COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2053-CR **Cir. Ct. No. 2011CF4394**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN DEMTRIUS JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and REBECCA F. DALLET, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Shawn Demtrius Jones appeals from a judgment of conviction, entered upon his guilty plea, on one count of aggravated battery. Jones also appeals from an order denying his postconviction motion for plea withdrawal.

Jones claims he should have been allowed to withdraw his plea to prevent a manifest injustice because his plea was not knowing, intelligent, and voluntary and because the circuit court erred in finding a factual basis for the plea. We reject these arguments and affirm the judgment and order.[1]

BACKGROUND

¶2 On September 4, 2011, police were dispatched to aid Debra Rogers. She told police that Jones had become angry after she informed him that her cousin was going to move in with her. She also told police that Jones, who was high on ecstasy and marijuana, punched her in the face and struck her with a crutch. Rogers was treated for multiple injuries, including a fractured skull, a fractured mandible, a ruptured ear drum, and three missing teeth.

¶3 Jones was charged with one count of aggravated battery. A jury was impaneled on December 14, 2011, but Jones decided to enter a guilty plea the next day. In February 2012, the circuit court sentenced Jones to eight years' initial confinement and four years' extended supervision.

¶4 Jones subsequently filed a postconviction motion, seeking to withdraw his plea. He contended that his plea was not knowing, intelligent, and voluntary because he "directly informed the court that he was having trouble with his comprehension." Jones also claimed that the circuit court "failed to properly determine a factual basis" because Jones "denied any wrongdoing to the pre-

[1] The Honorable Ellen R. Brostrom accepted Jones's plea, imposed sentence, and entered the judgment of conviction. The Honorable Rebecca F. Dallet denied the postconviction motion.

sentence investigation writer." The circuit court denied the motion without a hearing. Jones appeals.

DISCUSSION

¶5 A defendant seeking to withdraw a guilty plea must show, by clear and convincing evidence, that withdrawal is necessary to prevent a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way to show manifest injustice is to demonstrate that a plea was not knowing, intelligent, and voluntary. ***Id.*** Manifest injustice also occurs if the circuit court fails to establish a factual basis for the offense to which a defendant pleads. *See* ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836.

¶6 "To warrant an evidentiary hearing on a postconviction motion to withdraw a plea of guilty … the defendant must satisfy the requirements of ***Bangert*** or ***Nelson/Bentley***."[2] ***State v. Howell***, 2007 WI 75, ¶24, 301 Wis. 2d 350, 734 N.W.2d 48. ***Bangert*** and subsequent cases set forth the duties a circuit court must fulfill when accepting a plea in order to ensure the plea is knowing, intelligent, and voluntary. *See* ***Brown***, 293 Wis. 2d 594, ¶23. Whenever those mandated duties are not fulfilled, a defendant may move to withdraw his plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¶7 The defendant who seeks to withdraw his plea has the initial burden of making a *prima facie* showing that his plea was accepted without conformance

[2] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***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).

with the mandatory procedures. *See* ***id.*** Two of the mandated duties require the circuit court to "[d]etermine the extent of the defendant's … general comprehension so as to assess the defendant's capacity to understand the issues at the hearing," and "[a]scertain personally whether a factual basis exists to support the plea." ***Brown***, 293 Wis. 2d 594, ¶35.

¶8 On appeal, Jones phrases his two main issues as whether "the trial court violate[d] ***Bangert*** and create[d] a manifest injustice by failing to determine the extent of the defendant's comprehension … [and] by failing to properly determine factual basis." However, Jones makes no *prima facie* showing that the circuit court failed to comply with the mandatory duties for taking a plea.

¶9 During the plea colloquy, the circuit court inquired whether Jones had any questions. He said no. The circuit court noted that the plea questionnaire indicated Jones "had some medication in the last 24 hours," and inquired if that made it difficult for him to understand what was happening. Jones answered, "Kind of." When the circuit court asked whether there was anything Jones did not understand, he said, "The whole situation right now." The circuit court then asked Jones a series of questions in an attempt to determine precisely what he did not understand so that the court could explain it to him. When Jones expressed confusion about possible penalties, the circuit court reviewed those with him again. Jones did not indicate confusion on any other topics. There is no ***Bangert*** violation: the circuit court properly inquired so as to ascertain Jones's general comprehension and, when he expressed a lack of comprehension, the court took steps to close the gaps in Jones's understanding of the proceedings.

¶10 With respect to the factual basis, the circuit court inquired whether it could rely on the facts as stated in the criminal complaint. Both the district

attorney and the defense attorney agreed that the court could do so. The facts within the complaint are adequate to show Jones committed the crime of aggravated battery. Thus, the circuit court properly ascertained a factual basis for the plea. *See* WIS. STAT. § 971.08(1)(b) (2011-12) (before accepting guilty plea, circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged"). There is no justification for plea withdrawal for lack of a factual basis under ***Bangert***.

¶11 A plea may be problematic for reasons other than the circuit court's failure to conduct a proper colloquy, though, and "when the defendant alleges that some factor extrinsic to the plea colloquy … renders a plea infirm," he invokes the ***Nelson/Bentley*** line of cases. *See* ***Howell***, 301 Wis. 2d 350, ¶74. To be entitled to an evidentiary hearing on a ***Nelson/Bentley*** motion, the defendant's motion must allege sufficient material facts which, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). "[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶12 Jones's postconviction motion alleged that he had "started on new medication less than 24 hours before the plea hearing which affected his comprehension." The impact of new medication is a factor extrinsic to the plea colloquy, but this allegation is conclusory. Though Jones faults the circuit court for failing to ask him for "additional information" beyond the drugs' names, such as whether the medications were psychotropic, newly prescribed, or in a new dose, the postconviction motion does not allege any of this information, either. It is

Jones's obligation, in postconviction posture, to allege sufficient facts that would entitle him to relief. *See* ***Bentley***, 201 Wis. 2d at 309.

¶13 As the postconviction court noted in rejecting Jones's motion:

> While [Jones] alleges that his general understanding was not established once an issue regarding his lack of comprehension was raised, he has not alleged what further steps the court should have taken to establish his understanding of the proceedings. The record shows that [the court] asked the defendant if the medication he was taking affected his understanding. When the defendant reported only a *general* misunderstanding, the court asked the defendant about various aspects of his plea to try to identify what he did not understand. The only issue the defendant expressed any confusion over was the maximum penalties. After the court explained them again, the defendant said that he understood them. Moreover, the defendant has not alleged with any specificity what he did not understand about the proceedings because of his medication. Further, the defendant's statement that he felt "confused and rushed["] is vague and does not, by itself, undermine confidence in the voluntariness of his plea.

Although the postconviction court gave this explanation in concluding there were no ***Bangert*** grounds for plea withdrawal, the reasoning applies equally to a ***Nelson/Bentley*** argument. Accordingly, there is no basis for withdrawing the plea because Jones has not alleged sufficient facts to show that his plea was anything other than knowing, intelligent, and voluntary.

¶14 Jones's postconviction motion also claimed that the circuit court failed to properly ascertain a factual basis for his guilty plea because *after* the plea hearing, Jones "denied any wrongdoing to the pre-sentence investigation writer." Clearly, the presentence investigation is also extrinsic to the plea colloquy. But Jones believes that his denial of responsibility to the PSI author somehow calls the factual basis for his plea into question, as does the circuit court's attempt to clarify Jones's denial during sentencing:

> THE COURT: Your description of what happened, makes it sound like you didn't do it. That's not what you are saying? Is that what you are saying?
>
> THE DEFENDANT: That's not what I said.
>
> THE COURT: Because I wrote down next to it in big letters quote, no way, exclamation point. He pled to the charge on the day of trial. That was my note in the margin. Some kind of miscommunication. Is that what you are saying?
>
> THE DEFENDANT: Yes, it is.

¶15 When applying the manifest injustice test, we may review the entire record, not just the plea hearing record. *See* ***State v. Cain***, 2012 WI 68, ¶¶29-31, 342 Wis. 2d 1, 816 N.W.2d 177. This is because the question is not whether the circuit court should have accepted the plea but whether the defendant should be allowed to withdraw that plea. ***Id.***, ¶30. A defendant need not admit a factual basis in his own words; counsel's statements may suffice. *See* ***Thomas***, 232 Wis. 2d 714, ¶18.

¶16 We agree with the postconviction court that Jones's exchange with the sentencing court was an acknowledgement of a misunderstanding with the PSI author. In any event, we do not think that Jones's subsequent disavowal of responsibility to the PSI author is sufficient to negate the previously established factual basis in this case. Jones had acknowledged the elements of aggravated battery during the plea colloquy. *See* ***id.***, ¶25. Defense counsel opined that there was a sufficient factual basis for the plea, and agreed with the State that the court could use the allegations in the complaint as the factual basis. *See* ***id.*** The facts alleged in the complaint are more than adequate to demonstrate that Jones committed aggravated battery. In addition, Jones apologized to Rogers during his allocution for what he had done to her. The record as a whole persuades us that the circuit court did not err when it found a factual basis for Jones's plea.

¶17 Jones made no *prima facie* showing of any ***Bangert*** violation and provided insufficient pleadings under ***Nelson/Bentley***, and the record conclusively shows that Jones is not otherwise entitled to relief. Accordingly, the circuit court properly denied the postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).