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DISTRICT II

March 6, 2013

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

2012AP770-CR

State of Wisconsin v. Roberto Quinonez (L.C. # 2009CF318)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Roberto Quinonez appeals from a judgment of conviction and an order denying his postconviction motion for plea withdrawal. 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 (2011-12).¹ We affirm because Quinonez failed to establish a prima facie case that his pleas were entered without an understanding of the nature of or factual basis for the charges.

Quinonez pled guilty to three counts of delivering cocaine in connection with a series of controlled buys to a confidential informant. Originally, appellate counsel was appointed and filed a no-merit report. This court dismissed the no-merit appeal after concluding that there was an arguably meritorious issue concerning whether the trial court failed to ascertain the existence of a factual basis supporting Quinonez's pleas. *State v. Quinonez*, No. 2010AP2722, unpublished op. and order (WI App June 29, 2011).

Successor counsel was appointed to represent Quinonez and filed a postconviction motion for plea withdrawal alleging that: (1) the trial court failed to ascertain Quinonez's understanding that any plea agreement was not binding on the court and Quinonez did not otherwise know this information; and (2) the trial court "neglected to [identify] any factual source supporting the defendant's convictions." The postconviction court initially granted plea withdrawal, but reversed its decision upon reconsideration. Noting that it could consider the entire record in determining whether there was a factual basis for the charges and "whether the defendant had actual notice of the nature of the charge," the trial court concluded that Quinonez failed to demonstrate that he did not understand "the facts as they relate to his case." The trial court informed the parties that it remained willing to hold an evidentiary hearing on whether

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Quinonez understood the nature of the charges, or on any remaining issues. Quinonez instead filed a notice of appeal.²

On appeal, Quinonez maintains that his plea was unknowing and involuntary because the trial court failed to address “the defendant personally regarding a factual basis to conclude that the pleas were made voluntarily with [an] understanding of the nature of the charges in compliance with Wis. Stats. Sec. 971.08(1)(a).” Section 971.08(1)(a) requires that the court “[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.”

A postconviction motion seeking plea withdrawal due to a defective colloquy must demonstrate that the trial court failed to comply with WIS. STAT. § 971.08 or other mandatory procedures, and must allege that the defendant did not know or understand the information that should have been provided. *State v. Hampton*, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. 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.*; *State v. Bangert*, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986).

We conclude that Quinonez did not establish a prima facie case for plea withdrawal because his postconviction motion failed to allege that he did not understand the nature of the

² Quinonez’s plea agreement did not include any sentencing concessions and on appeal, he has abandoned his postconviction claim concerning the trial court’s failure to inform him that it was not bound by any plea agreement. *See State v. Johnson*, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) (issues not briefed or argued on appeal are deemed abandoned).

charges or how the facts satisfied the elements of the offenses. We reject Quinonez's contention that it was sufficient to allege his lack of knowledge concerning the non-binding nature of the plea agreement. The issue presented on appeal is whether Quinonez made a prima facie showing that he did not understand the nature of the charges.³

Finally, we conclude that there was a factual basis for each charge.⁴ As part of its plea-taking duties, a trial court must “personally ascertain whether a factual basis exists to support the plea.” *Bangert*, 131 Wis. 2d at 262; *see also* § 971.08(1)(b) (the court shall “[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.”). The requirement that a trial court ascertain the existence of a factual basis “protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.” *State v. Thomas*, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). In determining whether a factual basis exists, a reviewing court examines the totality of the circumstances, including the criminal complaint, the preliminary hearing, and the plea and sentencing hearing records. *State v. Cain*, 2012 WI 68, ¶31, 342 Wis. 2d 1, 816 N.W.2d 177; *Thomas*, 232 Wis. 2d 714, ¶18. Here, the

³ Further, even if Quinonez had alleged a lack of understanding, we are not convinced that the plea colloquy was defective. The plea hearing transcript demonstrates that the trial court ascertained from Quinonez that he had discussed with his attorney and understood “the elements of this offense” and “what the State has to prove in order for you to be convicted[.]” The trial court specifically drew Quinonez’s attention to the signed plea questionnaire and attached jury instruction, and ascertained that Quinonez understood the documents. It thus appears that the Court satisfied its duty under *State v. Hoppe*, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (use of the plea/questionnaire at the plea hearing lessens the extent and degree of the requisite colloquy).

⁴ Though Quinonez does not directly or specifically argue that the trial court failed to ascertain a factual basis under WIS. STAT. § 971.08(1)(b), we will briefly address this requirement because it was the subject of the court’s order rejecting the no-merit report and dismissing the appeal.

totality of the record, including Quinonez's own sentencing memorandum, demonstrates an abundance of evidence as to each essential element of the three charges to which Quinonez pled.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the trial court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals