COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1407-CR **Cir. Ct. No. 2012CF201**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIK DEMETRIUS WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Erik White appeals a judgment of conviction and an order denying his postconviction motion for plea withdrawal. White asserts the circuit court's plea colloquy was defective because the court failed to inquire about his education and general comprehension. We conclude the State proved by

clear and convincing evidence that White's plea was knowing, intelligent, and voluntary. We therefore affirm.

BACKGROUND

¶2 A criminal complaint was filed in Douglas County case No. 2012CF201, charging White with one count of substantial battery, domestic abuse, and one count of misdemeanor bail jumping. An Information was subsequently filed adding a repeater enhancer to the substantial battery count. White rejected multiple plea offers from the State. However, the parties ultimately reached a plea agreement shortly before the start of trial.

¶3 A plea hearing was held on May 2, 2013. Shortly before the start of the hearing, White signed a Plea Questionnaire/Waiver of Rights form. Among other things, the form stated White was twenty-six years old; had completed eleven years of schooling; had a high school diploma, GED, or HSED; understood the English language; understood the charges to which he was pleading; was not currently receiving treatment for a mental illness or disorder; and had not taken any alcohol, medications, or drugs within the last twenty-four hours.

¶4 At the beginning of the plea hearing, the State summarized the plea agreement for the court. Pursuant to the agreement, White would plead no contest to the substantial battery count in Douglas County case No. 2012CF201 and to a misdemeanor battery count in Douglas County case No. 2012CM134. In exchange, the State would recommend dismissal of the bail jumping count in case No. 2012CF201. In addition, the parties would jointly recommend sentences of sixty days in jail on the misdemeanor battery count and three years' initial confinement and two years' extended supervision on the substantial battery count. The parties would also recommend that the substantial battery sentence be

imposed and stayed and that White be placed on probation for three years, with nine months in jail as a condition of probation. The parties further agreed the conditional jail time on the substantial battery count would be consecutive to White's sentence on the misdemeanor battery count.

¶5 The circuit court then engaged White in a colloquy regarding his no contest pleas. First, the court listed the elements of the charges to which White was pleading and their maximum penalties. Next, the court confirmed that White had signed the Plea Questionnaire/Waiver of Rights form, that he had read through the form before signing it, and that he understood its contents. The court then confirmed that White understood he was giving up certain constitutional rights by pleading no contest, including "your right to remain silent, your right to see and ask questions of the State's witnesses and the right to have your own witnesses come into court and testify on your behalf[.]" The court continued:

> And do you understand that if you were to plead not guilty, the State would have the burden to prove you guilty by evidence beyond a reasonable doubt? They would need to convince a jury of your peers that you were guilty, and those 12 persons would need to reach a unanimous verdict in finding you guilty. Do you understand those rights?

White responded, "Yes." The court also confirmed White's understanding that, if the case proceeded to trial, he would have the right to testify in his own defense.

¶6 Next, the court confirmed that White's no contest pleas were not the result of any promises or threats. The court informed White that it was free to impose the maximum penalties for the charged offenses and that, by pleading no contest, White was "not contesting any of the elements" of the crimes. The court also informed White that his no contest plea to the substantial battery count would

result in him being unable to vote until his civil rights were restored and would bar him from possessing a firearm.

¶7 The court then stated:

> And then there was some discussion about a prison sentence being imposed and stayed and you being put on probation with certain conditions.
>
> Do you understand that if the Court approves that agreement, that if you were to violate a condition of your probation, your probation may be revoked, at which time you would then be required to serve that prison sentence without returning back to court for purposes of sentencing? Do you understand that?

White responded, "Yes, sir." Finally, White's attorney confirmed that White did not object to the court using the allegations in the complaint as the factual basis for White's pleas.

¶8 Following this colloquy, the court accepted White's no contest pleas to the substantial battery count in case No. 2012CF201 and the misdemeanor battery count in case No. 2012CM134, concluding the pleas were freely, voluntarily, and intelligently made. The court dismissed the bail jumping count in case No. 2012CF201. The court then proceeded to sentencing, ultimately imposing sentences consistent with the parties' joint recommendation.

¶9 About one month after the plea and sentencing hearing, White wrote a letter to the circuit court asserting he had misunderstood the plea agreement due to a learning disability. The court construed White's letter as a motion to withdraw his plea to the substantial battery count, and it scheduled a hearing on the motion for July 16, 2013. White appeared at the hearing pro se. He asserted he had a "mental illness" that prevented him from understanding the plea agreement. In particular, he asserted he did not understand when he agreed to

plead no contest that he would not earn "good time" credit while serving his conditional jail time on the substantial battery count. He also asserted he did not understand the concept of an imposed and stayed sentence. Specifically, he did not understand that if his probation on the substantial battery count were revoked, he would "go[] right to three years of prison."

¶10 The State called White's trial attorney to testify. Trial counsel testified he explained the terms of the plea agreement to White over the phone on April 29, 2013. On May 1, he met with White before the plea hearing, and they reviewed the Plea Questionnaire/Waiver of Rights form. White had a number of questions about the plea agreement, which counsel answered. Counsel testified he had adequate time to respond to White's questions, and counsel "felt comfortable enough to proceed to the plea." Counsel further testified he "didn't have any indication that would lead [him] to believe that [White] was confused." In addition, counsel stated he specifically recalled discussing the concept of an imposed and stayed sentence with White and "importing upon him the fact that it was important for him to complete probation without any further problems because he had a significant period of incarceration state time which would be hanging over his head."

¶11 The circuit court denied White's motion for plea withdrawal. Although a transcript of White's plea hearing was not yet available, the court noted it followed a "general practice" when conducting plea colloquies, and it was therefore "fairly confident" it had discussed the required information with White, including explaining the concept of an imposed and stayed sentence. The court also observed that White had signed the Plea Questionnaire/Waiver of Rights form, which specifically stated, "I understand that if I am placed on probation and my probation is revoked … if sentence is imposed and stayed, I will be required to

serve that sentence." The court further stated it was "not aware of any requirement that a Court explain the fact that [a defendant is] not going to get good time[.]"

¶12 About seven months later, White, through counsel, filed a second motion for plea withdrawal. In that motion, White asserted the plea colloquy was deficient because the court did not personally address him "regarding his education, understanding of English, whether he understood the charges, was receiving treatment for a mental illness or disorder or had alcohol, medications or drugs which may have impeded his understanding of the proceedings." The court scheduled a hearing on White's motion for April 11, 2014.

¶13 At the April 11 hearing, White testified he did not understand the concept of an imposed and stayed sentence when he entered his plea. He further testified he suffers from "Schizophrenic Bipolar Manic Depression Disorder." He asserted he had been prescribed medications for that disorder, but he stopped taking them "months or weeks" before the plea hearing. White also testified he was under the influence of marijuana and Ecstasy when trial counsel explained the plea agreement to him, and he was under the influence of marijuana during the plea hearing.

¶14 At the close of the April 11 hearing, the circuit court denied White's second motion for plea withdrawal. The court noted the Plea Questionnaire/Waiver of Rights form specifically addressed White's education level, stated he was not being treated for mental illness, and stated he had not taken alcohol or drugs in the last twenty-four hours. The court explained, "If any of those [questions] had been answered in the affirmative, I … would have probably had more of a colloquy with Mr. White about that, but he indicated to the

Court that … was not an issue." The court also noted that the Plea Questionnaire/Waiver of Rights form included an explanation of an imposed and stayed sentence.

¶15 The court further observed that it engaged in an extensive colloquy with White during the plea hearing, and White answered all the court's questions appropriately. During the colloquy, the court specifically explained what it meant for a sentence to be imposed and stayed. As a result, the court concluded White's testimony was not credible that he did not understand the concept of an imposed and stayed sentence due to a mental disorder or drug use. In addition, the court found credible trial counsel's testimony at the previous hearing that he spent adequate time explaining the plea agreement to White and had no indication White was confused.[1]

¶16 For these reasons, the court stated the "record as a whole clearly establishe[d] that [White] did understand the proceedings and that his ability to understand the proceedings … was in no way affected by any alleged mental illness or by any alleged adverse effects of alcohol or drugs." Accordingly, the court concluded the State had proved by clear and convincing evidence that White's plea was knowingly, intelligently, and voluntarily entered. White now appeals.

[1] The circuit court also relied on the fact that White received a Written Explanation of Determinate Sentence form regarding his sentence on the substantial battery count, on which the court wrote, "Imposed & Stayed—3 yr. probation[.]" We agree with White that the circuit court's reliance on this form was improper because the form was not provided to White until after he was sentenced, and it therefore had no bearing on whether he understood the concept of an imposed and stayed sentence at the time he entered his plea. However, as we explain below, even without the Written Explanation of Determinate Sentence form, we agree with the circuit court that White's plea was knowingly, intelligently, and voluntarily entered.

DISCUSSION

¶17 On appeal, White renews his argument that he should be allowed to withdraw his no contest plea to the substantial battery count because he did not understand the concept of an imposed and stayed sentence.[2] When a defendant seeks to withdraw a no contest plea after sentencing, he or she must prove, by clear and convincing evidence, that refusing to allow plea withdrawal would result in manifest injustice. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. "One way for a defendant to meet this burden is to show that he [or she] did not knowingly, intelligently, and voluntarily enter the plea." ***Id.***

¶18 "[T]here are two methods by which courts typically review motions to withdraw guilty or no contest pleas after judgment and sentence." ***State v. Negrete***, 2012 WI 92, ¶16, 343 Wis. 2d 1, 819 N.W.2d 749. One method, based on ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), applies when the defendant's motion alleges defects in the plea colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. The other method, based on ***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), applies when the defendant seeks plea

[2] The State argues White's claim for plea withdrawal is procedurally barred, pursuant to WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because White's current arguments were already litigated in his first plea withdrawal motion, or, alternatively, because White has not demonstrated a sufficient reason for failing to raise his arguments in the previous motion. In response, White argues § 974.06(4) and ***Escalona*** do not apply because his second plea withdrawal motion was filed within the time limits for direct appeal and was therefore not a § 974.06 motion. We need not resolve this dispute because, assuming without deciding that White's arguments are not procedurally barred, they nevertheless fail on the merits. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (If a decision on one point is dispositive, we need not address other issues raised.).

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

withdrawal based on factors extrinsic to the plea colloquy. *See* ***Hoppe***, 317 Wis. 2d 161, ¶3. Here, White alleges the circuit court's plea colloquy was defective because the court failed to inquire regarding his education level and general comprehension. We therefore analyze White's motion using the ***Bangert*** approach.[3]

¶19 A defendant moving for plea withdrawal pursuant to ***Bangert*** must: (1) make a prima facie showing that the plea colloquy was defective because the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties; and (2) "allege[] that in fact the defendant did not know or understand the information that should have been provided at the plea colloquy." ***State v. Howell***, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48. If the defendant meets both of these requirements, the circuit court must hold an evidentiary hearing on the defendant's motion, at which the State has the burden to prove, by clear and convincing evidence, that the defendant's plea was knowing, intelligent, and voluntary despite any identified defects in the plea colloquy. ***Id.***, ¶29; ***Hoppe***, 317 Wis. 2d 161, ¶44. The State may rely on evidence outside the plea hearing transcript in order to make this showing, including testimony from the defendant and defense counsel, a Plea Questionnaire/Waiver of Rights form, documentary evidence, recorded statements, and transcripts of prior hearings. ***Hoppe***, 317 Wis. 2d 161, ¶47. If the

[3] As the State points out, at times White's arguments seem to rely on factors extrinsic to the plea colloquy. Thus, the State suggests White's second plea withdrawal motion could be viewed as a dual-purpose motion, raising both ***Bangert*** and ***Nelson***/***Bentley*** challenges to the plea. *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); ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). However, White consistently characterizes his motion as a ***Bangert*** motion, and he does not develop any argument based on the ***Nelson***/***Bentley*** approach to plea withdrawal. Consistent with White's framing of the issues, we therefore analyze his motion using solely the ***Bangert*** approach.

State carries its burden to show the plea was knowing, intelligent, and voluntary, the plea remains valid. ***Id.***, ¶44.

¶20 The circuit court did not explicitly determine whether White made a prima facie showing the plea colloquy was defective, or whether White alleged he did not know or understand information that should have been provided during the colloquy. Instead, the court simply proceeded to an evidentiary hearing. We assume, without deciding, that White was entitled to an evidentiary hearing on his motion for plea withdrawal. Nevertheless, we conclude the circuit court properly denied his motion because the State proved, by clear and convincing evidence, that his plea was knowing, intelligent, and voluntary.

¶21 Whether a defendant's plea was knowing, intelligent, and voluntary is a question of constitutional fact. ***Brown***, 293 Wis. 2d 594, ¶19. Accordingly, we accept the circuit court's findings of historical fact unless they are clearly erroneous, but we independently determine whether those facts demonstrate that the defendant's plea was entered knowingly, intelligently, and voluntarily. ***Id.***

¶22 The only aspect of the plea agreement White claims he did not understand is the concept of an imposed and stayed sentence. However, White's trial attorney testified he specifically recalled explaining that concept to White before the plea hearing. Moreover, the Plea Questionnaire/Waiver of Rights form, which White signed, also explained the concept of an imposed and stayed sentence. During the plea colloquy, White informed the court he had read the Plea Questionnaire/Waiver of Rights form and understood its contents. In addition, the court specifically explained the concept of an imposed and stayed sentence during the plea colloquy, which White confirmed he understood.

¶23 Although White testified he did not understand the explanations provided because of his mental disorder and drug use, the circuit court concluded his testimony was not credible.[4] The court noted it engaged in a lengthy plea colloquy with White, and he answered all the court's questions appropriately. The court also noted White represented on the Plea Questionnaire/Waiver of Rights form that he was not being treated for any mental illness or disorder and had not consumed alcohol, drugs, or medications in the last twenty-four hours. In addition, the court found credible the testimony of White's trial attorney, who stated he had sufficient time to review the plea agreement with White and there was no indication White was confused.[5] The circuit court, sitting as fact-finder, is the ultimate arbiter of witnesses' credibility. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶24 On this record, we agree with the circuit court that the State met its burden to prove, by clear and convincing evidence, that White's plea was entered knowingly, intelligently, and voluntarily. Consequently, the court's refusal to

[4] White cites ***State v. Nichelson***, 220 Wis. 2d 214, 222-23, 582 N.W.2d 460 (Ct. App. 1998), for the proposition that a circuit court's finding that a defendant's testimony is not credible is insufficient, standing alone, to satisfy the State's burden to prove the plea was not knowing, intelligent, and voluntary. Here, however, the circuit court did not rely solely on its finding that White's testimony was not credible. The court also considered the plea colloquy, the Plea Questionnaire/Waiver of Rights form, and the testimony of White's trial attorney. ***Nichelson*** is therefore inapposite.

[5] White asserts the circuit court could not rely on his trial attorney's testimony from the hearing on his first motion for plea withdrawal because White was not represented by counsel during that hearing. However, White fails to cite any legal authority in support of this argument. Accordingly, we need not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In addition, White never argued in the circuit court that reliance on trial counsel's testimony from the previous hearing was improper. We need not consider arguments raised for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

allow White to withdraw his plea did not result in manifest injustice. *See* ***Brown***, 293 Wis. 2d 594, ¶18.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.