COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1846-CR **Cir. Ct. No. 2011CF671**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY L. FINLEY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. Judgment affirmed; order reversed, and cause remanded for further proceedings.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Timothy Finley, Jr., appeals a judgment of conviction and an order denying his postconviction motion for plea withdrawal or sentence commutation. Finley argues he made a prima facie showing that his plea

was not knowing and voluntary because he was not accurately apprised of the maximum potential sentence. Because Finley was significantly misinformed of the potential penalty, we reverse the order and remand for further proceedings.

BACKGROUND

¶2 Finley was charged with several crimes in connection with a domestic abuse incident. The case was resolved by a plea agreement, under which Finley pled no contest to one count of first-degree reckless endangerment, by use of a dangerous weapon, as a repeater. At the plea hearing, Finley's attorney tendered a completed plea questionnaire and waiver of rights form to the court. The form indicated, "The maximum penalty I face upon conviction is: 19 years, 6 months confinement and $25,000 fine and court costs." Concerning the potential penalty, the court's colloquy with Finley was as follows:

> THE COURT: The *maximum penalty* for the offense would be a fine of not more than $25,000 or *imprisonment* not more than twelve years and six months or both.
>
> MR. FINLEY: Yes, sir.
>
> THE COURT: Okay. I take it—are we pleading as a repeater?
>
> [THE STATE]: Yes, your Honor.
>
> THE COURT: Okay. That will be the *base penalty*. Then because you are a repeater, then they could increase the *incarceration period* by not more than an additional six years. And they are basing the repeater enhancement provision on the fact that you were convicted of possession of cocaine as a subsequent offender, and possession of THC as a subsequent offender on September 12th, 2008, in Brown County. Do you remember those felonies?
>
> MR. FINLEY: Yes, sir.
>
> THE COURT: And they are also charging that you used a dangerous weapon. And for the enhancement provision of using a dangerous weapon then the *term of imprisonment*

> can be increased by not more than five years for that. Do you understand that then?
>
> MR. FINLEY: Yeah.
>
> THE COURT: All right. So, *the maximum* you would look at then[,] nineteen years six months *confinement*. Do you understand the *maximum penalties*?
>
> MR. FINLEY: Yes, sir.

(Emphasis added.) The court ultimately accepted Finley's plea.

¶3 The court sentenced Finley as follows: "I am going to impose the maximum sentence in this case. I calculate that to be [23.5] years consisting of [18.5] years of initial confinement and [5] years of extended supervision." Finley later moved to withdraw his plea, arguing he was misinformed of the maximum potential penalty he faced. Further, he asserted he did not know the maximum penalty at the time of his plea.

¶4 The court held a nonevidentiary hearing on Finley's motion, at which the State argued Finley had failed to establish a prima facie case of a ***Bangert***[1] violation. The court agreed, holding:

> I'm satisfied the defendant has not made a prima facie case that the plea was made anything but knowingly and voluntarily. I think he knew fully well. I think if you look at that transcript, I went piecemeal by piecemeal, twelve point five, five, six, I went through exactly why it was being added on. He knew his base and he knew exactly each reason why the numbers would be added on. They are consistent with the information placed in the information.
>
> Now, in essence what he wants to claim is, oh, in that case it should get me out of this plea. I think where the information is provided clearly orally, and I think I'm required to provide the length of the sentence orally … I

[1] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

> think I'm required actually to tell him what his maximum penalty is orally on the offense.
>
> So, I orally have him sitting in that chair exactly right there. We are this distance apart, and I went over the base penalty and the reason why he was receiving each of the enhancements and what the enhancement was. Now, clearly he hasn't made a prima facie case to this Court that he didn't make that plea knowingly and voluntarily.

Finley now appeals.

DISCUSSION

¶5 Finley renews his argument that he is entitled to plea withdrawal because he was misinformed of the maximum penalty he faced. "When a defendant seeks to withdraw a guilty plea after sentencing, he [or she] must prove … that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (quoting ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836). One way to meet this burden is to show that the defendant did not knowingly, intelligently, and voluntarily enter the plea. ***Id.*** A defendant's plea is not knowing, voluntary and intelligent if he or she is not aware of the potential penalty he or she faces. ***Id.***, ¶35.

¶6 The framework for seeking plea withdrawal after sentencing was set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Whenever the procedure set forth in WIS. STAT. § 971.08[2] is not followed, or the court does not

[2] WISCONSIN STAT. § 971.08(1)(a) requires a court to "[a]ddress 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."

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

fulfill other mandated duties at the plea hearing, a defendant may move for plea withdrawal. ***Bangert***, 131 Wis. 2d at 274. The initial burden rests with the defendant to make a prima facie showing that the plea was accepted without the trial court's conformance with mandatory procedures. ***Id.*** The defendant must also allege he or she in fact did not know or understand the information that should have been provided at the plea hearing. ***Id.***

¶7 Once the defendant makes the prima facie showing and alleges a lack of understanding, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was nevertheless knowingly, voluntarily and intelligently entered. ***Id.*** The State may present the testimony of the defendant and defense counsel to establish the defendant's understanding. ***Id.*** at 275. Whether a defendant has correctly identified a flaw in the plea colloquy or sufficiently alleged lack of understanding are questions of law. ***Brown***, 293 Wis. 2d 594, ¶21.

¶8 The parties agree the circuit court accurately set forth the maximum penalty at the sentencing hearing: twenty-three and one-half years' imprisonment, comprised of up to eighteen and one-half years' initial confinement and five years' extended supervision. Finley argues that, because both the plea questionnaire form and the circuit court misinformed him of the maximum penalty, and he alleged he did not know the correct information, he made a prima facie case for plea withdrawal. Citing ***State v. Taylor***, 2013 WI 34, ¶33, 347 Wis. 2d 30, 829 N.W.2d 482, the State responds, "The present case involves small deviations that are insufficient to establish a prima facie ***Bangert*** violation."

¶9 Finley's appellate brief anticipated a ***Taylor*** small-deviation argument, as the State had argued that case's application at the motion hearing.

Finley therefore explained at length why ***Taylor*** was inapplicable to the facts of his case. Yet, the State responds with little more than a generic assertion based on a couple of quotations that lack context. We conclude the State's small-deviation argument is inadequately developed and fails to refute Finley's corresponding argument. The argument therefore does not merit further discussion. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we need not address undeveloped arguments); ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶10 The State also argues Finley could have simply computed the maximum penalty himself based on the numbers the court provided during the plea hearing. Specifically, the State contends:

> The circuit court correctly advised Finley that the maximum base penalty for his offense was twelve and one-half years.
>
> The court also correctly advised Finley that the incarceration period for this twelve and one-half year sentence could be increased by six years because he was charged as a repeater who had been convicted of a felony.
>
> Finally, the court correctly advised Finley that his term of imprisonment could be increased by another five years because he was charged with using a dangerous weapon.
>
> The court did not add up these numbers for Finley. But adding them is simple fifth grade arithmetic, and Finley, who completed twelve grades in school, is presumably smarter than a fifth grader. So presumably he could add 6 to 12½ to come up with 18½ and then add 5 more to that sum to come up with 23½ as the total number of years he faced as the maximum penalty by entering his plea. *See* ***Taylor***, 347 Wis. 2d 30, ¶33 n.8 (in some circumstances defendant may be presumed to understand even though specific explanation not shown on record).

(Record and statutory citations omitted.)

¶11 The State's argument fails in the first instance because it ignores the court's final computation, when after setting forth the above numbers, it advised Finley: "All right. So, the maximum you would look at then[,] nineteen years six months confinement." Technically, the State is correct when it asserts, "The court did not add up these numbers for Finley." That does not, however, favor the State's position because the Court did add up *some* numbers. The State's assertion is true only because the court either added up the wrong numbers or miscalculated the correct numbers.

¶12 More importantly, the State's argument fails to acknowledge that the court never explained what it was talking about. The court's explanation of the potential sentence jumped between imprisonment and initial confinement, without ever explaining that imprisonment means initial confinement plus extended supervision. *See* WIS. STAT. § 973.01(1)-(2). Thus, it is not merely "simple … arithmetic," because Finley would have had to first recognize and sort, and then add, apples and oranges. Moreover, that process was complicated by the imprecise language used. During the plea hearing, the court never used the conventional terms "bifurcated sentence," "initial confinement," or "extended supervision." Rather, during its explanation of the potential sentence, the court utilized the following terms, in order: "maximum penalty," "imprisonment," "base penalty," "incarceration period," "term of imprisonment," "the maximum," "confinement," and "maximum penalties." Thus, with all due respect to the circuit court, Finley was not only dealing with apples and oranges, he had to digest an entire fruit cocktail. As if all that was not enough to swallow, Finley's attorney had presented him with a plea form explaining that his "maximum penalty" was "19 years, 6 months confinement." Thus, even if the GED-holding Finley was

sophisticated enough to do the math himself, he, and we, would have to conclude that he knew better than both his attorney and the court.[3]

¶13 Of course, most lay people would never know that "term of imprisonment" means something different than "confinement" or "incarceration period." And, even if a person understood that a felony sentence mandatorily included an extended supervision component, he or she would not likely know whether any, or which, of the three preceding terms included that component. Indeed, the State essentially acknowledges as much in its next argument when, addressing the court's (inaccurate) computation of nineteen and one-half years, it asserts, "Those familiar with the criminal law can easily see that the court was referring only to the confinement portion of the bifurcated sentence, so that this statement was not inconsistent with the court's advice regarding the maximum penalty."

¶14 In that next argument, the State contends we must accept, under the clearly erroneous standard, the circuit court's apparent factual determination at the postconviction hearing that Finley really knew the maximum penalty. That is not, however, the proper standard for determining whether there was a ***Bangert*** violation entitling Finley to an evidentiary hearing, where the State would have the burden to prove Finley knew the maximum penalty despite the misinformation and inadequate explanation. *See* ***Bangert***, 131 Wis. 2d at 274. Moreover, even if that was the proper standard, such a finding would not be supported by the record and, therefore, would be clearly erroneous. We also are not convinced by the State's

[3] The plea questionnaire indicates Finley had completed twelve years of schooling and obtained a GED.

repeated assurances that Finley must have understood the maximum penalty because, following the court's explanation and faulty computation, Finley responded, "Yes, sir" when asked whether he understood.

¶15 Finally, citing ***State v. Cross***, 2010 WI 70, ¶¶30-31, 326 Wis. 2d 492, 786 N.W.2d 64, the State argues:

> [A]lthough the court erred by telling Finley that the maximum period of confinement was nineteen and one-half years when it was actually only eighteen and one-half years, … that is not a cognizable problem since Finley clearly knew when he [pled] that he could be given the sentence he received, which included eighteen and one-half years of confinement.

This argument impermissibly ignores the extended supervision component of the maximum term of imprisonment. *See* ***State v. Sutton***, 2006 WI App 118, ¶¶14-15, 294 Wis. 2d 330, 718 N.W.2d 146. As Finley emphasizes, those additional years of extended supervision could be transformed into actual confinement. Thus, when a defendant like Finley is told he faces nineteen and one-half years when the maximum is actually twenty-three and one-half years due to extended supervision, he receives materially incorrect information about the maximum penalty he faces.

¶16 Finley was informed by the court, and by the plea questionnaire prepared by his own attorney, that the maximum penalty he faced was nineteen and one-half years. Finley actually faced a maximum penalty of twenty-three and one-half years, which was slightly over twenty percent greater than he was told. The court later sentenced Finley to the maximum penalty. Finley alleged he was not aware of the correct maximum penalty. Under these circumstances, Finley has established a ***Bangert*** violation as a matter of law. *See* ***Brown***, 293 Wis. 2d 594,

¶21. We therefore remand to allow the State the opportunity to prove that Finley nonetheless knew the maximum penalty he faced at the time he entered his plea.[4]

By the Court.—Judgment affirmed; order reversed, and cause remanded for further proceedings.

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

[4] Finley alternatively argues he is entitled to sentence commutation if we determine there was no prima facie showing of a ***Bangert*** violation. Because Finley prevails on his first argument, we need not address the alternative. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).