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You are hereby notified that the Court has entered the following opinion and order:

2016AP1919-CR State of Wisconsin v. Cullen J. Mitchell (L.C. #2013CF3829)

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

Cullen Mitchell appeals a judgment of conviction for felony murder and an order denying his motion for post-conviction relief. He argues that he should be allowed to withdraw his guilty plea because he was misinformed as to the maximum amount of initial confinement to which he could be sentenced, and that his trial counsel was ineffective for not giving him accurate information about the maximum amount of initial confinement. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹

Mitchell pleaded guilty to one count of felony murder. During the plea colloquy, the circuit court correctly informed Mitchell that the maximum possible penalty for his offense was 35 years in the Wisconsin prison system. The court asked if Mitchell understood the charge and the maximum possible penalty, and Mitchell confirmed that he did. Also at the plea hearing, Mitchell signed a Plea Questionnaire and Waiver of Rights form. This document stated that the maximum 35-year penalty could be composed of up to 22.5 years of initial confinement followed by up to 12.5 years of extended supervision. This breakdown of the total potential sentence was not accurate. The parties now agree that the correct maximum initial confinement period is 26.25 years.

At the sentencing hearing, the prosecutor identified a math error, explaining that under WIS. STAT. § 973.01(2)(b)10., the maximum initial confinement period was 75% of the total sentence. The prosecutor stated that applying this 75/25 rule to Mitchell's maximum sentence of 35 years yielded a maximum period of initial confinement of 25.75 years. As indicated above, this was much closer to the correct number, 26.25, but was still inaccurate.

The court asked Mitchell's attorney if he agreed with this calculation, and the attorney said he did. The court then asked Mitchell's attorney if he had explained this new information to his client. Following an off the record discussion, Mitchell stated that he understood that the maximum initial confinement period was higher than was stated at the plea hearing and that he

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

wished to proceed. The court gave Mitchell an opportunity to discuss it further with his attorney, which Mitchell declined. At that point, the court asked Mitchell if he wished to proceed with sentencing notwithstanding the corrected calculation of the maximum period of initial confinement. Mitchell again confirmed that he understood the new information and that he wished to proceed with sentencing. The court asked Mitchell if he had any desire to withdraw his plea based on the misunderstanding of the maximum possible penalty of initial confinement. Mitchell responded, “No.”

The court sentenced Mitchell to 15 years of initial confinement and 8 years of extended supervision. In imposing the sentence, the court stated that it was “[k]eeping in mind the maximums for this offense.”

Mitchell moved for post-conviction plea withdrawal, focusing on the two math errors made in calculating the maximum initial confinement portion of the sentence, as summarized above.² Mitchell argued that the circuit court committed a *Bangert* violation at the plea hearing because Mitchell did not understand “the maximum possible sentence,” specifically because Mitchell thought that the maximum initial confinement was 22.5 years. See *State v. Bangert*, 131 Wis. 2d 246, 260, 279, 389 N.W.2d 12 (1986) (explaining that plea colloquies must ensure that guilty pleas are knowing, voluntary, and intelligent). Mitchell also argued that his attorney was ineffective for failing to properly advise him about the consequences of his plea. The circuit court denied Mitchell’s post-conviction motion. This appeal followed.

² Mitchell filed two post-conviction motions. In the first he claimed that his trial counsel had incorrectly promised that the plea agreement would include amending a robbery charge in a separate case. The motion was denied. Mitchell does not raise that claim on appeal.

We first address Mitchell's *Bangert* claim. Under *Bangert*, the circuit court must address the defendant personally and fulfill several statutory and judicial mandates to ensure that a guilty plea is constitutionally sound. See *State v. Brown*, 2006 WI 100, ¶¶34-36, 293 Wis. 2d 594, 716 N.W.2d 906. In order to obtain relief under *Bangert*, Mitchell must clear two hurdles. See *State v. Howell*, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48. First, he must make a prima facie showing that the circuit court accepted his plea without conforming to the requirements of WIS. STAT. § 971.08(1)(a) or other mandatory procedures. See *id.* Second, Mitchell must allege that he “did not know or understand the information that should have been provided at the plea colloquy.” See *id.*

Mitchell cannot clear either hurdle. WISCONSIN STAT. § 971.08(1)(a) requires a circuit court to determine that a defendant has entered his plea understanding “the potential punishment” if convicted. Our Supreme Court has explained that the phrase “the potential punishment” that circuit courts must address at plea hearings under § 971.08(1)(a) is the maximum statutory penalty that a defendant faces. *State v. Finley*, 2016 WI 63, ¶¶3-4, 370 Wis. 2d 402, 882 N.W.2d 761. As stated above, the circuit court correctly informed Mitchell that he faced the maximum possible penalty of 35 years in the Wisconsin prison system before accepting his plea. Because the record establishes that the court correctly informed Mitchell that he faced the potential punishment of 35 years at the time of his plea, Mitchell cannot make a prima facie showing that the circuit court accepted his plea without conforming to the requirements of § 971.08(1)(a). See *Howell*, 301 Wis. 2d at 367-68.

Nor are there other mandatory procedures that would require the court to inform Mitchell of the calculation of the maximum period of confinement under the 75/25 rule before accepting his plea. See *State v. Taylor*, 2013 WI 34, ¶42 n.12, 347 Wis. 2d 30, 829 N.W.2d 482 (“We

have never held ... that the court must parse out and specifically advise the defendant of the potential term of confinement and also the potential term of extended supervision at the plea colloquy.”); *State v. Sutton*, 2006 WI App 118, ¶15, 294 Wis. 2d 330, 718 N.W.2d 146 (rejecting the claim that a plea colloquy was defective because the defendant was not informed of the maximum term of confinement). To the contrary, our Supreme Court has explained that to “parse out and specifically advise the defendant of the potential term of confinement and also the potential term of extended supervision at the plea colloquy.... could be misleading” because that information is subject to change after sentencing, unlike the maximum statutory penalty that a defendant faces. *Taylor*, 347 Wis. 2d 30, ¶42 n.12 (citing WIS. STAT. § 302.113(3)(a) (allowing extension of initial confinement when an inmate violates regulations or refuses or neglects to perform assigned duties) and § 302.113(9)(am) (providing for revocation of extended supervision and return to confinement for violations of conditions of extended supervision)). Therefore, Mitchell’s claim that he misunderstood the maximum initial confinement period is not sufficient to make a prima facie showing that he did not know or understand the information that should have been provided at the plea colloquy. See *Howell*, 301 Wis. 2d at 367.

Mitchell argues that the smaller, second math error at the sentencing hearing rendered his guilty plea not knowing, voluntary, and informed. However, the math error at the sentencing hearing does not change the *Bangert* analysis above. When the circuit court accurately informed Mitchell during the plea colloquy that he faced a maximum possible penalty of 35 years in the Wisconsin prison system, this satisfied the circuit court’s obligation to ensure that Mitchell was pleading guilty with knowledge of his potential punishment if convicted. See *Finley*, 370 Wis. 2d 402, ¶3.

We now turn to Mitchell's ineffective assistance claim. Mitchell argues that his attorney was ineffective for not detecting the two math errors in calculating his maximum period of initial confinement and informing him of the correct information. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697.

“A claim of ineffective assistance of counsel is a mixed question of fact and law.” *State v. Carter*, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 (citations omitted). “We will uphold the circuit court's findings of fact unless they are clearly erroneous,” but “the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review de novo.” *Id.*

The circuit court determined that the attorney's performance was not deficient and that Mitchell was not prejudiced. We need not consider whether the attorney's performance was deficient in failing to accurately advise Mitchell regarding the maximum term of initial confinement, because assuming without deciding deficient performance, we conclude that there was no prejudice to Mitchell.

As noted above, the first math error on the plea questionnaire was noted at the sentencing hearing. At that time, Mitchell chose to proceed with sentencing and stated that he did not wish to withdraw his plea. Accordingly, Mitchell cannot claim that he was prejudiced by this first error. See *State v. Ruud*, 41 Wis. 2d 720, 726, 165 N.W.2d 153 (1969) (A deliberate and knowing election between alternative courses of action as a matter of strategy does, in effect, estop the defendant from claiming error.).

Nor can Mitchell establish prejudice in connection with the second math error. Mitchell argues that his attorney should have informed him that the correct maximum period of initial confinement was 26.25 years. However, the circuit court sentenced Mitchell to 15 years of initial confinement, which was well below what the court believed to be the maximum. Moreover, in sentencing Mitchell to 15 years, the circuit court noted that it was “[k]eeping in mind the maximums for this offense.” Because the second math error was, if anything, favorable to Mitchell, he cannot establish that he was prejudiced by his attorney’s failure to correct it.

Finally, Mitchell argues that he was prejudiced by his attorney’s role in the plea process. This argument is underdeveloped, but Mitchell may intend to argue that his attorney should have caught the math errors in time to give Mitchell information which would have caused him to withdraw his plea. We interpret this as a claim under *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996), that he should be allowed to withdraw his plea based on the ineffective assistance of counsel.

To succeed on a *Bentley* claim, Mitchell must allege that he would not have entered a guilty plea but for the ineffective assistance of counsel. See *Howell*, 301 Wis. 2d 350, ¶75. Mitchell has not alleged any facts that suggest he would have gone to trial if his attorney had informed him of the correct initial confinement maximum. His affidavit only avers that he misunderstood the maximum period of initial confinement when he pleaded guilty and when he opted to proceed with sentencing. Nowhere does he allege that the correct information would have changed his decision about the plea.

In denying Mitchell’s postconviction motion, the circuit court noted that Mitchell was not deterred in pursuing his plea agreement when he learned that the confinement maximum was

3.25 years greater than stated at the plea hearing. Yet Mitchell now argues that his response might have been different if he had been told that he faced a maximum of 26.25 years of initial confinement rather than 25.75 years. Because Mitchell's plea decision was unaffected by learning of an additional 39 potential months of initial confinement, the court concluded that Mitchell could not establish that 6 more potential months would have made a difference in his decision about whether to plead guilty. We agree with the circuit court that Mitchell cannot raise a *Bentley* claim on this record. *See id.*, ¶85 (court may deny a *Bentley* motion when it determines that the record as a whole conclusively demonstrates that the defendant is entitled to no relief).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals