Appeal No. 2011AP1030-CR **Cir. Ct. No. 2009CF330**

WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD D. TAYLOR,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Sherman and Blanchard, JJ.

Gerald Taylor appeals a criminal conviction and an order denying his postconviction motion to withdraw his plea on the grounds that the trial court failed to inform him during the plea colloquy—and he failed to understand—that he faced an increased penalty due to a repeater allegation. The sole issue on appeal is whether the trial court properly employed the harmless error doctrine to deny the defendant's plea withdrawal motion without a hearing. As we explain below, we believe that existing case law suggests two different approaches to resolving this issue, each leading to a different result. Specifically, it is unclear whether understating the potential penalty during a plea colloquy can properly be deemed harmless error, and if so, where in the analytical framework of ***Bangert*** such a determination should be made. Accordingly, we certify the appeal in this

case to the Wisconsin Supreme Court for its review and determination pursuant to WIS. STAT. RULE 809.61 (2009-10).[1]

BACKGROUND

The facts relevant to the determination of this appeal are undisputed. Taylor was charged with one count of uttering a forgery, as a repeat offender. Uttering a forgery is a Class H felony, punishable by up to three years of initial confinement and three years of extended supervision. WIS. STAT. §§ 943.38(2), 939.50(3)(h) and 973.01. The repeater allegation increases the potential initial confinement to five years, making the total potential imprisonment eight years. WIS. STAT. § 939.62(1)(b).

Taylor agreed to enter a plea to the charge in exchange for a probation recommendation by the State. At the plea hearing, the circuit court erroneously informed Taylor that the maximum sentence he faced was six years, without mentioning the sentence enhancer. The court ultimately sentenced Taylor to three years of initial confinement and three years of extended supervision.

Taylor moved to withdraw his plea, alleging it had not been knowingly, voluntarily, and intelligently entered because the court misinformed Taylor about the maximum sentence he faced with a repeater allegation, and he did not in fact understand the actual enhanced penalty. The circuit court denied the motion without an evidentiary hearing, ruling that any error in failing to advise Taylor about the potential increased penalty for habitual criminality prior to the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

entry of his plea was harmless because the court did not actually apply the sentence enhancer.

DISCUSSION

The standard methodology for evaluating a plea withdrawal request premised upon an inadequate plea colloquy was established in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). When a defendant makes a prima facie showing that the court failed to comply with WIS. STAT. § 971.08(1) or some other mandated duty to provide the defendant with information necessary to evaluate whether to enter a plea, and the defendant further alleges a failure to understand the information that should have been provided, the defendant is entitled to an evidentiary hearing at which the State bears the burden of showing that the plea was nonetheless knowingly, voluntarily, and intelligently given. ***Id.*** at 274-75. This burden-shifting procedure for deficient plea colloquies is an exception to the general rule wherein a defendant bears the burden of both alleging sufficient facts to warrant a hearing and then establishing a manifest injustice by clear and convincing evidence in order to withdraw a plea. *See* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). Two recent cases address the application of ***Bangert*** to situations in which a defendant claimed to have been misinformed about the potential penalty he faced.

In ***Brown***, a defendant attempted to withdraw his pleas to multiple charges based in part on the trial court's failure to inform him that the sentences for the multiple counts could be imposed consecutively. ***State v. Brown***, 2006 WI 100, ¶78, 293 Wis. 2d 594, 716 N.W.2d 906. The Wisconsin Supreme Court held that the omission did not constitute a violation of the court's mandatory duty under WIS. STAT. § 971.08(1) to inform the defendant of the punishment he faced if

convicted on each count, since it should be self-evident to a defendant facing multiple charges that there could be multiple punishments. ***Id.*** The court went on to observe that, even if the court were required to inform a defendant that sentences on multiple charges could be imposed consecutively, such an error would be harmless in the case before it because the defendant's "total sentence did not reach the maximum on even one of the [counts]."

In ***Cross***, a defendant attempted to withdraw his plea on the grounds that the trial court had erroneously informed him that he faced twenty-five years of initial incarceration and ten years of extended supervision, when the actual maximum potential penalty for the crime of conviction was only twenty years of initial incarceration and ten years of extended supervision. ***State v. Cross***, 2010 WI 70, ¶5, 326 Wis. 2d 492, 786 N.W.2d 64. The Wisconsin Supreme Court held that the trial court did not violate its mandatory duty under WIS. STAT. § 971.08(1) and ***Bangert*** to inform the defendant of the potential punishment he faced, since the erroneously overstated penalty was not "substantially higher" than the penalty actually authorized by law. ***Id.***, ¶¶4-5, 38. Among other factors, the court considered that a defendant who is erroneously informed that he is subject to a greater punishment is necessarily aware that he is subject to a lesser punishment; that other jurisdictions have rejected the proposition that a failure to understand the precise maximum punishment is a per se due process violation; and that federal rules apply a harmless error rule to such alleged violations. ***Id.***, ¶¶31-36. The court noted, however, that "when the defendant is told the sentence is *lower* than the amount allowed by law, a defendant's due process rights are at greater risk and a ***Bangert*** violation may be established." ***Id.***, ¶39 (emphasis added).

Following either ***Brown*** or ***Cross*** in the instant case could arguably lead to different results. As in ***Brown***, the defendant here was told that he faced a

lesser punishment than the law actually provided, but the sentence actually imposed did not exceed the amount of time the court had erroneously informed the defendant he faced. The court's emphasis in ***Brown*** on the fact that the defendant was not sentenced to more time than he was told he faced suggests that the harmless error doctrine might be applicable in these circumstances—regardless of whether the defendant was or was not aware of the actual penalty. That would negate the necessity for a hearing. In contrast, the court's discussion in ***Cross*** seems to suggest that the due process concerns implicated whenever a defendant has erroneously been informed that the penalty is less than the actual maximum might, in fact, require a hearing to determine whether the defendant was aware of the actual penalty he faced.

Accordingly, we believe there is a threshold issue requiring clarification as to whether and under what circumstances the harmless error doctrine can be applied to a plea withdrawal motion premised on the trial court having advised a defendant that the maximum sentence was lower than it actually was. Assuming that the harmless error doctrine can properly be applied to a plea withdrawal motion prior to holding an evidentiary hearing, the question then becomes whether the failure to advise a defendant about a charged penalty enhancer constitutes a ***Bangert*** violation, and if so, whether that error becomes harmless if the court does not actually impose an enhanced sentence. *See generally* ***State v. Harris***, 119 Wis. 2d 612, 350 N.W.2d 633 (1984) (stating that being a repeater is not a crime; it is a status that renders the defendant eligible for an increased penalty and only applies after the maximum penalty on the underlying crime has been imposed).

The application of the harmless error doctrine to ***Bangert*** violations is an issue that appears likely to recur,[2] and is plainly of statewide importance to parties, victims, and the courts. We believe that the Wisconsin Supreme Court is in the best position to harmonize ***Brown*** and ***Cross*** and give direction as to the proper analysis to employ in these circumstances. *See generally* ***Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n of Wis.***, 176 Wis. 2d 955, 958 n.1, 501 N.W.2d 36 (1993) (Abrahamson, J., *concurring*) (noting that it is appropriate to certify to the supreme court appeals raising issues which that body might otherwise ultimately consider on a petition for review, in order to reduce the burden and expense of the appellate process on both the parties and the judicial system). Accordingly, we hereby certify the appeal.

[2] For example, we note that another district of this court has recently had occasion to consider whether a court's failure to advise a defendant that the court would not be bound by any plea agreement could be deemed harmless error. *See* ***State v. Johnson***, No. 2011AP348-CR (Jan. 24, 2012), recommended for publication.