COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2008AP459-CR
2008AP460-CR
2008AP461-CR
2008AP462-CR
2008AP463-CR

Cir. Ct. Nos. 2006CM201
2006CF6
2006CF168
2006CF172
2006CF173

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARRY F. KRIVOSHEIN, III,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Vilas County: ROBERT E. KINNEY and PATRICK F. O'MELIA, Judges. *Judgments affirmed; order affirmed in part; reversed in part and cause remanded with directions*.

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

¶1 PER CURIAM. Harry Krivoshein, III appeals an order denying his postconviction motion, without an evidentiary hearing, to withdraw his no contest pleas. Krivoshein argues the circuit court failed to advise him it was not bound by the State's sentencing recommendation. He contends this constitutes a prima facie showing the court accepted his plea without complying with WIS. STAT. § 971.08(1)(a)[1] or other mandatory procedures, and that he is therefore entitled to an evidentiary hearing on whether he entered his plea knowingly and voluntarily under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). We agree. We reverse the part of the order[2] denying Krivoshein's motion to withdraw his no contest pleas without a hearing and remand to the circuit court for a hearing on the motion.[3]

BACKGROUND

¶2 This is a consolidated appeal of five cases in which Krivoshein was charged with a panoply of offenses over a twelve-month period. The original charges included six counts of felony bail jumping, three counts of issuing worthless checks, three counts of forgery, and one count each of battery, false imprisonment, and disorderly conduct. Krivoshein agreed to plead no contest to

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

[2] Order filed February 7, 2008.

[3] We reverse the order in part because the order also granted Krivoshein's request for 134 days' sentence credit, which he does not challenge. Procedurally, Krivoshein's appeal of the order denying his request to withdraw his no contest pleas also challenges the judgments of conviction. However, we need not reach this issue because we conclude he is entitled to an evidentiary hearing to determine whether his pleas were knowingly, voluntarily, and intelligently entered.

one count each of forgery, false imprisonment, felony bail jumping, and disorderly conduct. In exchange, the State would dismiss two counts of felony bail jumping and the battery charge, and dismiss but read in for the purposes of restitution several remaining charges. The State also agreed to recommend the court impose and stay a five-year prison term and order probation for five years, with six months' jail as a condition of probation.

¶3 Before the plea and sentencing hearing, Krivoshein signed a "plea questionnaire/waiver of rights" form. The form states that he "understand[s] the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty." The form also states the maximum penalty Krivoshein faced.

¶4 At the plea hearing and sentencing, the court conducted the following colloquy before accepting Krivoshein's no contest pleas.

> The Court: First of all, did anyone make any threat or use any force of any kind which enters into your decision to plead no contest?
>
> Mr. Krivoshein: No, sir.
>
> The Court: Did anyone make any promise to you in order to get you to plead no contest?
>
> Mr. Krivoshein: No, sir.
>
> The Court: Did anyone tell you what the judge was likely to do about it if you pleaded no contest?
>
> Mr. Krivoshein: No, Your Honor.
>
> The Court: The maximum penalty for forgery is 6 years in prison and a $10,000 fine or both. Do you understand that?
>
> Mr. Krivoshein: Yes, I do, Your Honor.
>
> The Court: The maximum penalty for … false imprisonment is 6 years in prison or a $10,000 fine or both,

> the maximum penalty for felony bail jumping is 6 years in prison or a $10,000 fine or both, and the maximum penalty for misdemeanor disorderly conduct is 90 days in jail or a $1,000 fine or both.
>
> In other words, your maximum exposure is 18 years and 90 days in jail and $31,000 in fines. Do you understand that?
>
> Mr. Krivoshein: I do, Your Honor.
>
> The Court: Knowing all of that, do you still wish to plead no contest to those four charges?
>
> Mr. Krivoshein: I do, Your Honor.

At the close of the hearing, the court sentenced Krivoshein to: (a) two concurrent five-year sentences, each consisting of two and a half years' initial confinement and two and a half years' extended supervision; (b) ninety additional days in prison, concurrent with the five-year sentences; and (c) three years' probation, consecutive to the five-year sentences. These sentences exceeded the State's recommendation.

¶5 Krivoshein filed a postconviction motion to withdraw his pleas, arguing that the circuit court failed to inform him it was not bound by the sentencing recommendation, and that his pleas were not entered knowingly and voluntarily. The court denied the motion without a hearing, concluding Krivoshein had not made any showing the plea hearing and sentencing court had failed to comply with mandatory procedures. In the court's view, the colloquy, viewed together with the plea questionnaire, unequivocally showed Krivoshein had been advised the court need not follow the State's recommendations.

Discussion

¶6 Whether a postconviction motion to withdraw a no contest plea entitles a defendant to an evidentiary hearing is a question of law, which we

review without deference to the circuit court. ***State v. Howell***, 2007 WI 75, ¶30, 301 Wis. 2d 350, 734 N.W.2d 48. Our supreme court established the procedure for determining whether a defendant is entitled to an evidentiary hearing in ***Bangert***. According to ***Bangert***, an evidentiary hearing is appropriate if two conditions are fulfilled. First, the defendant's motion to withdraw the pleas must make a prima facie showing the circuit court accepted the plea without conforming with WIS. STAT. § 971.08 or other mandatory procedures. Second, the motion must allege that the defendant "in fact did not know or understand the information which should have been provided at the plea hearing…." ***Bangert***, 131 Wis. 2d at 274.[4]

¶7 WISCONSIN STAT. § 971.08(1)(a) imposes the following requirement on the court before accepting a plea of guilty or no contest: "Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Compliance with § 971.08(1)(a) requires courts to "advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court." ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 24, 203 N.W.2d 638 (1973). Our supreme court recently affirmed the duty mandated by ***White***, clarifying that the court must ascertain whether the defendant understands this information. ***State v. Hampton***, 2004 WI 107, ¶3, 274 Wis. 2d 379, 683 N.W.2d

[4] The burden is on the defendant to show a prima facie violation of the WIS. STAT. § 971.08(1)(a) or other mandatory duties and allege he did not know or understand the court was not bound by the plea agreement. If the defendant carries this burden, the burden then shifts "to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered despite the inadequacy of the record at the time of the plea's acceptance. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

14. While "there is no single, inflexible way for the court to discharge this duty," at minimum, the court must have a personal dialogue with the defendant. ***Id.***, ¶3.

¶8 Krivoshein argues the plea colloquy was defective because the court failed to inform him it was not bound by the sentencing recommendation. ***Hampton***, he asserts, does not permit a court to infer the defendant's knowledge that the court is not bound by the plea agreement. Nor does it allow the court to rely on the defendant's completion of a plea questionnaire. Rather, he contends, ***Hampton*** requires a personal, on-the-record inquiry that specifically addresses the defendant's expectation the court will follow the State's recommendation.

¶9 The court's failure to make such an inquiry, Krivoshein argues, is evidence the court did not comply with WIS. STAT. § 971.08 or other mandatory procedures. This failure, he concludes, satisfies the first prong of ***Bangert***. The second prong is also satisfied, he asserts, because he alleges in his motion to withdraw his pleas that he did not know or understand the court was not bound by the State's recommendations.

¶10 The State responds that it is clear from Krivoshein's responses to the court during the plea colloquy that he was aware the court was not bound by the plea agreement. The State argues Krivoshein's affirmations that he (a) had received no promises from anyone, (b) had not been told what the judge was likely to do, and (c) was aware of his maximum penalty exposure, unequivocally indicate he understood the court was free to sentence him as it saw fit. Thus, the State contends that because the court made no error, Krivoshein is not entitled to an evidentiary hearing.

¶11 At the postconviction motion hearing, the court agreed with the State. Pointing to the court's inquiry about whether anyone had told Krivoshein what the court was likely to do, the court concluded Krivoshein's response could only mean that he understood "the court can do what [it] wants." This response, viewed together with the plea questionnaire and the court's discussion of Krivoshein's maximum penalty exposure, convinced the court Krivoshein "was advised that the judge is not bound by the recommendations."

¶12 In ***Hampton***, the Wisconsin Supreme Court found a plea colloquy fatally flawed that was in many ways similar to the one here. While the ***Hampton*** court acknowledged the circuit court had engaged in extensive discussion with the defendant, "at no point … did the circuit court personally advise the defendant that it was not bound by the plea agreement, or ask the defendant whether he understood that the court was not bound by the plea agreement." ***Hampton***, 274 Wis. 2d 379, ¶15. The Krivoshein colloquy is defective for the same reason.

¶13 As in ***Hampton***, the court here informed Krivoshein of his maximum penalty exposure and asked whether anyone had made him any promises. Although the court did not mention the plea questionnaire here as it did in ***Hampton***, like the ***Hampton*** defendant, Krivoshein signed a plea questionnaire informing him the judge was not bound by any plea agreement. These questions, together with the plea questionnaire, did not satisfy the court's obligation to personally advise the defendant and ascertain his understanding in ***Hampton***. Accordingly, they cannot have satisfied the court's duty here.

¶14 It is only the court's inquiry about whether anyone told Krivoshein what the judge was likely to do if he pleaded no contest that offers any opportunity to distinguish the Krivoshein colloquy from the one in ***Hampton***. However, this

inquiry can only offer an inference that he understood the court could disregard the State's recommendation. The ***Hampton*** court explicitly rejected the argument that the court could fulfill its obligation by inferring the defendant's comprehension. "The circuit court cannot satisfy its duty by inferring from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands that the court is not bound by the plea agreement." ***Hampton***, 274 Wis. 2d 379, ¶69. Rather, "the court must *advise the defendant personally* that the court is not bound by the terms of that agreement and ascertain that the defendant understands this information." ***Id.***, ¶73 (emphasis added).

¶15 In ***Hampton,*** it was

> undisputed that the circuit court did not advise [the defendant] that it was not bound by the plea agreement by expressly communicating this information to [him] at the plea hearing. The court never asked [the defendant] if he understood that the court was not bound by the plea agreement.

Id., ¶66. The same is true here. Krivoshein has therefore made the requisite prima facie showing that the plea colloquy failed to conform with WIS. STAT. § 971.08 or other mandatory procedures. *See* ***Bangert***, 131 Wis. 2d at 274. This satisfies the first condition necessary to entitle him to an evidentiary hearing.

¶16 Krivoshein has also satisfied the second ***Bangert*** condition requiring he allege he did not know or understand the information that should have been provided at the colloquy. *See* ***id.*** Krivoshein's motion asserts that he "did not understand [the court] could impose a sentence in excess of the State's recommendation," and although he had signed a plea questionnaire containing that information, "[he] did not fully understand that provision."

¶17 While Krivoshein is not presently entitled to withdraw his no contest pleas, he is entitled to an evidentiary hearing on whether he entered these pleas knowingly and voluntarily.

By the Court.—Judgments affirmed; order affirmed in part; reversed in part and cause remanded with directions.

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