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DISTRICT II

February 12, 2025

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

2022AP630-CRNM State of Wisconsin v. Elijah J. Willis (L.C. #2020CF1542)
2022AP631-CRNM State of Wisconsin v. Elijah J. Willis (L.C. #2021CF303)

Before Neubauer, Grogan and Lazar, 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).

Elijah J. Willis appeals from judgments convicting him of misdemeanor battery, felony witness intimidation, and felony bail jumping. Appellate counsel has submitted a no-merit report

pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22),[1] concluding that there are no arguably meritorious issues to pursue. Counsel also filed a supplemental report as ordered by this court. Willis responded to the original report and submitted two additional letters after we ordered the supplemental report.

We have reviewed the Record in light of counsel's reports and Willis's responses. We are not persuaded by counsel's conclusion of no arguable merit; on this Record, it appears that Willis could make an arguably meritorious claim for plea withdrawal. We emphasize that we do not reach any conclusion that such argument would or should prevail, only that the argument would not be frivolous within the meaning of WIS. STAT. RULE 809.32 and ***Anders***.

Willis resolved these cases through a combination of guilty and no contest pleas. To be constitutionally valid, a plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). To help ensure the defendant makes a valid plea, one of the circuit court's many duties in accepting a plea is to "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge[.]" WIS. STAT. § 971.08(1)(a); ***Bangert***, 131 Wis. 2d at 260-61.

One way the circuit court can ensure the defendant's understanding is to "summarize the elements of the crime charged by reading from the appropriate jury instructions." ***Id.*** at 268. Another option is for the court to "refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing." ***Id.*** In this case, the court opted to refer to a plea questionnaire, which Willis purportedly signed, and an attached exhibit, which

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

appears to have been copies of applicable jury instructions, but the court did not summarize or discuss the offense elements directly with Willis.

In the original no-merit report, counsel stated that "[t]he record contains a plea questionnaire and waiver of rights form, signed by the defendant, that explains his rights in detail," and concluded that Willis's pleas were knowing, intelligent, and voluntary. However, neither the plea questionnaire nor the exhibit were included in the appellate records, even though circuit court docket entries indicated that both had been filed.

With no way to know what elements were actually reviewed with Willis, we could not fully review whether Willis "possesse[d] accurate information about the nature of the charge[s]." *See* ***id.*** at 267. We ordered the Record to be supplemented with the plea questionnaire and exhibit, but the clerk of the circuit court informed us that the documents could not be located.[2] Given this gap in the Record, we directed counsel to file a supplemental report that more thoroughly addressed why Willis could not pursue an arguably meritorious claim that his pleas were not knowing, intelligent, and voluntary.

In the supplemental report, appellate counsel concludes that the circuit court "followed the terms required by statute and ***Bangert***" when it "referenced the plea questionnaire in the plea colloquy by specifically directing attention to the signed plea questionnaire and asking the defendant specific questions regarding the questionnaire."[3] Appellate counsel explains that

[2] The clerk of the circuit court did contact trial counsel, who provided an unsigned file copy of both the plea questionnaire and the exhibit. However, this material is not part of the Record on appeal.

[3] These probing questions, all of which Willis answered affirmatively, were:

(continued)

Willis appeared at the plea hearing "[w]ith the help of an experienced attorney who reviewed the plea questionnaire and submitted the plea questionnaire after presumably discussing with his client at length the ramifications of his plea[.]" Appellate counsel further explains that Willis appeared "in front of a judge who further inquired as to whether the defendant was completely aware of the gravity of the situation and his decision in going forward with the plea" and the "transcript is replete with questions posed by the court to determine the efficacy of the plea." Thus, counsel concludes, "it appears that the defendant made a knowing and voluntary plea."

A defendant who seeks to withdraw his or her plea after sentencing must prove by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996); *see also* ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. A plea that is not entered knowingly, intelligently, and voluntarily constitutes a manifest injustice. *See* ***State v. Sulla***, 2016 WI 46, ¶24, 369 Wis. 2d 225, 880 N.W.2d 659.

> THE COURT: … Has [trial counsel] explained to you the elements of these three offenses?
>
> ….
>
> THE COURT: [Trial counsel] has attached what's been called Exhibit A. Do you recall going over this document with [trial counsel]?
>
> ….
>
> THE COURT: And on this document, for each of the cases, they are listed, and [trial counsel] has spelled out the elements of these offenses. Do you recall having that conversation with [trial counsel]?
>
> ….
>
> THE COURT: And so you understand that in each of these three different sets of charges, that the State has a burden to meet each of those elements – to prove each of those elements beyond a reasonable doubt?

One pathway to plea withdrawal is a ***Bangert*** motion, which is based on a claim that the circuit court failed to fulfill its plea colloquy duties. *See* ***State v. Howell***, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48. A ***Bangert*** motion merits an evidentiary hearing if (1) the motion makes a prima facie showing that the plea was accepted without the circuit court's conformance with WIS. STAT. § 971.08 or other mandatory procedures, and if (2) the motion alleges that in fact the defendant did not know or understand the information that should have been provided at the plea colloquy. *See* ***Howell***, 301 Wis. 2d 350, ¶27. The requirements for a ***Bangert*** motion are relatively relaxed; "[w]e require less from the allegations in a ***Bangert*** motion because the circuit court bears the responsibility of preventing failures in the plea colloquy." ***Howell***, 301 Wis. 2d 350, ¶28.

We acknowledge that the plea colloquy transcript reflects that the circuit court attempted to discharge its duties when it referenced the plea questionnaire and jury instruction exhibit. However, because the court only referenced the documents, rather than expressly reviewing their content with Willis, the documents' omission from the Record prevents us from confirming whether Willis had an "understanding of the nature of the charge[s]" to which he was pleading. *See* WIS. STAT. § 971.08(1)(a).

This information gap is particularly problematic in these cases because Willis has, from the beginning of the no-merit process, claimed that he did not fully understand his pleas. In response to the original no-merit report, Willis asserted, among other things, that he "never understood the plea that was given to [him]"; that trial counsel told him "just say yes to everything"; that trial counsel tried talking to him about the pleas "with all these big [words]," which Willis told counsel he did not understand; and that he had a learning disability. After our order for the supplemental report, Willis submitted two letters. In the first of the two letters,

Willis states that he "never read, understood, or conceded to any assertions that [the] pleas were knowingly, intelligently, and voluntarily entered." He also claimed he never signed the plea questionnaire and that he did not read or understand the plea questionnaire or the attached exhibit with the elements of his offenses.

When resolving an appeal under WIS. STAT. RULE 809.32, the question presented to this court is whether, upon review of the entire proceedings, any potential arguments would be "wholly frivolous." *See* ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915; *see also* ***Anders***, 386 U.S. at 744. The test is not whether the lawyer should expect the argument to prevail. *See* ABA Comment [2], SCR 20:3.1. The question is only whether any potential arguments or issues so lack a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988). Based on the foregoing, we conclude that further proceedings, at least in regard to a potential plea withdrawal under ***Bangert***, would not lack arguable merit or be wholly frivolous.[4]

Upon the foregoing, therefore,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for Willis to file a postconviction motion under WIS. STAT. RULE 809.30 is extended until forty-five days after the date of remittitur.

[4] We reiterate that we do not reach any conclusion whether Willis would or should prevail, only that such proceedings would not be frivolous within the meaning of WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967).

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

Samuel A. Christensen
Clerk of Court of Appeals