COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1020 **Cir. Ct. No. 2011JV59**

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

IN THE INTEREST OF DAROLD M., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAROLD M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed as amended.*

¶1 BRENNAN, J.[1] In this delinquency case, Darold M. seeks to withdraw his plea of admission to armed robbery as a party to a crime, a violation of WIS. STAT. §§ 943.32(1)(a), (2) and 939.05, arguing that the plea colloquy was deficient under WIS. STAT. § 971.08(1)[2] and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). More specifically, Darold argues that his plea was deficient because he failed to check a box on the guilty plea questionnaire answering whether he understood the charges to which he was pleading, including whether the charge was a felony. In a postdisposition motion to withdraw his plea, Darold argued that his failure to check the box was evidence that "the plea may be involuntary."

¶2 We conclude that Darold has not met his burden of showing that plea withdrawal is necessary to prevent a manifest injustice under the juvenile plea statute, WIS. STAT. § 938.30(8), and ***Bangert***. The plea hearing transcript clearly demonstrates that the circuit court personally addressed Darold and explained the charge to which Darold was pleading, its elements, its felony status and Darold's penalty exposure. After Darold acknowledged that he understood and his attorney confirmed that fact, the circuit court determined that Darold's admission was knowing, free and voluntary. Thus, we conclude plea withdrawal is not necessary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version.

[2] Darold bases his plea withdrawal argument on alleged violations of WIS. STAT. § 971.08. However, because this is a juvenile prosecution, the applicable statute is actually WIS. STAT. § 938.30(8), which Darold acknowledges in his reply brief.

to prevent a manifest injustice and affirm both the circuit court's dispositional order[3] and its order denying Darold's postdisposition motion to withdraw his plea.

BACKGROUND

¶3 In a petition for delinquency filed on January 17, 2011, Darold was charged with one count of armed robbery as party to a crime and one count of possession of a dangerous weapon by a person under eighteen years of age. On February 28, 2011, pursuant to plea negotiations, Darold entered a plea of admission to count one, armed robbery. Count two, possession of a dangerous weapon by a person under eighteen years of age, was dismissed and read in for sentencing purposes. Darold was represented by counsel at the plea hearing and both Darold and counsel signed the Plea Questionnaire/Waiver of Rights (Juvenile) form. Although all other box options were checked on the form, no box was checked on the line that stated:

> I □ do □ do not understand the charges(s) to which I am pleading, including whether any charge is a felony.

¶4 The circuit court conducted the following colloquy with Darold at the plea hearing:

[3] We note that, in the plea questionnaire, Darold admits to violations of WIS. STAT. §§ 943.32(1)(a), (2) and 939.05; however, the dispositional order only reflects Darold's admission to §§ 943.32(2) and 939.05. The Consolidated Court Automation Program (CCAP) entry for February 28, 2011, reflects Darold entered pleas to §§ 943.32(1)(a), (2) and 939.05. One of the elements of § 943.32(2) is violation of § 943.32(1). It is clear from the plea colloquy that Darold is pleading to both subsections. As such, we direct the clerk, on remittitur, to amend the dispositional order to reflect the correct disposition.

BY THE COURT:

Q Darold, you are here on a petition alleging that you committed Armed Robbery as a Party to the Crime, that's a Class C felony for which an adult could be confined in prison for I think up to 40 years. Do you understand that?

A Yes.

Q And in order to prove this charge the State would have to prove on January 14, 2011 at 3916 North Teutonia Avenue in Milwaukee as a Party to a Crime, meaning you were acting along with somebody else, in this case your brother Loren, and that together the two of you performed all the elements of the offense. Do you understand that?

A Yes.

Q With intent to steal, using a dangerous weapon, that you did take property from the person of Barbara W[.] who owned the property and you took that property by using force against her person and you used that force to make her give up her property. Do you understand that?

A Yes.

Q And do you admit that charge or do you deny it?

A I admit.

Q Darold, I have a Plea Questionnaire and Waiver of Rights form. On the back there's a signature along -- the name Darold M[.] is written along side --

[DAROLD'S ATTORNEY]: He put down his date of birth, Your Honor.

THE COURT:

Q Okay. And today's date. Did you sign this form?

A Yes, I did.

Q Before you signed it had you gone over all the information with your lawyer?

A Yes.

Q Did you understand everything?

A Yes.

Q You are 15 years old and in the 9th grade in school, you can read and write the English language, you understand the charge that you are admitting and you understand that it is a felony, you are not being treated for any mental health issues, and you have not had any alcohol, medications or drugs in the last 24 hours; is that all true?

A Yes.

¶5 After going through the waiver of constitutional rights with Darold, the circuit court continued by asking him questions about his understanding of the delinquency petition.

Q Did you and your lawyer go over the delinquency petition that was filed in this case?

A Yes.

Q Did you understand what it says in the delinquency petition?

A Yes.

Q And is the information in the petition all true?

A Yes.

¶6 The circuit court then questioned Darold's counsel, who asserted that he had gone over the elements, penalties, defenses and rights with Darold; that counsel believed that Darold understood them; and that Darold was freely, voluntarily, knowingly and understandingly entering his plea. At the conclusion of the plea hearing, the circuit court accepted the plea saying: "All right. I find that Darold is entering his plea freely, voluntarily, intelligently, with full understanding of the nature of the charge, the maximum possible penalty and all of the rights given up by admitting." At disposition, on the same day as the plea, the

circuit court imposed a five-year term in the Serious Juvenile Offender program, with up to three years in confinement, and entered a written order to that effect.

¶7 Darold filed a notice of intent to pursue postdisposition relief on March 7, 2011, and on June 14, 2011, he filed a postdisposition motion to modify sentence and withdraw his plea. The circuit court denied Darold's postdisposition motion without a hearing in an order filed October 11, 2011. Darold appeals.

STANDARD OF REVIEW

¶8 A juvenile is ordinarily entitled to a hearing on his plea withdrawal motion when he: (1) establishes that the statutory procedures or court-mandated duties in ***Bangert*** were not followed; and (2) alleges that he did not know or understand the information that should have been provided at the plea hearing. *See generally* ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. We review *de novo* the circuit court's decision to deny a plea withdrawal motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

DISCUSSION

¶9 Darold challenges the circuit court's postdisposition order denying his motion to withdraw his plea without a hearing, on the grounds that the circuit court performed a defective plea colloquy, under WIS. STAT. § 971.08(1) and ***Bangert***, when it failed to ask him about the unchecked box on the plea questionnaire. As such, Darold claims that he is entitled to withdraw his

admission to armed robbery to prevent a manifest injustice.[4] We note that the unchecked box on the plea questionnaire only addressed whether Darold understood the charge against him and that the offense was a felony. Thus, Darold does not challenge his understanding during the plea colloquy of the penalties he faced, the constitutional rights he was giving up and the voluntariness of the plea. The sole issue on appeal is whether either the juvenile plea statute or ***Bangert*** required the circuit court to inquire about the unchecked box referring to Darold's understanding of the charge he faced and the felony status of the charge. Darold does not cite to any case or statute which imposes this requirement, nor does he otherwise challenge the completeness of the plea colloquy.

¶10 The State responds that this is a juvenile matter, and, therefore, the applicable plea statute is WIS. STAT. § 938.30(8), rather than WIS. STAT. § 971.08. The State contends that the transcript shows that the circuit court complied with that statute and that nothing in the statute requires the court to inquire about unchecked boxes on the plea questionnaire. We agree.

¶11 The State also argues that Darold failed to show under ***Bangert*** that his plea did not comport with WIS. STAT. § 938.30(8)(a) and that he did not know or understand the information that should have been provided at the hearing. *See* ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906; *see also* ***Bangert***, 131 Wis. 2d at 274. Again, we agree.

[4] Darold has abandoned the sentence modification argument he raised in his postdisposition motion by failing to raise it on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

¶12 A defendant seeking to withdraw a plea postsentencing must demonstrate that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. James***, 176 Wis. 2d 230, 236-37, 500 N.W.2d 345 (Ct. App. 1993). "A 'manifest injustice' occurs where a defendant makes a plea involuntarily or without knowledge of the consequences of the plea[]or where the plea is 'entered without knowledge of the charge or that the sentence actually imposed could be imposed.'" ***Id.*** at 237 (citation omitted).

¶13 A defendant seeking to withdraw his plea on the grounds that his plea was entered without knowing the charges and penalties he faced has the burden of: (1) establishing a *prima facie* case that the circuit court failed to comply with the applicable plea statute, here, WIS. STAT. § 938.30(8)(a), or other mandatory plea procedures as described by ***Bangert***, *and* (2) alleging that he did not know or understand information that should have been provided at the plea hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶39; ***Bangert***, 131 Wis. 2d at 274. If the defendant establishes both (1) and (2), the circuit court must hold an evidentiary hearing, and the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowing, voluntary and intelligent. ***Brown***, 293 Wis. 2d 594, ¶40. Darold has failed to meet his burden here.

¶14 First, we examine whether Darold has made a sufficient showing that the circuit court failed to comply with the juvenile plea statute. That statute, WIS. STAT. § 938.30(8), states, in pertinent part:

> **(8)** ADMISSION OR NO CONTEST PLEA; INQUIRES REQUIRED. Except when a juvenile fails to appear in response or stipulates to a citation before accepting an admission or plea of no contest of the alleged facts in a petition or citation, the court shall do all of the following:

> (a) Address the parties present including the juvenile personally and determine that the plea or admission is made voluntarily with understanding of the nature of the acts alleged in the petition or citation and the potential dispositions.

The adult plea statute, WIS. STAT. § 971.08, discussed in ***Bangert***, but not applicable to this juvenile delinquency case, is only slightly different. Section 971.08 provides, in pertinent part:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

While the juvenile statute requires that the circuit court specifically determine the juvenile's understanding of the acts alleged in the petition, the adult statute does not. However, both statutes require that the circuit court determine that the juvenile or the defendant understands the charges to which he is pleading.

¶15 Neither WIS. STAT. § 971.08(1), the adult plea statute Darold relies on, nor WIS. STAT. § 938.30(8), the juvenile plea statute applicable here, require a circuit court to inquire as to unchecked boxes or unanswered questions on the plea questionnaire. In fact, neither statute requires that the juvenile or defendant even complete the plea questionnaire. What both statutes require is that the circuit court ensures that the defendant understands the nature of the charges and penalties he faces before entering his plea. As we develop more fully below, the transcript of the plea colloquy shows that the circuit court did exactly that by properly questioning Darold's understanding of the charge and the penalties, including its felony status, during the plea colloquy.

¶16 Next, we examine whether Darold has shown that the circuit court violated the plea requirements of ***Bangert***. In ***Bangert***, while reviewing an adult criminal prosecution, the Wisconsin Supreme Court construed WIS. STAT. § 971.08, the adult plea statute, to require that the circuit court "do more than merely record the defendant's affirmation of understanding pursuant to [§] 971.08(1)(a)."[5] ***Bangert***, 131 Wis. 2d at 267. The supreme court described three possible methods by which the circuit court can comply with its duty to determine whether the defendant understands the nature of the charge to which he is pleading: (1) the circuit "court may summarize the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute" (internal citations omitted); (2) the circuit court "may ask defendant's counsel whether [counsel] explained the nature of the charge to the defendant and request [counsel] to summarize the extent of the explanation"; or (3) the circuit court "may expressly refer to the record or other evidence of the defendant's knowledge of the nature of the charge established prior to the plea hearing," such as the criminal complaint or a signed statement by the defendant. ***Id.*** at 268. The supreme court specifically noted that the list of methods was not exhaustive and that only one method needs to be utilized. ***Id.*** at 267-68.

¶17 Here, the circuit court employed variants of all three methods described by ***Bangert*** to ensure that Darold understood the charges to which he was pleading. As the transcript shows, the circuit court summarized the elements

[5] In ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the defendant did not sign a plea questionnaire. The issue on appeal was whether the circuit court erred when it failed to ask the defendant if he understood the nature of the charges to which he was pleading. ***Id.*** at 255.

of the charges and specifically linked the elements of the charges to the facts as alleged in the delinquency petition, thereby combining methods one and three:

> Q Darold, you are here on a petition alleging that you committed Armed Robbery as a Party to the Crime, that's a Class C felony for which an adult could be confined in prison for I think up to 40 years. Do you understand that?
>
> A Yes.
>
> Q And in order to prove this charge the State would have to prove on January 14, 2011 at 3916 North Teutonia Avenue in Milwaukee as a Party to a Crime, meaning you were acting along with somebody else, in this case your brother Loren, and that together the two of you performed all the elements of the offense. Do you understand that?
>
> A Yes.
>
> Q With intent to steal, using a dangerous weapon, that you did take property from the person of Barbara W[.] who owned the property and you took that property by using force against her person and you used that force to make her give up her property. Do you understand that?
>
> A Yes.

¶18 Even though the circuit court did not read from the jury instruction or statute as to the elements, it summarized the charge by incorporating the specific factual allegations from the petition into each element of the charge. Strict conformity to the described methods is not required under ***Bangert***. *See* ***id.*** ***Bangert*** merely requires that a circuit court ascertain a defendant's understanding of the nature of the charge and by a method other than simply asking the defendant if he understood the charge without giving him any description of the charge and elements. *See* ***id.*** at 269 ("a perfunctory affirmative response by the defendant that

he understands the nature of the offense, without an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the [statutory] requirement"). Here, the circuit court properly summarized the charge and elements under ***Bangert***.

¶19 In addition, the circuit court also followed the second suggested method in ***Bangert*** by asking Darold's counsel whether he had explained the nature of the charges to Darold and whether he believed Darold understood those charges:

> THE COURT: Counsel, did you go over the Plea Questionnaire and Waiver of Rights form with your client?
>
> [DAROLD'S ATTORNEY]: I did, Your Honor.
>
> THE COURT: Did you go over the elements of the offense with him?
>
> [DAROLD'S ATTORNEY]: Yes.
>
> THE COURT: Are you satisfied that he understands the elements and how his conduct meets them?
>
> [DAROLD'S ATTORNEY]: Yes.

¶20 The circuit court also performed the third ***Bangert*** method by expressly referring to the delinquency petition and establishing that Darold had read it, gone over it with his attorney, understood it and agreed it was all true:

> Q Did you and your lawyer go over the delinquency petition that was filed in this case?
>
> A Yes.
>
> Q Did you understand what it says in the delinquency petition?

A Yes.

Q And is the information in the petition all true?

A Yes.

¶21 The circuit court's thorough plea colloquy conclusively rebuts Darold's contention on appeal that the unchecked box on the plea questionnaire indicates that Darold *may* not have understood the felony nature of the offense. The circuit court twice informed Darold that he was pleading to a felony and twice secured Darold's acknowledgment:

> Q Darold, you are here on a petition alleging that you committed Armed Robbery as a Party to the Crime, that's a Class C felony for which an adult could be confined in prison for I think up to 40 years. Do you understand that?
>
> A Yes.
>
> ….
>
> Q You are 15 years old and in the 9th grade in school, you can read and write the English language, you understand the charge that you are admitting and you understand that it is a felony, you are not being treated for any mental health issues, and you have not had any alcohol, medications or drugs in the last 24 hours; is that all true?
>
> Q Yes.

¶22 After this careful colloquy, the circuit court asked Darold's counsel if he believed Darold's plea "is being entered freely, voluntarily, knowingly and understandingly?" Counsel answered, "Yes." Then the circuit court entered its finding that Darold's plea was entered "freely, voluntarily, intelligently, with full understanding of the nature of the charge."

¶23 The only showing that Darold makes in this appeal is that the circuit court failed to inquire as to why the box confirming that he understood the nature

of the charge and the felony status of the offense was unchecked. As shown above, neither WIS. STAT. § 938.30(8)(a) (the juvenile plea statute), WIS. STAT. § 971.08(1)(a) (the adult plea statute on which Darold relies), nor ***Bangert*** require that the circuit court ask about unchecked boxes on the plea questionnaire. All the statutes and ***Bangert*** require is that the circuit court address the juvenile or defendant and determine, by means other than a mere affirmative response, that he understands the charges and penalties. The circuit court did that here.

¶24 Because Darold fails to establish the first prong of the ***Bangert*** plea withdrawal analysis, we need not address the second prong, that is, whether he affirmatively alleged that he in fact did not know or understand the information which should have been provided at the plea hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶39.

¶25 For the reasons set forth above, we conclude that the record establishes that Darold's plea was knowing, intelligent and voluntary under WIS. STAT. § 938.30(8)(a) and ***Bangert***.

By the Court.—Orders affirmed as amended.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.