COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1057-CR **Cir. Ct. No. 2011CF004287**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LYNNESHA L. CRAIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Lynnesha L. Craig appeals the judgment convicting her of three counts of Medicaid fraud as a party to the crimes. *See*

WIS. STAT. §§ 49.49(1)(a)1. & 939.05 (2009-10).[1] Craig also appeals the order denying her postconviction motion to withdraw her guilty pleas.[2] We reject Craig's arguments and affirm the judgment and order.[3]

BACKGROUND

The Charges

¶2 Craig was charged with seventeen counts concerning false claims submitted to Medicaid, which represented that people eligible for benefits were provided with durable medical equipment. According to the complaint, this required registering with the Medicaid program online, sending in a signed agreement, and obtaining approval to be a provider. Getting the payment requests approved required the unauthorized use of people's Medicaid identification numbers submitted with claims indicating that each individual received the listed medical item.

¶3 The charges against Craig specifically included counts one through seven of Medicaid fraud contrary to WIS. STAT. § 49.49(1)(a)1. (2009-10), which applies to persons who "[k]nowingly and willfully make or cause to be made any false statement or representation of a material fact in any application for any

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

[2] The Honorable Dennis R. Cimpl presided over the plea proceedings and entered the judgment of conviction. The Honorable Michael D. Guolee presided over the postconviction hearing and entered the order denying Craig's postconviction motion.

[3] At the outset, this court notes its frustration with the briefs on appeal. Both parties provide numerous citations to legal authority but offer little in terms of explanation and analysis. Despite the inadequacies in the briefing, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992), the court has done its best to address the relevant arguments.

benefit or payment," and counts eight through seventeen of unauthorized use of an individual's personal identifying information contrary to WIS. STAT. § 943.201(2) (2009-10). Craig was not charged as a party to the crimes.

The Guilty Pleas

¶4 At the plea hearing, the State relayed the plea agreement: Craig had agreed to plead guilty to counts one through three of Medicaid fraud, the remaining counts of Medicaid fraud would be read in, and the State would seek to dismiss outright counts eight through seventeen, unauthorized use of an individual's personal identifying information. After confirming the terms of the agreement with Craig's trial counsel, the circuit court stated:

> THE COURT: All right. Ms. Craig, you're charged right now with seventeen different crimes. The first seven are crimes of Medicaid fraud, and the last ten are identity theft. The lawyers are telling me you're going to plead guilty to Counts 1, 2 and 3 of the Medicaid fraud. Counts 4 through 7 are going to be dismissed and read in. Which means that when we get to sentencing, I can consider those for purposes of sentencing. I can order restitution on those, and the benefit to you is you can never be charged with those again. Okay. You understand that concept?
>
> [CRAIG]: Yes.
>
> THE COURT: And the identity theft, those ten counts are going to be dismissed outright. Which means I can't consider them at all at sentencing; do you understand that?
>
> [CRAIG]: Yes.

¶5 As it went through its colloquy with Craig, the circuit court noted the plea questionnaire signed by Craig indicating that she was pleading to three counts of Medicaid fraud as a party to the crimes and that the elements of those crimes (as

evidenced by the attached jury instructions) were explained to her by her attorney. When the circuit court pointed out that Craig had not been charged as party to the crimes, Craig's trial counsel advised:

> [TRIAL COUNSEL]: … She was involved in … going online to open an account … with the Medicaid agency, and then … she had a hard copy document that bears her actual signature to activate that account. Then she was in custody for about 60 days on a revocation hold, and it's on those dates that somebody put in the claims. Then when she got out, she went and cashed the checks, so clearly she didn't do this all alone.
>
> THE COURT: But she was the direct actor because she's the one that applied for the … application for payment as durable medical equipment. She's the one that signed it. She's the one that cashed the checks.
>
> [TRIAL COUNSEL]: Correct, but she is not the one who made the false statement. In other words, the false statement is the claim for payment saying, *We provided medical supplies. Pay me.* That's not what she did. She enabled someone else to do that by opening an account. She enabled someone else then to benefit from that by cashing the checks.
>
> But one of the elements, the false statement element, at least in some of these counts, wasn't done by her. So I just thought to make it cleaner, we would plead as party to a crime.

(Emphasis in original.)

¶6 The State then explained that its legal theory was that Craig either "made or caused to be made" a false statement in an application for payment in connection with a medical assistance program. *See* WIS. STAT. § 49.49(1)(a) (2009-10); WIS JI—CRIMINAL 1870. The circuit court advised the parties that it was "going to go with the original Information and find that she's the direct committer of this crime because she caused to be made." It told Craig, "You

certainly at sentencing can argue what you've argued as a mitigating factor. But just so you understand …, I'm going to find that you're the one that did this."

¶7 Later in the colloquy, the circuit court asked Craig's trial counsel if he knew of any reason why Craig should not enter in the pleas and counsel stated: "Well, just what I explained about my theory … seeing this as a party to a crime theory. The Court's disagreeing with that, but … that's the only thing that is going in an unexpected direction this morning." The State interjected that if Craig was more comfortable pleading guilty as a party to the crimes, it would seek to amend the charges accordingly. Craig's trial counsel confirmed that he believed amending the information would better fit the facts of this case, and the circuit court allowed it. It then accepted Craig's pleas.

Sentencing

¶8 The circuit court sentenced Craig to three consecutive prison sentences (consecutive to each other and to a sentence Craig was serving at the time), each of which consisted of one year of initial confinement and two years of extended supervision. In its sentencing remarks, the circuit court stated:

> And there were 21 people whose identities were stolen by this scheme that you participated in, just your portion. And you know, those— Those people are probably going to have some ramifications of the fact that their names, dates of birth and social security numbers were used in this scheme. Hopefully the government will help with any ramifications to clear those ramifications up for them.

Postconviction Motion

¶9 Postconviction, Craig sought plea withdrawal. She argued that she was misled to believe that, because the personal-identification charges were dismissed, the court would not consider her guilty of using personal identification

information in committing Medicaid fraud. Craig submitted that she thought pleading as a party to the crimes had this effect and that this "belief grew stronger when she approved a plea agreement that distinguished between guilty-plea counts, read-in counts for which she admitted the conduct, and charges that were dismissed outright, which she believed were dismissed outright because the State was dropping the allegations." She claimed "[h]er strong belief grew stronger again when the court indicated that it was not allowed to consider at sentencing, 'at all,' the allegations that she had used personal identification information to obtain money." Following briefing and an evidentiary hearing, the postconviction court denied the motion.

ANALYSIS

¶10 Craig contends that because she has shown serious questions affecting the fundamental integrity of her pleas, she is entitled to withdraw them. She claims to have misunderstood the nature of the charges due to "problems occurring both within and outside the plea colloquy." *See* ***State v. Howell***, 2007 WI 75, ¶5, 301 Wis. 2d 350, 734 N.W.2d 48.

¶11 Craig's postconviction motion was a dual-purpose motion insofar as it contains claims that she is entitled to plea withdrawal under the rationales set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and ***Nelson***/***Bentley***. *See* ***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); *see also* ***State v. Hoppe***, 2009 WI 41, ¶3 & n.3, 317 Wis. 2d 161, 765 N.W.2d 794. The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson***/***Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his or her plea infirm. *See* ***Hoppe***, 317 Wis. 2d 161, ¶3.

¶12 The burden of proof for these two types of challenges differs. "Once the defendant files a ***Bangert*** motion entitling him to an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Hoppe***, 317 Wis. 2d 161, ¶44.

¶13 Conversely, "[t]he burden at a ***Nelson***/***Bentley*** evidentiary hearing is on the defendant," who "must prove by clear and convincing evidence that withdrawal of the guilty plea is necessary to avoid a manifest injustice." ***Hoppe***, 317 Wis. 2d 161, ¶60. One way that "[a] defendant may demonstrate a manifest injustice [is] by showing that his guilty plea was not made knowingly, intelligently, and voluntarily." ***Id.***

¶14 In determining whether plea withdrawal is warranted, "[w]e accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

I. *Bangert violations*

¶15 We begin with the ***Bangert*** issue. According to Craig, the circuit court violated ***Bangert*** in two ways: (1) by failing to ascertain her understanding of the nature of the party-to-a-crime charges to which she pled; and (2) by misleading her about the role that charges "dismissed outright" would have at her sentencing. *See* WIS. STAT. § 971.08(1)(a).

¶16 "While the defendant's understanding must be measured at the time of the plea, we may look to the record as a whole to determine if a defendant

understood the consequences of his or her plea at that time." ***State v. Quiro***z, 2002 WI App 52, ¶19, 251 Wis. 2d 245, 641 N.W.2d 715, *abrogated on other grounds by* ***State v. Cross***, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64.

¶17 We now address Craig's ***Bangert*** claims in turn.

a. Nature of party-to-a-crime charges.

¶18 Craig claims the circuit court failed to ascertain her understanding of the nature of the party-to-a-crime charges to which she pled. The record, however, reveals the following: (1) the plea questionnaire Craig signed and presented to the circuit court specified that she was pleading guilty to three counts of Medicaid fraud "PTAC"; (2) Craig's trial counsel attached the party-to-a-crime jury instruction to the plea questionnaire and annotated relevant portions of the instruction with references to the charges of Medicaid fraud; and (3) Craig herself testified at the postconviction evidentiary hearing that she had "constantly asked" her attorney to ask about charging her as a party to the crimes because she did not believe she was directly responsible for the crimes given that she disputed the allegation that she, personally, made false statements or representations.[4] Against

[4] Craig testified:

> I felt that I was being innocent of the second element [of Medicaid fraud], because I constantly asked my attorney to talk to them about party to a crime, because I was not a direct conspirator. And by him allowing me to take the party to a crime disposition, it shows me—it told me that I was not being held responsible for the crime that I didn't admit to.

Craig argued that she never submitted payment requests. However, conviction of Medicaid fraud did not require she personally submit payment requests. Instead, it required only that she "[k]nowingly and willfully ma[d]e or cause[d] to be made any false statement or representation of a material fact in any application for any benefit or payment." *See* WIS. STAT. § 49.49(1)(a)1. (2009-10). We agree with the State's assessment that "even if [Craig] did not personally make the statements or representations, she 'cause[d] [them] to be made' by (continued)

this backdrop, we agree with the State that "the notion that amending the charges to reflect party-to-a-crime liability adversely affected Craig's understanding of the charges cannot survive. If anything, the amendment gave Craig the outcome she asked her lawyer to obtain."

b. Effect of charges "dismissed outright."

¶19 Additionally, Craig asserts a ***Bangert*** violation occurred because the circuit court misstated the sentencing import of a charge "dismissed outright." As noted, the circuit court advised Craig that outright dismissal of the ten counts of identity theft "means I can't consider them at all at sentencing." The State concedes that the circuit court erred when it made this statement. *See* ***State v. Frey***, 2012 WI 99, ¶43, 343 Wis. 2d 358, 817 N.W.2d 436.

¶20 Craig has not, however, convinced us that this error amounts to a violation of WIS. STAT. § 971.08(1)(a), which requires that a circuit court confirm that the defendant understands the nature of the charge to which she is pleading guilty, including the potential punishment she faces.

¶21 Here, the circuit court made sure that Craig had signed the plea questionnaire and waiver of rights form. Craig confirmed that her attorney had explained what the State had to prove in order for the circuit court to find her guilty of Medicaid fraud, and the circuit court also went through the crimes with her on the record. The circuit court further stated and confirmed Craig's

---

establishing a business entity for the purpose of allowing someone—whether herself or someone else—to make those statements or representations." (Quoting § 49.49(1)(a)1. (2009-10); record citation omitted.)

understanding of the potential punishment she faced on the Medicaid fraud charges.

¶22 Craig did not make a *prima facie* showing the circuit court's plea colloquy violated WIS. STAT. § 971.08 or other mandated procedures.[5] *See* ***Hoppe***, 317 Wis. 2d 161, ¶17 (We consider *de novo* the sufficiency of the plea colloquy and the need for an evidentiary hearing.).

II. *Nelson/Bentley claim*

¶23 We next address whether Craig is entitled to withdraw her guilty pleas based on her trial counsel's alleged ineffective assistance. She argues that her trial counsel was ineffective for failing to correct the circuit court's remark about the sentencing import of a charge "dismissed outright." This amounts to a ***Nelson/Bentley*** claim in which she alleges that factors extrinsic to the plea colloquy rendered her plea infirm. *See* ***Hoppe***, 317 Wis. 2d 161, ¶3. As stated above, Craig "is entitled to withdraw h[er] guilty plea if the circuit court's refusal to allow withdrawal of the plea would result in a manifest injustice." *See* ***id.***, ¶60. "The 'manifest injustice' requirement is met if a defendant is denied the effective

[5] Judge Guolee took over this case as a matter of judicial rotation. In deciding to hold a hearing on the postconviction motion, he concluded that because the parties were present with witnesses, "I will let you make a record so we don't have to come back again." Thus, he did not explicitly conclude that the Craig had established a *prima facie* ***Bangert*** violation. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). And, later, he stated:

> But I find nothing in this record to indicate that anything the Court did, or was done during this plea infected [Craig's] rights, infected her ability to understand what she was pleading guilty to. And [the court] will find that there has been no showing by the defense that there is any defects in the nature of what happened to her to allow the Court to go any further.

assistance of counsel." ***State v. Burton***, 2013 WI 61, ¶54, 349 Wis. 2d 1, 832 N.W.2d 611 (citation omitted).

¶24 Craig cannot prevail on her ineffective-assistance-of-counsel claims unless she shows that her trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If she fails to satisfy one component of the analysis, we need not address the other. *See* ***id.*** at 697.

¶25 "To establish prejudice in the context of a postconviction motion to withdraw a guilty plea based upon ineffective assistance of counsel, the defendant must allege that 'but for the counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial.'" ***Burton***, 349 Wis. 2d 1, ¶50 (citation omitted). Here, as the State points out:

> [Craig's] plea-withdrawal motion did not allege that she would have refrained from pleading guilty and gone to trial if her lawyer had corrected the circuit court. Her supplemental motion did not contain the requisite allegation. Her reply brief in support of her motion did not contain the requisite allegation. At the postconviction motion hearing, she did not testify that she would have refrained from pleading guilty if her lawyer had corrected the circuit court.

(Record citations omitted.) We conclude that Craig's ineffective-assistance-of-counsel claim fails.

¶26 Additionally we address Craig's claim that the circuit court's remark about the import of a charge "dismissed outright" amounted to impermissible judicial participation in plea bargaining entitling her to plea withdrawal as a matter of right. *See* ***State v. Wolfe***, 46 Wis. 2d 478, 487, 175 N.W.2d 216 (1970) ("A trial judge should not participate in plea bargaining."). She submits that the circuit

court's explanation that it could not consider the charges dismissed outright was "part of the process of finalizing the [plea] agreement" and goes so far as to assert that her pleas were induced by misstatements of the law.

¶27 The record does not support these assertions. The plea questionnaire and accompanying jury instructions reflect the terms of the agreement. The circuit court's remark postdated the creation of the questionnaire and did not change those terms. Moreover, as previously detailed, the process of finalizing the plea agreement to ultimately include party-to-a-crime liability occurred as a result of efforts by Craig's trial counsel to accommodate Craig's wishes. We are wholly unconvinced that the court's remark amounted to impermissible involvement in plea bargaining.

III. *Cumulative effects*

¶28 Finally, we consider Craig's assertion that withdrawal is warranted because a manifest injustice in her case was "synergistically" created by the structure of the plea agreement, advice from defense counsel, erroneous information from the court, and the late amendment of the charges. Notwithstanding a conceded misstatement by the circuit court as to the import of a charge "dismissed outright," we have otherwise concluded that Craig's claims do not warrant relief. Consequently, we are not convinced that a manifest injustice was "synergistically" created in this case.

By the Court.—Judgment and order affirmed.

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