COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2015AP2513-CR
2015AP2514-CR
2015AP2515-CR

Cir. Ct. Nos. 2013CM83
2013CF111
2013CM159

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRIN H. CHURCH,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Orders reversed and causes remanded with directions.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Darrin Church appeals judgments of conviction and orders denying his motion for postconviction relief.[1] We conclude that, although in almost all respects the circuit court conducted an exemplary plea colloquy, ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, compels the conclusion that a single omission by the circuit court regarding Church's right to a unanimous verdict constitutes a plea colloquy defect under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Because we conclude that there was a plea colloquy defect regarding jury unanimity, we reverse and remand for an evidentiary hearing at which the State will have the burden of proving that Church understood, prior to his pleas, that he had a right to a unanimous verdict.

¶2 Church pled no contest to several felonies and misdemeanors. The specifics of his criminal acts are not relevant to this opinion. Church moved to withdraw his pleas after sentencing. Church alleged that the plea colloquy was defective because the court did not, personally with Church, inquire about Church's understanding of his right to jury unanimity. Church asked for a hearing at which the State would have the burden of proving that Church understood the missing information.

¶3 The circuit court heard oral argument, and denied the motion. Although the denial orders recite that there was "evidence offered," it does not appear to us that an evidentiary hearing was held. No testimony or exhibits were received at the hearing. The "evidence offered" reference in the orders is

[1] While Church appeals both judgments of conviction and orders denying postconviction relief, we address only the orders for the reasons set forth in this opinion.

apparently explained by the fact that Church's attorney prepared the orders *before* the hearing.

¶4 For the reasons that follow, we agree with Church that there was a plea colloquy defect.

¶5 Among other plea colloquy duties, the circuit court is required to "'address the defendant personally and ... [i]nform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights.'" ***Hoppe***, 317 Wis. 2d 161, ¶18 (quoted source omitted). The constitutional rights the court must address in this manner include the right to a unanimous verdict. *See* ***Bangert***, 131 Wis. 2d at 271 & n.5. If the court failed to perform this duty, the postconviction burden shifts to the State to prove by clear and convincing evidence that the pleas were entered knowingly, voluntarily, and intelligently. ***Hoppe***, 317 Wis. 2d 161, ¶44. Whether the plea colloquy is defective is a question of law. ***Id.***, ¶17.

¶6 Church argues that the plea colloquy was defective because the circuit court did not personally inform him of the right to a unanimous jury and verify that he understood he was giving up that right. According to Church, even though that right, and Church's forfeiture of that right, was covered in the plea questionnaire, the colloquy was defective because the court did not address him *personally* on these topics.

¶7 The State does not appear to disagree with Church's factual assessment of what did and did not happen at the plea colloquy. The circuit court was presented with a "Plea Questionnaire/Waiver of Rights" form signed by Church. In the portion of the plea questionnaire regarding constitutional rights

being given up, all of the boxes next to the constitutional rights are checked, including the box covering Church's right to a unanimous verdict.

¶8 The court questioned Church's counsel about discussions counsel had with Church prior to the plea hearing. Referring to Church's decision to enter a plea, counsel told the court that counsel had discussed it with Church "yesterday" and "today" and that counsel believed Church "understands the basics." The circuit court verified with counsel that counsel went "through the constitutional rights that [Church would] be waiving by entering this plea."

¶9 The court then engaged in an extended colloquy directly with Church. In addition to other topics, the circuit court personally addressed Church regarding constitutional rights he was giving up if he entered a plea. The court explained to Church that he was giving up his right to a trial, his right to have the State prove his guilt beyond a reasonable doubt, his right to silence, his right to testify, his right to compel witnesses to testify, and his right to confront witnesses. After the court explained these rights, Church affirmed that he understood he was giving them up by entering his pleas. However, the circuit court omitted from this colloquy with Church any reference to Church's right to a unanimous verdict.

¶10 Following this extended colloquy with Church, covering several pages of transcript, the court asked Church whether he had had enough time to discuss "this" with his attorney, and Church responded yes. The court then asked Church's counsel whether he thought Church understood his rights, and counsel responded yes.

¶11 The question here, then, is whether, despite an otherwise exemplary plea colloquy and despite questions to counsel regarding the plea questionnaire,

the circuit court's failure to personally address Church on the topic of jury unanimity constitutes a plea colloquy defect. As noted, we conclude that ***Hoppe*** compels the conclusion that there is a defect.

¶12 We conclude that a comparison of the facts here with the facts in ***Hoppe*** is dispositive. As in this case, the State in ***Hoppe*** argued that references during the plea colloquy to a plea questionnaire form were sufficient. Indeed, in ***Hoppe*** the circuit court directly addressed Hoppe:

> "THE COURT: [H]ave you gone over this plea questionnaire and waiver of rights form with your attorneys—and by the way, which one did you go over it with, [local counsel] or [lead counsel]?
>
> "THE DEFENDANT: Both, sir.
>
> "THE COURT: Both, excellent. Are you satisfied you understand everything in the questionnaire and waiver of rights [form] and the elements of the charges you're going to be pleading to, a copy of which elements are attached hereto?
>
> "THE DEFENDANT: Yes, sir, I am.
>
> "THE COURT: In your opinion, are you going to be—first I guess, do you understand everything else in the questionnaire and waiver of rights form?
>
> "THE DEFENDANT: I understand it fully, sir."

Id., ¶25.

¶13 Still, the ***Hoppe*** court concluded that the colloquy was deficient. The ***Hoppe*** court acknowledged that a circuit court may use a plea questionnaire to assist in fulfilling its duties, but explained that the plea questionnaire is not a substitute for a "substantive in-court plea colloquy." ***Id.***, ¶31. Instead, "the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy *each of the duties*" required of it. ***Id.*** (emphasis added).

¶14 Turning to the facts here, we conclude that the circuit court's failure to engage in a personal colloquy with Church regarding jury unanimity was a plea colloquy defect. If general and brief questioning about a plea questionnaire directed at a defendant, as in ***Hoppe***, is insufficient, it follows that the general and brief questioning regarding the plea questionnaire here, directed at Church's counsel, is also insufficient. Indeed, if, with respect to one of the required inquiries, all that appears is a colloquy with counsel, there is a plea colloquy defect because there has not been engagement with the defendant on that topic.

¶15 Further, we fail to understand why it matters that the insufficiency here involves a single constitutional right. To repeat, ***Hoppe*** requires personal engagement with a defendant with respect to "each of the duties" required of the circuit court. ***Id.***

¶16 The State's argument on this topic is not entirely clear. The State seemingly argues that the circuit court's questions directed at Church's counsel about the plea questionnaire, combined with the undisputed fact that the court directly inquired as to Church's understanding of other applicable constitutional rights, means that the court sufficiently inquired into Church's understanding that he was giving up the right to a unanimous jury verdict. If this is what the State means to argue, we disagree. We are aware of no authority for the proposition that a deficiency in one respect can be remedied by sufficient inquiries in other respects.

¶17 In summary, the absence in this case of a personal colloquy between the court and Church about Church's right to jury unanimity is not overcome by: (1) the fact that the court conducted a personal colloquy as to the defendant's *other*

rights; or (2) the fact that unanimity was covered in a plea questionnaire that was not discussed with Church personally during the colloquy.

¶18 The State argues that, even if we conclude that there was a plea colloquy defect, we should nonetheless affirm. According to the State, we may conclude that Church understood his right to a unanimous verdict by looking to the plea questionnaire and counsel's statements during the colloquy indicating that Church filled out and understood the form.

¶19 More specifically, the State contends that Church's assertion that he did not understand his right to jury unanimity "rings hollow" because Church filled out and signed a plea questionnaire that plainly informed Church of this right. And, the State adds, Church's counsel assured the circuit court that counsel believed that Church understood his rights.[2]

¶20 We think it obvious that the logic of this argument would render superfluous most plea colloquy defects when a plea questionnaire is filled out and the plea hearing merely includes brief questioning about whether the form was filled out and whether the defendant understood the contents of the form. Taking the right to confront witnesses as an example, if there is a completed plea questionnaire covering the right to confront witnesses and, during the plea hearing, a couple of general questions as to whether the defendant completed the form and understood its contents, and if this is the court's full inquiry into the defendant's

[2] As a part of this argument, the State additionally asserts: "Church's representations during the colloquy that he reviewed and understood the questionnaire ... diminishes the significance of the court's failure to mention unanimity during the colloquy." This statement misrepresents the record. Church neither represented to the circuit court that he reviewed the plea questionnaire nor did he represent that he understood the questionnaire.

understanding that he or she is giving up the right to confront witnesses, thereby rendering the plea colloquy defective on this topic, it makes no sense to say that this plea colloquy defect does not matter because the *same facts* provide clear and convincing evidence that the defendant understood the confrontation right information. Plainly, the adoption of this reasoning would seriously undercut ***Bangert***.

¶21 This is not to say that the plea questionnaire is not useful to the State. On remand, if an evidentiary hearing is held, the State can call Church as a witness and ask him questions about the plea questionnaire form and why Church would indicate on that form that he understood his rights, including jury unanimity, but also take the position that he did not in fact understand that jury unanimity was one of the rights he was giving up. Corresponding questions could be posed to Church's trial counsel. The circuit court could assess the credibility of such testimony.

¶22 Before concluding, it is necessary to explain why we have concluded that a remand for an evidentiary hearing is the appropriate remedy.

¶23 On appeal, the parties appear to regard the circuit court hearing as having been an evidentiary one. As we stated above, it is not clear why. No evidence was offered, much less presented. All that was before the court was the record up to that point in time, including the plea questionnaire and a transcript of the plea hearing.

¶24 Nonetheless, Church argues that the existing plea colloquy record fails to provide clear and convincing evidence of his understanding. The State responds that the existing plea colloquy record provides clear and convincing

evidence. However, under the circumstances we describe below, we conclude that it is premature for us to comment on whether the evidence is sufficient because there is no reason to believe that this is the only evidence that might be available.

¶25 While rendering its decision denying the postconviction motion, the circuit court does not appear to have made a clear statement as to whether the plea colloquy was defective. To the extent the court may have made such a decision, it may have been colored by an erroneous belief that the colloquy included a statement that all jurors must agree. At one point the court stated: "The question is, what would the defendant understand by my wording, 'That they would all have to agree.'" Church argues, and the State does not dispute, that the colloquy does not contain such a statement. Later, in making its decision, the court stated that, "even though the word unanimous wasn't used specifically," the court was satisfied that Church understood his rights.

¶26 This point is significant because the decision on whether there is a plea colloquy defect is the legally controlling factor in whether the court takes postconviction evidence. If, as here, the defendant is making solely a claim based on a defective colloquy, but there is no defect, then no evidentiary hearing is necessary. However, if there is a colloquy defect, an evidentiary hearing is necessary for the State to have an opportunity to put on witnesses to meet its burden.

¶27 In this case, we do not see in the record a discussion about whether the State would put on evidence if the colloquy was defective. In practical effect, what appears to have occurred was an oral argument on Church's motion during which the court did not clearly decide the threshold question of whether there was a plea colloquy defect. However, the court did deny the motion, and as a result

did not inquire whether the State wanted to put on evidence. Therefore, because we have now concluded that the colloquy was defective, we further conclude that the State should have an opportunity to meet its burden of proof at an evidentiary hearing on remand.

¶28 In summary, we conclude that the plea colloquy was defective and, as a result, the burden shifts to the State to prove Church's understanding of the missing jury unanimity information. On remand, unless the parties present to the court a proposal acceptable to the court that disposes of the need for an evidentiary hearing, we direct the circuit court to hold an evidentiary hearing.

By the Court.—Orders reversed and causes remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).