COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2669 **Cir. Ct. No. 2003CF005521**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERSHEL RAMONE MCCRADIC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Hershel Ramone McCradic, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion without a hearing.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

McCradic alleges errors in the plea and sentencing hearings. We agree with the circuit court's conclusion that McCradic is not entitled to relief. Therefore, we affirm the order.

BACKGROUND

¶2 In March 2004, McCradic entered an ***Alford*** plea[2] to one count of repeated acts of sexual assault of the same child, a violation of WIS. STAT. § 948.025 (1999-2000). In exchange for the plea, the State pursued only the single charge, not the eight originally charged counts of second-degree sexual assault. Additionally, the State agreed to recommend a sentence of no more than fifteen years' initial confinement, leaving the extended supervision term to the circuit court. On April 30, 2004, the court sentenced McCradic to thirty-five years' initial confinement and ten years' extended supervision.

¶3 Appellate counsel was appointed but did not file an appeal. McCradic petitioned this court for a writ of *habeas corpus*; that petition was denied by order dated June 8, 2009, because McCradic had not exhausted all of his remedies in the circuit court. On September 23, 2009, McCradic filed a WIS. STAT. § 974.06 motion for relief, seeking resentencing or plea withdrawal. The court denied the motion without a hearing. McCradic appeals. Additional facts will be discussed below as necessary.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea wherein a defendant pleads guilty but maintains his or her innocence. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111 (1995).

DISCUSSION

¶4 A defendant seeking to withdraw a plea after sentencing must establish, by clear and convincing evidence, that withdrawal is necessary to remedy some manifest injustice. ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). Scenarios presenting "manifest injustice" include, among other things, an involuntary plea or ineffective assistance of counsel.[3] *See* ***id.***, 213-14 n.2.

¶5 McCradic's motion is based primarily on a claim that his plea was not knowing, intelligent, and voluntary. The motion contains elements of both a ***Bangert*** motion, which alleges defects in a plea colloquy, and a ***Nelson/Bentley*** motion, which alleges factors extrinsic to the plea colloquy rendered a plea invalid.[4]

¶6 First, McCradic complains of two errors in the plea colloquy. When raising ***Bangert*** allegations, a defendant must allege that there was a specific defect in the colloquy and that he failed to understand the information omitted by the defect. *See* ***State v. Hampton***, 2004 WI 107, ¶57, 274 Wis. 2d 379, 683 N.W.2d 14.

¶7 McCradic claims the colloquy was deficient because the circuit court did not follow WIS JI—CRIMINAL SM-32, the special materials relating to the

[3] An invalid plea is constitutionally infirm, therefore bringing the motion within the WIS. STAT. § 974.06 realm. *See* WIS. STAT. § 974.06(1).

[4] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

court's taking of a guilty plea. While use of the special materials—which provide an outline and model a court can follow—has been encouraged by the courts, *see* ***Hampton***, 274 Wis. 2d 379, ¶44, the circuit courts are not required to follow any rigid script, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987). In any event, McCradic's burden cannot be fulfilled "merely by alleging that 'the plea colloquy was defective' or 'the court failed to conform to its mandatory duties during the plea colloquy.'" ***Hampton***, 274 Wis. 2d 379, ¶57. Thus, McCradic's claim that the colloquy was defective because the court did not exactly follow the specific materials is too vague to warrant relief. Further, McCradic failed to allege what he did not understand as a result of this so-called error.

¶8 McCradic makes a slightly more specific ***Bangert*** claim when he argues the circuit court inadequately discussed the constitutional rights he was surrendering because it referred to the plea questionnaire rather than specifically enumerating each right during the colloquy. *See* ***Hampton***, 274 Wis. 2d 379, ¶24. This argument fails because here, too, McCradic did not allege what information he did not comprehend as a result of the claimed error.

¶9 Further, contrary to McCradic's assertion, a circuit court may refer to a completed plea questionnaire during a colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-31, 317 Wis. 2d 161, 765 N.W.2d 794. Here, the court first inquired whether McCradic understood "every single thing" on the forms. He answered, "Yes, I did." The court then asked if that meant McCradic understood each of the constitutional rights listed in the middle front of the form. McCradic again answered affirmatively. The court went on to observe that the rights had "a check mark in the box in front of each of these rights. Does that mean that your attorney explained each right to you, and then you told him you understood it?" McCradic

responded, "Yes, ma'am." Finally, the court asked whether McCradic understood he was surrendering all those rights, including the right to a jury trial, by entering a plea. McCradic again responded affirmatively.

¶10 The circuit court did more than blithely refer to the plea questionnaire and hope that it was all-encompassing of the court's obligations. *See* ***id.***, ¶31 (questionnaire no substitute for substantive plea colloquy). It referred to specific elements that indicated a particular conversation with counsel regarding McCradic's constitutional rights. *See* ***id.***, ¶30. This information sufficiently satisfied the circuit court—and satisfies this court—that McCradic understood the constitutional rights he was surrendering. Indeed, our review of the transcript reveals that the circuit court fully complied with its obligations. There is no basis under ***Bangert*** to justify plea withdrawal.

¶11 McCradic's next group of alleged errors are ***Nelson/Bentley*** issues, things extrinsic to the plea colloquy and court-mandated duties. Thus, we review whether McCradic alleged sufficient material facts which, if true, would entitle him to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A sufficient motion requires a hearing. ***Id.*** If the motion raises insufficient facts or only conclusory allegations, or if the record demonstrates no entitlement to relief, the court may deny the motion without a hearing. ***Id.*** The decision to grant or deny a hearing in that case is discretionary. ***Id.***

¶12 McCradic alleges that he was not sufficiently apprised of what statute and penalties he was pleading to. In some ways, this claim includes elements of a ***Bangert*** claim, but we discuss it under the ***Nelson/Bentley*** analysis because McCradic's claimed troubles extend beyond the plea colloquy itself.

¶13 McCradic was originally charged with eight counts of second-degree sexual assault of a child for acts alleged to have occurred between December 4, 2001 and March 4, 2002. At the time, second-degree sexual assault of a child was a Class BC felony, subject to a maximum of thirty years' imprisonment. *See* WIS. STAT. § 948.02(2) (1999-2000) and WIS. STAT. § 939.50(3)(bc) (1999-2000). As part of the plea agreement, McCradic pled to one count of engaging in repeated acts of sexual assault of the same child, contrary to WIS. STAT. § 948.025(1) (1999-2000). That statute provides that whoever commits three or more violations of § 948.02(2) (1999-2000) within a specific timeframe is guilty of a Class B felony. *See* § 948.025(1) (1999-2000). At the time, a Class B felony was punishable by up to sixty years' imprisonment. *See* WIS. STAT. § 939.50(3)(b) (1999-2000). The plea questionnaire advised McCradic of the sixty-year maximum, as did the court. McCradic confirmed to the court he understood the penalty during the plea colloquy.

¶14 McCradic now claims confusion because in its opening, the State referred to a Class D felony.[5] We note, however, McCradic never alleges that, because the State mentioned that felony class, he expected to be subject to ten years' imprisonment. Indeed, such a belief would be contrary to McCradic's express understanding that the State was recommending at least a fifteen-year sentence. Further, the State went on to correctly advise the court, and McCradic, that McCradic faced a sixty-year maximum sentence. The record conclusively demonstrates McCradic knew the maximum penalty he faced.

[5] Our review of the record indicates that it is likely the prosecutor simply misspoke, as everything else refers to the Class B penalties.

¶15 McCradic goes on to claim that because he acted in 2001-2002, he can only be charged with a Class C felony, which had a maximum exposure of forty years. McCradic misreads his statute books.

¶16 At first glance, the printed text of WIS. STAT. § 948.025(1) (2001-02) might suggest that McCradic's crime was a Class C felony. McCradic fails to appreciate, however, that this classification did not exist until February 1, 2003. *See* 2001 Wis. Act 109, §§ 882, 9459. The 2001-02 bound statute book includes both the revised statute, effective February 1, 2003, and a note explaining the text of the statute effective prior to February 1, 2003. McCradic was charged with, apprised of, and sentenced under the appropriate felony classification and statutes.

¶17 McCradic next complains that the trial court breached the plea agreement by sentencing him to well in excess of the State's recommendation. This argument is baseless. The court advised McCradic that it was not bound by sentence recommendations. McCradic confirmed this understanding.[6] Additionally, it is well-established that Wisconsin courts do not participate in plea bargaining, and are not parties to the resulting agreements.

¶18 Cases McCradic cites for the proposition that courts are bound by plea agreements are inapposite. ***State v. Comstock***, 168 Wis. 2d 915, 485 N.W.2d 354 (1992), for instance, dealt with a court voiding, *sua sponte*, a previously accepted guilty plea after concluding it would be unable to give a harsh enough sentence on the pled-to charges. In any event, McCradic's plea agreement with

[6] The court at sentencing more than adequately explained its rejection of the recommendation.

the State included as a term not a fifteen-year term of initial confinement, but rather, a *recommendation* for a fifteen-year term of initial confinement.[7]

¶19 McCradic also presents a handful of generally baseless complaints. He first asserts that, at the plea hearing, "the defendant is questioning something about the plea agreement, and attempts to get some explanation, and tries to get the court to clarify" but the court cut off McCradic and his attorney because of the lunch hour. The record does not support any claim of error. The court was attempting to explain to McCradic the consequences of the plea and had just finished explaining that McCradic cannot possess any firearms. The transcripts shows the court then said, "Please, counsel. It's after lunch, and I'm trying to get this done. You can talk to him later." There is no record of anything McCradic or his attorney said. Thus, all the transcript establishes is that counsel was speaking to McCradic while the court was trying to address him. The transcript does not establish that the court prohibited McCradic from obtaining clarification, and it does not establish McCradic was seeking clarification.

¶20 McCradic complains that page one of the sentencing transcripts refers to second-degree sexual assault. That caption was placed on the transcript by the court reporter when she prepared it six months after the hearing, and, in any event, it recites the original charges. It does not form the basis for any valid claim of error.

[7] Based on McCradic's current misreading of the statutes and his misapprehension of the court's obligation to follow a plea sentencing recommendation, he claims trial counsel was ineffective for failing to object to the possible breach of the plea agreement. The record conclusively establishes no basis for counsel to object.

¶21 Finally, McCradic asserts he should be entitled to some relief because the circuit court, in response to his motion, ordered a correction to the judgment of conviction. The court observed that, in preparing the judgment of conviction, the clerk described the charge as repeated first-degree sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(a).[8] However, this appears to be only a scrivener's error as to the statute and charge description. The judgment of conviction properly reflects the sentence as ordered, and at all critical points in the transcript, the court refers to the proper charge and statute. The court has inherent authority to correct this type of error, but such an error does not demonstrate any substantive violation of McCradic's rights. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (clerk of court cannot correct error without court order).

¶22 McCradic's WIS. STAT. § 974.06 motion is insufficiently pled and, in any event, the record conclusively shows he is not entitled to relief. The court properly exercised its discretion in denying the motion without a hearing.

By the Court.—Order affirmed.

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

[8] WISCONSIN STAT. § 948.025(1)(a) did not exist at the time of McCradic's crime.