COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2019-CR **Cir. Ct. No. 2012CF566**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTION DEMANUEL DELAROSA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J. and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Antion Demanuel Delarosa appeals a judgment convicting him after a guilty plea of second-degree sexual assault of a child. He also appeals two orders denying his postconviction motions. Delarosa argues: (1) that he should be allowed to withdraw his plea because the circuit court did not

adequately review the constitutional rights he was waiving during the plea colloquy; (2) that he should be allowed to withdraw his plea because his attorney promised him that a psychological report would be prepared on his behalf and presented to the court at the time of sentencing; and (3) that the circuit court misused its sentencing discretion. We affirm.

¶2 Delarosa first argues that the plea colloquy was defective because the circuit court did not adequately inform him of the constitutional rights he was waiving by entering a plea. He also argues that he was entitled to an evidentiary hearing on his postconviction motion because he made a *prima facie* case that the circuit court failed to fulfill its mandatory duties during the plea colloquy as required by WIS. STAT. § 971.08 (2013-14),[1] and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶3 It is well established under ***Bangert*** and its progeny that the circuit court must conduct a plea colloquy with the defendant that ensures that the defendant is knowingly, intelligently and voluntarily entering a plea. Although "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea questionnaire and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the trial court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 A defendant seeking to withdraw a plea after sentencing based on a deficiency in the plea colloquy must: (1) show that the circuit court failed to fulfill its mandatory duties under WIS. STAT. § 971.08, which include informing the defendant of the constitutional rights he is waiving by entering a plea; and (2) allege that he "did not know or understand the information that should have been provided at the plea hearing." ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant shows that the circuit court failed to fulfill its duties under § 971.08 and the defendant alleges that he did not know or understand the information that should have been provided, "the court *must* hold a postconviction evidentiary hearing at which the state is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." ***Id.***, ¶40 (emphasis added).

¶5 We conclude that the circuit court's plea colloquy, when coupled with the plea questionnaire and waiver-of-rights form, adequately complied with WIS. STAT. § 971.08 in addressing whether Delarosa understood the constitutional rights he was waiving by entering the plea. Although the circuit court did not personally review all of the constitutional rights Delarosa was waiving with him during the plea colloquy, it asked Delarosa if he read the rights listed in the plea questionnaire and waiver-of-rights form and asked him whether he understood the rights. Delarosa said that he did. The circuit court also asked Delarosa if he understood that by pleading guilty he would be "giving up each and every one of [the] rights." Again, Delarosa said that he understood. The circuit court informed Delarosa that among the rights he would be giving up was the right "to force the State to come to court with a witness and prove beyond a reasonable doubt that it

was you that committed this crime," a synopsis that encompasses several of the rights Delarosa was waiving by entering the plea.

¶6 Delarosa acknowledges that his lawyer read him the rights during their review of the plea questionnaire, but contends that his lawyer did not explain the rights to him. Delarosa's contention is undermined by the plea colloquy. During the colloquy, the circuit court asked Delarosa whether his lawyer had reviewed the information in the plea questionnaire with him, and Delarosa said that he had. The circuit court also asked whether he understood everything in the form before he signed and initialed it, and Delarosa said that he did. Finally, the circuit court asked Delarosa's lawyer whether he thought that Delarosa understood all the rights that he was giving up by pleading guilty, and his lawyer said that he did. While the better practice would have been for the circuit court to review each of the constitutional rights with Delarosa personally during the plea colloquy, the circuit court's questions, coupled with the plea questionnaire, fulfilled the court's duty to make Delarosa aware of the constitutional rights he was waiving and verify that he understood that he was giving up those rights by entering the plea.

¶7 While Delarosa's first argument centers on his contention that he was entitled to an evidentiary hearing *as a matter of right* on his plea withdrawal claim because the circuit court violated its ***Bangert*** duties, to the extent Delarosa is also attempting to argue that he did not knowingly, intelligently and voluntarily enter the plea because he did not *understand* the constitutional rights he was waiving, his motion fails to allege sufficient facts to entitle him to a hearing. A defendant moving to withdraw his plea after sentencing must allege sufficient facts in the postconviction motion that, if true, would support plea withdrawal. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Delarosa does not allege which particular constitutional rights he did not understand and does not

explain how his lack of understanding caused him to enter the plea. Because Delarosa has not provided an adequate factual basis for his claim, the circuit court properly denied the motion for plea withdrawal without a hearing.

¶8 Delarosa next argues that he should be allowed to withdraw his plea because his attorney promised him that a psychological report would be prepared on his behalf and presented to the court at the time of sentencing. Delarosa avers that he would not have entered the plea if he had known that his lawyer was not going to obtain a psychological evaluation because he would not have exposed himself to a sentencing hearing without the evaluation to mitigate the severity of his sentence. There is a critical flaw in Delarosa's argument. On the day that Delarosa appeared in court for the combined plea and sentencing hearing, he chose to plead guilty even though he had not undergone a psychological evaluation in preparation for sentencing.[2] Because Delarosa chose to plead guilty without the evaluation, knowing that he would be immediately sentenced, and he did not mention the evaluation, much less request a delay in sentencing to obtain an evaluation, we reject his argument.

¶9 Finally, Delarosa argues that the circuit court misused its sentencing discretion because it considered punishments imposed on individuals in similar cases in deciding what sentence to impose on Delarosa. "Individualized sentencing has long been a cornerstone to Wisconsin's criminal justice jurisprudence." *See* ***State v. Sherman***, 2008 WI App 57, ¶18, 310 Wis. 2d 248,

[2] The circuit court electronic docket entries show that the hearing was scheduled for a projected guilty plea and sentencing hearing. Delarosa was aware that sentencing was going to occur during the hearing because he brought a witness to testify on his behalf and prepared a statement for the court.

750 N.W.2d 500 (quotation marks and citation omitted). Delarosa contends that "[b]y preconceiving that Delarosa's punishment should be similar to some other unidentified defendants, the sentencing court deprived Delarosa of a truly individualized sentence." He faults the following statement by the sentencing court:

> When we decide what the punishment is for a crime like this, what we do is we look at other cases like yours and find out what the punishment was in those cases and then we can impose a similar punishment on you. That's your assurance that what you get here doesn't come down to how the judge feels that day or how the prosecutor feels that day or something like that.

¶10 After reading the court's sentencing comments in their entirety, however, we agree with the circuit court's analysis rejecting this argument:

> The sentencing court's remarks, made at the outset of its sentencing decision, were meant to assure the defendant and the public that the court does not sentence offenders in a vacuum but rather in the context of its overall sentencing experience, and more specifically, its experience in sentencing offenders of similar crimes. The record shows that the sentence the court imposed was not "preconceived" based on some other offender's sentence but was specifically tailored to *this* defendant and to the particular facts and circumstances of *his* case.

(Emphasis in original.) The circuit court did not misuse its discretion.

By the Court.—Judgment and orders affirmed.

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