, the circuit court ascertained that he understood the maximum penalty for each of the four substantive offenses as enhanced by WIS. STAT. § 939.62. Though the court informed Duvall that he was also a WIS. STAT. § 961.48 drug repeater, it failed to inform him that this additional enhancer further increased his maximum sentence. The following exchange is illustrative:

> THE COURT: Okay. … For count number 17, which you're going to be entering a plea, the possible penalty is a fine of not more than $25,000 or 10 years in prison or both. Once again, due to that repeater enhancement, it is -- the maximum term of imprisonment may be increased by not more than 2 years. There's also a possibility of the operating privileges being suspended. Do you acknowledge that this is also a second as far as the possession of THC because of a prior possession?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you acknowledge the repeater enhancement due to three prior convictions of misdemeanors?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Then we will skip to [the next count].

The circuit court's numbers yield a maximum penalty of seventy-eight years. In reality, Duvall faced a maximum of ninety-six years. We accept the parties' agreement that this is not an insubstantial defect under ***State v. Taylor***, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482.

In sum, we agree with the parties that Duvall has set forth a prima facie case entitling him to an evidentiary ***Bangert*** hearing. We reverse the order denying postconviction relief and remand to the circuit court with directions that it hold an evidentiary hearing at which the State will carry the burden to prove that Duvall's no contest pleas were nonetheless knowing, intelligent, and voluntary.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded for further proceedings.

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

Sheila T. Reiff
Clerk of Court of Appeals