OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

March 28, 2023

To:

Hon. George L. Glonek
Circuit Court Judge
Electronic Notice

Michele Wick
Clerk of Circuit Court
Douglas County Courthouse
Electronic Notice

Frederick A. Bechtold
Electronic Notice

Kieran M. O'Day
Electronic Notice

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

2021AP1555-CR State of Wisconsin v. Edward Isaiah Austin
2021AP1556-CR (L. C. Nos. 2017CF536, 2019CF217)

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).

In these consolidated cases, Edward Austin appeals from judgments of conviction and from an order denying his postconviction motion for plea withdrawal. Austin challenges the circuit court's determination that Austin entered his pleas knowingly, intelligently, and voluntarily. Based upon our review of the briefs and records, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22). We affirm.

As relevant to this appeal, Austin pled no contest to charges of first-degree recklessly endangering safety; aggravated battery; and burglary of a building or dwelling, all as a repeat

offender. Another charge of possession of a firearm by an out-of-state felon was dismissed and read in. Austin concedes that he "received exactly the sentence he had initially bargained for."

Following sentencing, Austin filed a postconviction motion to withdraw his pleas, arguing that his pleas were not knowingly, intelligently, and voluntarily entered.[1] The motion alleged that the plea colloquy was insufficient because the circuit court did not properly ascertain Austin's understanding of the charges to which he pled. *See* ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986). Austin's motion also alleged ineffective assistance of counsel for failing to properly advise Austin of the elements to which he was pleading and for incorrectly advising Austin that he "could withdraw his plea as a matter of right at any point prior to his sentencing, without qualification." *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996).

The circuit court held an evidentiary hearing and denied the postconviction motion. As for Austin's assertion that his attorney told him that he could withdraw his pleas at any time before sentencing without qualification, the court found Austin's testimony "to lack any credibility." The court further found incredible Austin's testimony that his attorney did not review the elements of the offenses with him. The court determined that Austin's pleas were knowingly, intelligently, and voluntarily entered.

On appeal, Austin does not renew his ***Bentley*** ineffective assistance of counsel claims; rather, he "confine[s] his arguments [to] the ***Bangert*** claim in [his] brief." In this regard, Austin

[1] Prior to sentencing, Austin filed a motion to withdraw his pleas on the grounds that his pleas were not knowingly, intelligently, or voluntarily entered, which the circuit court denied. Austin does not challenge the court's denial of that motion.

spends nearly the entirety of the argument section of his brief pointing to deficiencies in his plea colloquy. However, we are beyond that issue at this point, because Austin was afforded a ***Bangert*** hearing, which presupposes a deficient colloquy. A ***Bangert*** evidentiary hearing is not a search for error; it is designed to determine whether the pleas were knowingly, intelligently, and voluntarily entered despite any deficiencies in the colloquy.[2] *See* ***State v. Brown***, 2006 WI 100, ¶¶18, 40, 293 Wis. 2d 594, 716 N.W.2d 906.

As Austin's attorney acknowledged at the postconviction hearing, the ***Bangert*** hearing came down to a credibility question as to whether Austin misunderstood the elements of the offenses. Based on the competing testimony of Austin and his attorney at the hearing, the circuit court found Austin's testimony incredible and his attorney's testimony credible. Austin does not challenge the court's credibility findings—a prudent choice, as the circuit court is the ultimate arbiter of the credibility of witnesses. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

We accept the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. ***State v. Hoppe***, 2009 WI 41, ¶45, 317 Wis. 2d 161, 765 N.W.2d 794. Here, the court's findings are supported by the totality of the evidence and are not clearly erroneous. *See* ***Brown***, 293 Wis. 2d 594, ¶40. Austin's attorney had practiced criminal law for thirty-three years. He testified that he met with Austin numerous times prior to Austin's plea hearing, and specifically twice in the two days preceding the plea hearing. The attorney explained that he

[2] We note that no issue is raised whether Austin's postconviction motion made a prima facie showing of entitlement to an evidentiary hearing. *See* ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. We assume without deciding that the postconviction motion made a prima facie showing and the plea colloquy was therefore insufficient.

brought to those meetings copies of the applicable jury instructions and explained to Austin the elements and definitions of the charges that Austin now contends he did not understand. The attorney testified that he did not have any concerns that Austin was unaware of the appropriate elements of the crimes or the nature of the charges prior to entering his pleas.

Austin acknowledged that his attorney provided him with information in addition to that set forth in the plea questionnaire. As mentioned, the circuit court specifically found Austin's testimony "claiming that [his attorney] never went through the Jury Instructions with him and that [his attorney] did not review all elements of the crimes with him (prior to his plea hearing …) to be incredible." The court found that the State met its burden to demonstrate that, despite any errors in the plea colloquy, Austin understood the nature of the charges against him, including the elements of the offenses. The facts demonstrate that Austin's pleas were knowingly, intelligently, and voluntarily entered.

Upon the foregoing,

IT IS ORDERED that the judgments and order are summarily affirmed. WIS. STAT. RULE 809.21 (2021-22).

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

Sheila T. Reiff
Clerk of Court of Appeals