COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1486 **Cir. Ct. No. 1999CF361**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE E. HEDRICK, SR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Dale Hedrick, Sr. appeals from an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion to withdraw his guilty plea. He argues that his plea was not knowing and voluntary because he was suffering from mental illness when the plea was entered and that there is no factual basis to support the plea. We conclude that the plea was properly entered and affirm the order denying the motion to withdraw it.

¶2 In 2000 Hedrick entered a guilty plea to second-degree sexual assault and failure to comply with an officer's attempt to take a person into custody.[2] He served his two-year prison term for the failure to comply conviction and one year in jail as a condition of the fifteen-year probation term imposed on the sexual assault conviction. Probation was eventually revoked. In 2006, Hedrick moved to withdraw his guilty plea. The circuit court denied the motion.

¶3 To withdraw a plea after sentencing, a defendant has the burden of establishing by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. ***State v. Fosnow***, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883 (Ct. App. 2000). We review the circuit court's determination for an erroneous exercise of discretion. ***Id.*** However, when a defendant establishes a denial of a relevant constitutional right, withdrawal of the plea is a matter of right. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997).

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] A charge of false imprisonment was dismissed pursuant to a plea agreement.

¶4 A plea that is not voluntarily, knowingly, and intelligently entered violates fundamental due process. ***Id.*** Whether a plea is voluntarily and knowingly made presents a question of constitutional fact. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine de novo whether those facts demonstrate a knowing, intelligent, and voluntary plea. ***Id.***

¶5 On appeal Hedrick asks this court to reverse the order and remand for an evidentiary hearing at which his assertions that his plea was invalid may be tested. He attacks the perfunctory nature of the plea colloquy and argues the circuit court failed to comply with WIS. STAT. § 971.08(1), and other court-mandated duties in taking his plea. *See* ***Brown***, 293 Wis. 2d 594, ¶58 (the circuit court judge may not perfunctorily question the defendant and a perfunctory affirmative response by the defendant may be inadequate). He asserts he made a prima facie showing under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and is entitled to an evidentiary hearing on his plea withdrawal motion.[3]

[3] The circuit court held a hearing on Hedrick's motion. At the start of the hearing, Hedrick indicated that he had met his burden and was satisfied with the purpose of the hearing to let the State meet its burden. Hedrick's counsel stated:

> So my position is I can sit here and do nothing else, and this Court would then have to hear from the State if the State wants to go forward with evidence or argument for the record. … But right now I'm content to rest on this and reference to the Court the factual assertions in here are accurate, they are based on my discussions with Mr. Hedrick. And if it becomes necessary he can testify to that, I don't think its relevant and necessary at this point.

(continued)

Under ***Bangert***, when a defendant makes a prima facie showing of nonconformity with § 971.08 or other mandatory procedures, and alleges that he or she in fact did not know or understand the information which should have been provided at the plea hearing, the burden shifts to the State and "the circuit court must hold an evidentiary hearing at which the State and the defendant can offer evidence as to whether the defendant in fact knew the information that should have been provided." *See* ***State v. Hampton***, 2004 WI 107, ¶¶45-46, 274 Wis. 2d 379, 683 N.W.2d 14. "A defendant's right to an evidentiary hearing under ***Bangert*** cannot be circumvented by either the court or the State asserting that based on the record as a whole the defendant, despite the defective plea colloquy, entered a constitutionally sound plea." ***State v. Howell***, 2007 WI 75, ¶7, ___ Wis. 2d ___, 734 N.W.2d 48 (2005AP731-CR).

¶6 However, a circuit court's failure to follow the procedures of WIS. STAT. § 971.08, or other court mandated procedures, does not amount to a constitutional violation and cannot be raised by a motion for relief under WIS. STAT. § 974.06, which is limited to issues of constitutional or jurisdictional dimension. *See* ***State v. Carter***, 131 Wis. 2d 69, 81, 389 N.W.2d 1 (1986). The ***Bangert*** standard for obtaining an evidentiary hearing should not be utilized outside the context of determining ***Bangert***-type violations. *See* ***Hampton***, 274 Wis. 2d 379, ¶¶56-65. When a defendant files a motion containing a non-***Bangert*** plea withdrawal argument, and requests an evidentiary hearing, the

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Although the State took the position that a prima facie showing had not been made, it argued from the entire record that Hedrick's claims lacked a basis. Hedrick never requested the opportunity to present additional evidence. Even if we were to accept Hedrick's contention that he made a prima facie showing and was entitled to an evidentiary hearing, the hearing held was the functional equivalent of an evidentiary hearing.

Nelson/Bentley[4] test is used to determine whether a hearing is required. *See* ***Howell***, 2007 WI 75, ¶74.

¶7 Hedrick claims the circuit court's plea colloquy failed to explore whether mental illness impaired his ability to understand and enter a guilty plea and it failed to secure an admission of conduct supplying a factual basis for the sexual assault conviction. In line with his application for relief under WIS. STAT. § 974.06, we construe Hedrick's claims to be that his plea was constitutionally deficient. To be constitutionally sound, there must be an affirmative showing or an allegation and evidence showing that the plea was knowingly, voluntarily, and intelligently made, including that the effective waiver of federal constitutional rights was knowing and intelligent. ***Boykin v. Alabama***, 395 U.S. 238, 242-43 (1969); ***Howell***, 2007 WI 75, ¶23; ***Bangert***, 131 Wis. 2d at 257; ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994). It follows that the court must necessarily explore defendant's capacity to make informed decisions. ***Brown***, 293 Wis. 2d 594, ¶30. The relevant inquiry is whether Hedrick actually understood the proceeding. *See* ***State v. Bartelt***, 112 Wis. 2d 467, 482, 334

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[4] ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

> To entitle a defendant to an evidentiary hearing under ***Nelson/Bentley***, a defendant must "allege [] facts which, if true, would entitle the defendant to relief.... However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." A defendant's ***Nelson/Bentley*** motion must meet a higher standard for pleading than a ***Bangert*** motion.
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> ***State v. Howell***, 2007 WI 75, ¶75, ___ Wis. 2d ___, 734 N.W.2d 48, (2005AP731-CR).

N.W.2d 91 (1983). The requirement that all pleas be supported by evidence establishing a factual basis to support the plea also implicates constitutional due process. *See* ***Fosnow***, 240 Wis. 2d 699, ¶8.

¶8 Here, without deciding whether Hedrick met his burden to require an evidentiary hearing, the circuit court looked to the record to determine if it conclusively demonstrates that relief is not warranted. *See* ***Howell***, 2007 WI 75, ¶77 ("If the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court in its discretion may grant or deny an evidentiary hearing."). The circuit court concluded that the plea colloquy, although not perfect, did meet the constitutional requirements for the acceptance of a plea and that "the defense has not met its burden here with regard to his motion." The determination that the record establishes that a defendant is not entitled to relief is a question of law that we review independently of the circuit court, although benefiting from its analysis. *See* ***id.***, ¶78. The circuit court's decision not to hold an evidentiary hearing is reviewed for an erroneous exercise of discretion. ***Id.***, ¶79.

¶9 With his motion to withdraw his plea, Hedrick included a summary and evaluation of his mental health and medications at the time of the plea. The author of the summary concludes that it was probable that at the time of the plea, Hedrick was not yet stabilized on his medications and that there was some merit to Hedrick's self-evaluation at that time that he was over medicated, could not comprehend anything he read, was subject to mood shifts, and lacked clarity of his environment.

¶10 The plea questionnaire indicates that Hedrick was then receiving treatment for a mental illness or disorder and that he was taking "Remeron-for

depression." During the plea colloquy, the circuit court did not ask Hedrick about his mental health or the medications he was then taking in treatment. Yet at no time during the plea colloquy did Hedrick exhibit any inability to understand or confusion about the proceeding. At an arraignment held three months earlier, the circuit court was informed that Hedrick was under a mental commitment order, was suffering from depression, and was being treated with medications monitored by a doctor. Indeed the circuit court authorized Hedrick's secured placement in the mental health ward of the local hospital if his treating physician recommended it. About six weeks before the plea hearing, the circuit court questioned Hedrick about his desire to withdraw his not guilty by reason of mental disease or defect plea. Hedrick exhibited no problems with comprehending the consequences of withdrawing that portion of his plea. Two months after entry of Hedrick's plea, at sentencing, defense counsel explained that despite correspondence by Hedrick suggesting he wanted to withdraw his plea, Hedrick did not wish to withdraw his plea. The circuit court addressed Hedrick personally and ascertained his understanding of going forward based on the plea and giving up his right to trial. Hedrick acknowledged that he understood the proceedings to date. He also explained that he understood the elements of the sexual assault charge and although he didn't intend to commit a crime, he did the things alleged to constitute sexual assault.

¶11 We conclude the record establishes that Hedrick is not entitled to relief. Hedrick never expressed an inability to understand the plea proceeding or the waiver of his constitutional rights. The circuit court was aware of his mental health status and found it did not impose an impediment to Hedrick's ability to enter a guilty plea. The discussion with Hedrick at sentencing goes a long way in demonstrating that Hedrick knowingly and voluntarily entered his plea. Hedrick

gives no explanation why his confirmation of his understanding and the plea at sentencing was to be disbelieved or inadequate. Hedrick's claim that there was no factual basis for the sexual assault conviction is without merit. As the circuit court noted, the preliminary hearing established a factual basis. Hedrick admitted to the alleged acts even though he maintained that he didn't think those acts should constitute a crime. Hedrick's plea was constitutionally sound and the circuit court did not erroneously exercise its discretion in not conducting an evidentiary hearing on Hedrick's motion to withdraw.

¶12 Hedrick suggests his plea to the failure to comply charge lacked a factual basis and is not supported by a colloquy establishing his understanding of the elements of that crime.[5] It is undisputed that Hedrick has served the two-year prison sentence imposed for that conviction. A motion for postconviction relief under WIS. STAT. § 974.06(1) requires that the movant be "a prisoner in custody under sentence of a court." Hedrick's is no longer in custody under the sentence for the failure to comply conviction. The circuit court correctly concluded that it lacked authority to act with respect to the failure to comply conviction. *See* ***Thiesen v. State***, 86 Wis. 2d 562, 570, 273 N.W.2d 314 (1979). We must adhere to the jurisdictional prerequisites of WIS. STAT. § 974.06, and therefore reject the application of ***State v. Lange***, 2003 WI App 2, ¶¶35-36, 259 Wis. 2d 774, 656 N.W.2d 480 (Ct. App. 2002), that convictions stemming from a singular, global plea agreement remain interconnected for the purpose of remedying the defendant's repudiation of part of the plea agreement.

[5] In a single sentence, Hedrick suggests that his misunderstanding as to the elements of the failure to comply charge and belief that he had no defense to that charge influenced his decision to enter a guilty plea on the sexual assault charge. We need not consider arguments not developed. ***Estrada v. State***, 228 Wis. 2d 459, 465 n. 2, 596 N.W.2d 496 (Ct. App. 1999).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.