

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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 No. 2008AP2965-CR

Cir. Ct. No. 2008CF16

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES L. STANDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Judgment and order reversed and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Charles Stands appeals judgments convicting him of operating with a prohibited alcohol content, fifth offense or more, and obstructing an officer. He also appeals an order denying postconviction relief.

The issues are whether the court erred by denying his postconviction motion to withdraw his pleas without an evidentiary hearing, and whether the court should have barred consideration of a prior OWI conviction. We conclude that the court's plea colloquy did not comport with the standards for ensuring a knowing and voluntary plea. We therefore reverse the judgment of conviction and the order denying postconviction relief, and remand for a hearing at which the State shall have the burden of proving that the defendant entered knowing, intelligent, and voluntary pleas notwithstanding defects in the plea colloquy. *See State v. Hoppe*, 2009 WI 41, ¶7, 317 Wis. 2d 161, 765 N.W.2d 794.

¶2 The charges the State filed against Stands included operating with a prohibited alcohol concentration (PAC) as a fifth or greater offense. In support the complaint listed five prior convictions for operating while intoxicated or with a prohibited alcohol content. Stands collaterally attacked two of those convictions, alleging that during those proceedings he did not validly waive his right to counsel. The court granted relief with regard to one of the proceedings, leaving him with four prior convictions for sentencing purposes. He subsequently entered a no contest plea to the charges of operating with a PAC and obstructing an officer. In exchange for the plea, the State agreed to recommend no incarceration on the obstructing charge.

¶3 At the plea hearing the court did not inform Stands of the maximum penalties that he faced, or that it was not bound by the plea agreement on sentencing and could sentence him up to the maximum. However, the court did engage in the following exchange with Stands:

THE COURT: I'm looking at a form entitled Plea Questionnaire and Waiver of Rights which your attorney just handed to me. Did you sign that form?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have enough time to read it and go over it before you signed it?

THE DEFEDANT: Yes, sir.

THE COURT: Is there anything in that form that you do not understand?

THE DEFENDANT: No, sir.

The plea questionnaire referred to in the colloquy explained the maximum penalties, and advised Stands that the judge was not bound by the plea agreement and could impose the maximum penalties listed. The court also did not explain to Stands at the plea hearing that his pleas might result in deportation if he were not a citizen.

¶4 Stands subsequently filed a postconviction motion to withdraw his plea on grounds the circuit court: (1) did not personally inform him at the plea hearing that it was not bound by the plea agreement and could sentence Stands up to the maximum penalties for his offenses; and (2) did not advise him that his pleas could result in deportation if he were not a citizen of this country. The circuit court denied the motion without requiring the State to show that Stands understood the information that the court omitted from the plea colloquy, because Stands' plea questionnaire form contained the missing information, and Stands did not allege nor show that his pleas to the charges were likely to result in deportation.

¶5 Among the mandatory duties the circuit court must perform during the plea colloquy are ensuring that the defendant understands the range of punishments available to the court, and the fact that the court is not bound by the terms of any plea agreement, including recommendations from the prosecutor.

Hoppe, 317 Wis. 2d 161, ¶18 (quoting *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906). If the court does not perform its mandatory duties during the colloquy, the burden shifts to the State to show that the defendant in fact knew and understood the required information. See *State v. Basley*, 2006 WI App 253, ¶17, 298 Wis. 2d 232, 726 N.W.2d 671. The circuit court may use the defendant's plea questionnaire when performing its plea colloquy duties. *Hoppe*, 317 Wis. 2d 161, ¶30.

A circuit court may not, however, rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. Although a circuit court may refer to and use a Plea Questionnaire/Waiver of Rights Form at the plea hearing, the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in *Brown*. The point of the substantive in-court plea colloquy is to ensure that the defendant's guilty plea comports with the constitutional requirements for a knowing, intelligent, and voluntary plea.

Id., ¶31. We determine the sufficiency of the plea colloquy independently, as a question of law. *Id.*, ¶17.

¶6 The circuit court did not sufficiently ensure during the plea colloquy that Stands understood the maximum penalties or that the court was not bound by the plea agreement and could sentence Stands up to the maximum. The plea hearing transcript is completely silent on those matters. To ensure Stands' understanding of them, the trial court relied completely on the plea questionnaire. The supreme court has made clear in *Hoppe* that such complete reliance on the questionnaire makes for an inadequate plea colloquy. The circuit court must use a substantive colloquy to satisfy each of its duties. *Id.*, ¶31. "The plea colloquy cannot ... be reduced to determining whether the defendant has read and filled out the [plea questionnaire]. Although we do not require a circuit court to follow

inflexible guidelines when conducting a plea hearing, the [questionnaire] cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant.” *Id.*, ¶32. No such colloquy occurred on Stands’ understanding of information that is undisputedly critical to an informed plea. He is therefore entitled to the presumption that he entered an unknowing plea, subject to the State’s opportunity to prove by other means that he understood the full sentencing ramifications of his pleas.

¶7 Stands does not have grounds to withdraw his plea based on the circuit court’s failure to advise him on the deportation consequences of his pleas. A defendant claiming the right to withdraw a plea on those grounds must show that the plea is likely to result in deportation. *State v. Douangmala*, 2002 WI 62, ¶23, 253 Wis. 2d 173, 646 N.W.2d 1. Here, Stands made no allegation or showing that he is potentially subject to deportation as a non-citizen.

¶8 Stands’ brief identifies the third issue on appeal as whether the trial court properly counted four rather than three of his prior convictions for sentencing purposes. However, he provides no argument on the issue. In fact, he states that in ruling on the issue the trial court “did assess the situation correctly.” Because he fails to argue any grounds for reversal based on this issue, we need not address it.

¶9 We conclude that Stands has made a prima facie showing for plea withdrawal. We therefore reverse the judgment of conviction and order denying postconviction relief. We remand for further proceedings to permit the State to satisfy its burden to show that Lange’s plea was knowingly and voluntarily entered. If the State satisfies its burden, the circuit court shall reinstate the judgment of conviction. However, if the State fails in meeting its burden, the

judgment of conviction shall remain reversed, and the State may reinstate the original charges against Stands. *See State v. Lange*, 2003 WI App 2, ¶47, 259 Wis. 2d 772, 656 N.W.2d 480.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

