COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP454-CR **Cir. Ct. No. 2005CF20**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALLAS R. PAZNONSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dallas Paznonski appeals a judgment of conviction, entered upon his no contest plea, on three charges and an order denying his motion to withdraw his plea. Paznonski complains the plea colloquy was inadequate and he was therefore entitled to at least an evidentiary hearing on

his motion. Because Paznonski has failed to make the requisite showing to entitle him to relief, we affirm the judgment and order.

Background

¶2 In March 2005, Paznonski was charged with one count each of repeated sexual assault of a child, as party to a crime; child enticement, as party to a crime and with a dangerous weapon; and felony intimidation of a victim. In July 2005, an amended Information charged Paznonski with one count of sexual assault of a child under the age of thirteen, with a dangerous weapon; one count of false imprisonment; two counts of felony intimidation of a victim, with a dangerous weapon; two counts of exposing his genitals; three counts of child enticement; and six counts of sexual assault of a child under the age of thirteen. These fifteen counts were all charged as party to a crime, and all carried a repeat offender enhancer.

¶3 Paznonski eventually agreed to plead no contest to two counts of first-degree sexual assault of a child, one count of which included the weapons enhancer, and one count of child enticement, all as party to a crime. The State agreed to dismiss the remaining charges and not to charge Paznonski with any other offenses it knew of on the date of the plea. The State further agreed to argue within the sentencing recommendation provided by the presentence investigation.

¶4 Paznonski completed a plea questionnaire and waiver of rights form. The waiver form stated, in relevant part, that "the judge is not bound by any plea agreement or recommendation and may impose the maximum penalty." During the plea colloquy, the court discussed with Paznonski the terms of the plea agreement, the voluntariness of his plea, the information in the plea questionnaire, the elements of the offenses, and the maximum possible penalties. The court did

not, however, personally advise Paznonski it was not bound by the plea agreement, nor did it otherwise inquire if Paznonski understood that to be the case.

¶5 The PSI recommended thirty-five to forty years' initial confinement plus fifteen to twenty years' extended supervision for each of the sexual assault charges and ten years' initial confinement with ten years' extended supervision for the child enticement charge. Consistent with the plea agreement, the State recommended a sentence of forty years' initial confinement and twenty years' extended supervision for each sexual assault, concurrent to a fifteen-year sentence Paznonski was already serving. Paznonski argued for a twenty-five year sentence. The court ultimately accepted the plea and sentenced Paznonski to thirty-six years' initial confinement and ten years' extended supervision for each sexual assault count, and ten years' initial confinement with ten years' extended supervision for the child enticement. All three sentences would be concurrent to each other and the sentence Paznonski was already serving.

¶6 Following entry of the judgment of conviction, Paznonski moved to withdraw his plea based on a defective colloquy. The court denied the motion without an evidentiary hearing, stating Paznonski had failed to show prejudice. Paznonski appeals.

Discussion

¶7 A circuit court is required to personally advise the defendant it is not bound by a plea agreement. ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. When statutory or court-mandated duties are not fulfilled at a plea hearing, the defendant may move to withdraw his plea. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). The defendant bears the initial burden of showing the plea was defective because of the court's failure to perform

mandatory procedures. ***Id.*** If a defendant makes a successful showing, the burden shifts to the State to show, through clear and convincing evidence, that the defendant's plea was knowing, intelligent, and voluntary despite the inadequate colloquy. *See* ***id.***

¶8 Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law we review de novo. ***Id.*** If the motion is sufficient, the court must hold an evidentiary hearing. ***Id.*** If the motion is insufficient, the court may use its discretion in determining whether to grant or deny a hearing. ***Id.*** We review discretionary determinations for an erroneous exercise of that discretion. ***Id.***

¶9 The court denied Paznonski's motion on the basis that he had not shown prejudice. Paznonski thus contends "[t]he only issue for this court … is whether the court properly ruled that the prejudice rule applied to a ***Hampton*** violation…." He further argues that whether his pleadings were technically sufficient was not ruled upon by the circuit court and therefore need not be addressed by this court. Because the sufficiency of pleadings is a question of law, and we are not bound by a circuit court's conclusions of law, *see* ***State v. Olson***, 2001 WI App 284, ¶6, 249 Wis. 2d 391, 639 N.W.2d 207, the fact that the circuit court failed to address the content of the pleadings is irrelevant. We may affirm a decision on grounds other than those used by the circuit court. *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992).

¶10 The State concedes the colloquy was deficient because of the court's failure to advise Paznonski it was not bound by the plea, as required by ***Hampton***. However, a defendant alleging error in a colloquy must also allege "he in fact did not know or understand the information which should have been provided at the plea hearing…." ***Bangert***, 131 Wis. 2d at 274. ***Hampton*** reiterates that the defendant who complains the circuit court did not advise him that the court need not follow the plea agreement must allege "that he did not understand that the court was not bound" before the defendant is entitled to an evidentiary hearing on a motion to withdraw the plea. ***Hampton***, 274 Wis. 2d 379, ¶73.

¶11 On its face, Paznonski's motion for withdrawal is insufficient. It alleges only the circuit court's error and does not include an allegation that he failed to understand the court was not bound by his agreement with the State. Although Paznonski offered an amendment to his motion, the proposed amendment was also insufficient. Paznonski sought to allege that he would not have entered the plea agreement had the court given him a ***Hampton*** warning. That allegation is not, however, substantively the same as failure to understand the court was not obligated to follow the agreement.

¶12 Because the motion is insufficient as a matter of law, it would be left to the circuit court's discretion to grant or deny an evidentiary hearing on the motion. We conclude the court has already done so by determining that Paznonski suffered no prejudice, a conclusion adequately supported by the record. The waiver of rights form—which Paznonski signed, discussed with his attorney, and stated he understood—explicitly advised him the court would not be bound by the plea agreement. The plea colloquy was adequate in all other respects. The court did not exceed the terms of the plea agreement. Moreover, Paznonski's contention he would not have entered the plea if the court had personally advised him it was

not bound by the agreement rings hollow: the plea agreement reduced his total potential maximum sentence by more than four hundred years.[1] The motion to withdraw was properly denied.

By the Court.—Judgment and order affirmed.

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

[1] Paznonski asks us to apply the plea withdrawal methodology from a line of cases including ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). However, it is ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), that controls cases involving defective plea colloquies. *See* ***State v. Hampton***, 2004 WI 107, ¶¶48, 51, 274 Wis. 2d 379, 683 N.W.2d 14.