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DISTRICT III

June 30, 2026

To:

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Electronic Notice

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Clerk of Circuit Court
Brown County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2025AP148-CR State of Wisconsin v. Andrew Scott Clark (L. C. No. 2020CF775)

Before Stark, P.J., Hruz, and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Andrew Clark appeals from a judgment convicting him of second-degree sexual assault of a child. The sole issue on appeal is whether the circuit court properly denied Clark's presentencing motion to withdraw his plea without holding an evidentiary hearing. 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 (2023-24).[1] We affirm on the basis that

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

Clark's allegations, which included three claims of ineffective assistance of counsel and an assertion that he had not signed his plea questionnaire, were insufficient to warrant a hearing.

A defendant may withdraw a plea prior to sentencing upon showing any fair and just reason for his or her change of heart beyond the simple desire to have a trial, so long as the prosecution has not been substantially prejudiced by reliance on the plea. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995); ***State v. Shanks***, 152 Wis. 2d 284, 288-90, 448 N.W.2d 264 (Ct. App. 1989). In order to obtain a hearing on a plea withdrawal motion, a defendant must first allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

Nonconclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for reviewing courts to meaningfully assess the defendant's claim. ***Allen***, 274 Wis. 2d 568, ¶23. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. This court will independently review the sufficiency of the allegations to warrant a hearing. ***Allen***, 274 Wis. 2d 568, ¶9.

Here, Clark filed a pro se plea withdrawal motion alleging that his trial counsel: (1) falsely told him that he had obtained witness statements; (2) failed to obtain any other evidence; and (3) failed to "introduce" Clark's offer to take a polygraph. Thereafter, the circuit

court appointed a new attorney for Clark and scheduled a plea withdrawal hearing. At the beginning of the hearing, Clark's new attorney asserted as an additional ground for plea withdrawal that Clark should not "be held bound to a plea" because he had not signed the plea questionnaire, and counsel therefore had "no confidence" that Clark really understood his constitutional rights.

Clark did not arrange for his former trial counsel to attend the plea withdrawal hearing, and the circuit court denied the plea withdrawal motion without taking testimony from Clark. The court reasoned that the plea colloquy was sufficient to demonstrate that Clark had understood his rights, notwithstanding his failure to sign the plea questionnaire, and that Clark had failed to express any concerns about counsel's performance during the plea hearing. The court concluded that the actual reason for Clark's plea withdrawal motion was that he got "cold feet."

We first observe that, generally speaking, credibility determinations are to be made based upon live testimony. ***State v. Jackson***, 2023 WI 3, ¶18, 405 Wis. 2d 458, 983 N.W.2d 608. However, under the standard of review set forth above, we need not rely upon the circuit court's determination that Clark's asserted reason for plea withdrawal was not credible. Rather, we independently determine that Clark's allegations were insufficient to warrant an evidentiary hearing on his plea withdrawal motion. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

The most fundamental flaw in the plea withdrawal motion is that Clark did not allege what testimony any potential witness would have provided or what other evidence an investigation would have revealed that would have been helpful to Clark's defense. *See* ***State v. Thiel***, 2003 WI 111, ¶44, 264 Wis. 2d 571, 665 N.W.2d 305 (requiring specific allegations as to

what an investigation would have revealed). Therefore, Clark's motion was insufficient on its face to demonstrate prejudice on either of the first two ineffective assistance of counsel claims. It is irrelevant to this analysis whether, as Clark asserts on appeal, counsel misled him about the extent of his investigation or whether Clark did not know about counsel's alleged failure to investigate prior to entering his plea. Clark's attempt on appeal to recharacterize his claims as due process violations is also misplaced because any claim that Clark entered his plea based upon misinformation about what evidence might be available for his defense would likewise depend upon a showing that helpful evidence was, in fact, available.

As to the third ineffective assistance claim, it is not clear what Clark meant when he alleged that counsel should have "introduced" his offer to take a polygraph. Given that the matter did not go to trial, counsel obviously had no opportunity to introduce the offer into evidence. To the extent Clark meant that counsel should have conveyed Clark's willingness to take a polygraph to the State, Clark provided no information to show that such an offer would have been material to the plea negotiations in this case. We also are not persuaded that professional norms generally would have required counsel to convey such an offer. The motion was therefore insufficient on its face to demonstrate deficient performance on the third claim. Moreover, absent the first attorney's presence at the hearing, the circuit court would have had no way to determine whether counsel had any strategic reason for his decision—meaning that Clark also could not satisfy his burden of proof on the deficient performance prong even if the court had taken testimony from Clark.

Regarding Clark's final claim, the circuit court must ascertain that a plea is being made voluntarily and with an understanding of the nature and consequences of the charge and the constitutional rights being waived. WIS. STAT. § 971.08(1)(a); ***State v. Brown***, 2006 WI 100,

¶35, 293 Wis. 2d 594, 716 N.W.2d 906. While a court *may* incorporate a plea questionnaire into its inquiry about whether a plea is being knowingly entered under ***State v. Hoppe***, 2008 WI App 89, ¶18, 312 Wis. 2d 765, 754 N.W.2d 203, *aff'd on other grounds*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, there is no separate requirement that a defendant *must* submit a plea questionnaire, signed or otherwise, before entering a plea.

Here, the circuit court explicitly noted at the plea hearing that Clark had not submitted a signed plea questionnaire because he was participating in the hearing by Zoom. However, Clark affirmed to the court that he had gone over the form with his attorney and understood it. The court then proceeded to discuss with Clark all of the information contained on the plea questionnaire that it was required to address under ***Brown***. Clark did not allege in the circuit court, and has not alleged here, that he had any actual misunderstanding of his rights or the nature or consequences of entering his plea. Therefore, even if the court had erred by incorporating a discussion of an unsigned plea questionnaire into its colloquy, Clark's motion was insufficient to warrant an evidentiary plea withdrawal hearing. *See* ***State v. Hampton***, 2004 WI 107, ¶¶56-65, 274 Wis. 2d 379, 683 N.W.2d 14 (discussing when a hearing is required on a claim that the defendant's rights under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), were violated).

Upon the foregoing,

IT IS ORDERED that the judgment of conviction is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals