COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP910 **Cir. Ct. No. 2004CF49**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS E. KOELLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County: BERNARD N. BULT, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. In 2005, Thomas Koellen pled no contest to three counts of second degree sexual assault. In 2014, Koellen filed a postconviction motion to withdraw his pleas on the ground that the plea colloquy was deficient.

The circuit court held an evidentiary hearing and denied Koellen's motion.[1] Koellen argues that the circuit court erroneously determined that the State met its burden to prove that Koellen knowingly, intelligently, and voluntarily entered his pleas despite the allegedly deficient plea colloquy. As we explain, we conclude that Koellen's motion failed to demonstrate a plea colloquy defect Accordingly, the circuit court could have denied Koellen's plea withdrawal motion without a hearing and, thus, we affirm the denial of his plea withdrawal motion, on grounds different from those relied on by the circuit court.[2]

BACKGROUND

¶2 Koellen was charged with multiple felonies stemming from an incident involving his neighbor on one night in June 2004. In 2005, Koellen pled no contest to three counts of second degree sexual assault. One count of burglary, one count of false imprisonment, and three counts of second degree sexual assault were dismissed and read in. Koellen was sentenced to eighteen years of initial confinement and fifteen years of extended supervision.

¶3 In 2014, Koellen filed a motion to withdraw his pleas. The circuit court determined that Koellen was entitled to an evidentiary hearing on the motion. Following the hearing, the circuit court determined that the State met its

[1] The Honorable Richard O. Wright presided at the 2005 plea hearing. The Honorable Bernard N. Bult heard and denied the postconviction plea withdrawal motion.

[2] Because we affirm the circuit court's denial of Koellen's postconviction plea withdrawal motion based on our conclusion that the motion did not show that the plea colloquy was deficient and, therefore, did not entitle Koellen to a hearing, we do not address the circuit court's determination that, at the hearing held by the court, the State met its burden to show that Koellen entered his pleas knowingly, intelligently, and voluntarily. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) (an appellate court may affirm a circuit court's correct decision on a different theory).

burden to prove that Koellen knowingly, intelligently, and voluntarily entered his pleas, and denied Koellen's plea withdrawal motion.

¶4 We will present additional relevant facts, including details of the 2005 plea hearing, in the discussion that follows.

DISCUSSION

¶5 Koellen filed his postconviction motion to withdraw his pleas alleging that the plea colloquy was deficient and he did not understand the information that should have been provided. For the following reasons, we conclude that Koellen's postconviction motion failed to show that the plea colloquy was deficient. Therefore, his motion was deficient and he was not entitled to an evidentiary hearing. Accordingly, we affirm the circuit court's denial of Koellen's postconviction plea withdrawal motion.

A. The issue of a procedural bar

¶6 We pause to acknowledge the parties' dispute as to whether Koellen's 2014 postconviction motion to withdraw his pleas is procedurally barred by the adjudication of his prior postconviction pleadings. *See* WIS. STAT. § 974.06(4) (2015-16)[3] (providing that any grounds for relief "finally adjudicated … may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original" proceeding); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-182, 184-186, 517 N.W.2d 157 (1994).

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶7 The dispute arises from Koellen's being allowed to proceed pro se after his judgment of conviction was entered in 2005, and his subsequent pro se filing in 2006 and 2007 of a series of motions for postconviction relief, appeals that he voluntarily dismissed, and motions for appointment of counsel. After hearing argument by the parties on this procedural bar issue, the circuit court determined that Koellen "did not have the requisite competence" to waive counsel and represent himself, and, therefore, the court allowed his 2014 postconviction plea withdrawal motion "to proceed."

¶8 The State argues that the circuit court erred in allowing Koellen to litigate claims that had previously been "summarily rejected on their merits" on direct review. Koellen responds that he had "sufficient reason" to be allowed to proceed on the merits: his incompetency to represent himself pro se, and his invalid waiver of counsel. We assume without deciding that Koellen's 2014 postconviction plea withdrawal motion is not barred by his previous filings, and we proceed to examine his motion as follows.

B. Relevant legal principles

¶9 "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.' One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citations omitted). One way a defendant can challenge the knowing, intelligent, and voluntary nature of his or her plea is to demonstrate a plea colloquy defect and allege that he or she did not understand the information

that should have been provided at the plea hearing. ***Id.***, ¶¶2, 39-40 (citing ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986)).

¶10 If the defendant's plea withdrawal motion demonstrates that the plea colloquy was deficient and alleges that the defendant did not know or understand the information that should have been provided at the plea hearing, then the defendant is entitled to an evidentiary hearing at which the State has the burden of showing "that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." ***Brown***, 293 Wis. 2d 594, ¶40. While the postconviction motion need only address what took place at the plea hearing and simply allege that the defendant did not understand, ***Bangert***, 131 Wis. 2d at 269, at the evidentiary hearing the State "may rely 'on the totality of the evidence, much of which will be found outside the plea hearing record.'" ***Brown***, 293 Wis. 2d 594, ¶40 (quoted source omitted).

¶11 In order to be granted an evidentiary hearing, a postconviction motion that concerns an alleged deficiency in the plea colloquy "must (1) make a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing." ***Id.***, ¶39 (citing ***Bangert***, 131 Wis. 2d at 274). "Whether [a defendant] has pointed to deficiencies in the plea colloquy that establish a violation of Wis. Stat. § 971.08 or other mandatory duties at a plea hearing is a question of law we review de novo." ***Brown***, 293 Wis. 2d 594, ¶21.

¶12 Under WIS. STAT. § 971.08, the record of the plea colloquy must show that the defendant entered his or her pleas with an understanding of the

nature of the charges, the constitutional rights being waived, the factual basis for the pleas, and the maximum penalties. ***Bangert***, 131 Wis. 2d at 261-62, 265. More specifically, the circuit court must address the defendant personally and:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his [or her] appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he [or she] is indigent and cannot afford an attorney, an attorney will be provided at no expense to him [or her];
>
> (5) Establish the defendant's understanding of the nature of the crime with which he [or she] is charged and the range of punishments to which he [or she] is subjecting him[- or her]self by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he [or she] waives by entering a plea and verify that the defendant understands he [or she] is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his [or her] plea; and
>
> (10) Advise the defendant that, "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation,

> the exclusion from admission to this country or the denial of naturalization, under federal law," ....

Brown, 293 Wis. 2d 594, ¶35 (internal footnotes and citations omitted).

C. Koellen's allegations of plea colloquy deficiency

¶13 In his postconviction motion to withdraw his pleas, Koellen alleged that the plea colloquy was deficient with respect to items (1) and (5) quoted above. For each of these two items, we set forth Koellen's allegation, explain how the record of the plea colloquy does not support his allegation, and address and reject his arguments to the contrary.

1. Determining the extent of Koellen's education and his general comprehension

¶14 Koellen alleged in his motion that the circuit court did not determine the extent of Koellen's education and general comprehension. The record does not support this allegation.

¶15 The circuit court began by confirming with Koellen that he went over the plea questionnaire with his attorney and understood what was in that document. The plea questionnaire, which Koellen and his attorney completed and signed, may properly be used by the court "when discharging its plea colloquy duties." ***State v. Hoppe***, 2009 WI 41, ¶¶30-31, 317 Wis. 2d 161, 765 N.W.2d 794. On the plea questionnaire, Koellen stated that he was fifty-three years old, had completed eighth grade, was taking blood pressure medication, and understood the English language and the charges. At the hearing, the circuit court confirmed with Koellen that he was not taking any medications that would make it difficult for him to understand the proceedings, confirmed with his attorney that his attorney had not observed anything that would make it difficult for Koellen to understand

the proceedings, and stated that the court itself had seen Koellen in court several times and observed nothing different about him. In all of these ways, the court determined the extent of Koellen's education and general comprehension at the time of the hearing.

¶16 Continuing on at the hearing, the circuit court confirmed with Koellen that Koellen understood the constitutional rights he was waiving by pleading; identified those rights, including the right to have a jury trial; noted that all of the constitutional rights being waived were also listed on the plea questionnaire; and confirmed with Koellen that he had read those rights with his attorney. The court also confirmed with Koellen that he understood that the court could impose up to the maximum sentence on each count, and specified the maximum sentence. In all of these ways, the court determined that Koellen was able to comprehend the consequences, or to use Koellen's word, the "nature," of his pleas.

¶17 Koellen argues that the circuit court should have delved more deeply into the details of Koellen's education and his intellectual capacity. However, Koellen points to nothing in the plea colloquy that would have alerted the court of the need to do more. The court was advised of Koellen's educational background and the court spent considerable time questioning Koellen, thereby amply inquiring into Koellen's ability to understand the nature of the proceedings.

¶18 In sum, we conclude that Koellen fails to show that the plea colloquy was deficient with respect to determining Koellen's educational background and ability to comprehend the issues at the hearing.

2. Determining Koellen's understanding of the nature of the crimes

¶19 Koellen alleged in his motion that the circuit court did not determine that Koellen understood the nature of the crimes with which he was charged by determining that Koellen understood the elements of the crimes. The record does not support this allegation.

¶20 In the plea questionnaire, Koellen acknowledged that the elements of the crimes "have been explained to me by my attorney," and as noted above, the circuit court confirmed with Koellen that he had gone over with his attorney what was in the plea questionnaire and that he understood what they had gone over. *See* ***Bangert***, 131 Wis. 2d at 268 (the circuit court may properly "specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge").

¶21 The circuit court also asked the prosecutor to recite the elements of the crimes at the hearing. The prosecutor explained that the three counts to which Koellen was pleading all charged sexual assault and had the same elements except that "[c]ount 1 involves sexual contact [and c]ounts 4 and 5 involve sexual intercourse." The prosecutor continued: "They [the charges] would require that the defendant had sexual contact or sexual intercourse; sexual intercourse including insertion of different objects into the victim; that it was without the consent of the person that the objects were inserted into or the sexual contact was with; and that those actions did cause injury." The court then confirmed with Koellen that he understood that "those are the things that would have to be proved to [the] jury beyond a reasonable doubt, and they would have to be unanimous," and that by entering his no contest pleas, he was incriminating himself and waiving his right to a jury trial.

¶22 Koellen argues that the prosecutor's explanation of the crimes was confusing, and that the circuit court "did not make separate inquiry or engage in any dialogue with Koellen to see if he understood the elements ... [and] that the State had to prove every element of the crime[s]." However, the prosecutor's explanation of the crimes was straightforward, and the court did make a separate inquiry as to both Koellen's understanding of the elements and his understanding that the State would have to prove those elements. Immediately after the prosecutor explained the nature of the crimes, the court asked, "You understand those are the things that would have to be proved to [the] jury beyond a reasonable doubt, and they would have to be unanimous in that?" Koellen answered, "Yes."[4]

¶23 Finally, quoting from ***Brown***, 293 Wis. 2d 594, ¶52, where the circuit court stated, "[t]he less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands the essential elements of the charges," Koellen implies that here: (1) the circuit court was required to go beyond asking "'yes' or 'no' type questions," citing ***State v. Howell***, 2007 WI 75, 301 Wis. 2d 350, 734 N.W. 2d 48; and (2) the court's questions were too "cursory," citing ***State v. Nichelson***, 220 Wis. 2d 214, 582 N.W. 2d 460 (Ct. App. 1998). However, Koellen points to no part of the plea colloquy that signaled to the court that Koellen might not have been understanding either the court's questions or what Koellen was saying he understood, or that his

[4] Koellen states without elaboration that the prosecutor did not explain what constituted "sexual contact." However, Koellen does not develop any argument, supported by legal authority, that more explanation was required than that provided by the prosecutor for the offense of second degree sexual assault under WIS. STAT. § 940.225(2) in the circumstances of this case. Accordingly, we do not consider this apparent argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

eighth grade education or his intellectual capacity prevented him from understanding. Nor does Koellen explain how this case is like ***Howell***, where the court did not provide a full "exploration regarding whether Howell understood the nature of his criminal liability as an aider and abettor," 301 Wis. 2d 350, ¶38, or like ***Nichelson***, where defense counsel conducted the entire plea colloquy concerning the nature of the charges, the plea colloquy was abbreviated, and the State conceded that the colloquy was constitutionally deficient. 220 Wis. 2d at 220.[5]

3. Determining Koellen's specific ability to comprehend consequences of pleas

¶24 Koellen argues that the circuit court did not establish "that [Koellen] understood that a no contest plea was effectively a guilty plea." However, as shown above, the court did establish that Koellen understood the consequences of his pleas, including that he was giving up the right to have a jury trial at which the charges would have to be proven, and that "when you enter this plea you do incriminate yourself," which the court defined as "to testify against yourself."

¶25 In sum, Koellen's postconviction plea withdrawal motion failed to demonstrate a plea colloquy defect. Accordingly, the circuit court could have denied Koellen's plea withdrawal motion without a hearing and, thus, we affirm the denial of the motion.

[5] Koellen also cites an unpublished opinion, which we do not find apposite.

CONCLUSION

¶26 For the reasons discussed above, we affirm the circuit court's order denying Koellen's postconviction motion to withdraw his pleas.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).