COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP1495-CR
2013AP1496-CR

Cir. Ct. Nos. 2011CF21
2012CF5

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN ALLAN INGLE,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Crawford County: JAMES P. CZAJKOWSKI, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Brian Ingle appeals the circuit court's judgments convicting him of manufacturing methamphetamine as a party to the crime and

felony bail jumping, both as a repeater. Ingle also appeals the order denying his motion for postconviction relief. He argues that he should be allowed to withdraw his pleas to the charges because he was not aware of the total maximum sentence he faced when he entered the pleas. The State does not dispute Ingle's lack of awareness. The State argues that, under ***State v. Taylor***, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482, the circuit court correctly concluded that Ingle is not entitled to plea withdrawal because Ingle received a sentence no greater than what Ingle was advised he could receive. We agree with Ingle that ***Taylor*** does not apply here and, lacking any other apparent basis to affirm, we reverse and remand for the circuit court to allow Ingle to withdraw his pleas.[1]

Background

¶2 The criminal complaints, informations, and plea questionnaires contained conflicting information regarding the total maximum term of imprisonment that Ingle faced. At Ingle's combined plea hearing, there was no discussion of the penalties during Ingle's plea colloquy. It is undisputed that the maximum term of imprisonment was 28 1/2 years. Ingle was sentenced to a total of seven years.

¶3 Ingle moved to withdraw his pleas, alleging that the colloquy did not satisfy WIS. STAT. § 971.08 (2011-12)[2] and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because the circuit court did not ascertain whether Ingle

[1] Ingle also argues that he is entitled to plea withdrawal because he did not understand the elements of party to a crime. We need not address this argument because the maximum sentence issue is dispositive.

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

was aware of the total maximum penalty he faced. Ingle further alleged that he was not aware of the maximum penalty when he entered his pleas. The circuit court agreed that the plea colloquy failed to satisfy § 971.08 and ***Bangert***, entitling Ingle to a ***Bangert*** evidentiary hearing at which the State had the burden to prove that Ingle's pleas were knowing, intelligent, and voluntary. *See* ***Bangert***, 131 Wis. 2d at 274-75.

¶4 At the evidentiary hearing, Ingle's plea counsel testified that she did not inform Ingle of the correct total maximum sentence. Instead, counsel went over the plea questionnaires with Ingle and advised Ingle of the incorrect maximums shown on the questionnaires. Specifically, the plea questionnaires understated by two years the maximum period by which the repeater allegations could increase each of the charged crimes. In other words, the questionnaires understated the total maximum term of imprisonment by four years.

¶5 The circuit court made a factual finding that Ingle understood that the total maximum term of imprisonment was "up to 24 1/2 years" instead of the correct maximum of 28 1/2 years. The court concluded, however, that Ingle's misunderstanding of the maximum sentence did not entitle Ingle to withdraw his pleas. The court appeared to agree with the State that, under ***Taylor***, Ingle was not entitled to plea withdrawal because Ingle received a sentence that was less than the total sentence he understood he could receive.

Discussion

¶6 The parties dispute whether, under ***Taylor***, Ingle's pleas should be considered knowing, intelligent, and voluntary even though Ingle was not aware of the correct total maximum penalty. We discuss ***Taylor*** in a moment, but first

summarize the standards that ordinarily apply when a defendant claims that a plea failed to comply with WIS. STAT. § 971.08 and ***Bangert***:

> If the circuit court fails at one of [its WIS. STAT. § 971.08 or ***Bangert***] duties ..., the defendant may be entitled to withdraw his plea. A defendant establishes that the circuit court failed at one of its duties by filing a motion (a "***Bangert*** motion") that: (1) makes a prima facie showing of a violation of § 971.08(1) or other court-mandated duties; and (2) alleges that "the defendant did not know or understand the information that should have been provided at the plea hearing." A defendant attempting to make this prima facie showing must point to deficiencies in the plea hearing transcript; conclusory allegations are not sufficient.
>
> Upon making this showing, the defendant is entitled to an evidentiary hearing (known as a "***Bangert*** hearing") at which the State must prove by clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent despite the deficiencies in the plea hearing. If the State cannot meet its burden, the defendant is entitled to withdraw his plea as a matter of right.

State v. Cross, 2010 WI 70, ¶¶19-20, 326 Wis. 2d 492, 786 N.W.2d 64 (citations omitted).

¶7 There is no dispute that Ingle's plea colloquy did not comply with WIS. STAT. § 971.08 and ***Bangert***. And, as indicated, the circuit court made a factual finding, after a ***Bangert*** hearing, that Ingle understood the total maximum sentence was "up to 24 1/2 years," instead of the correct amount of 28 1/2 years. As far as we can tell, given these facts and the parties' arguments, Ingle would be entitled to plea withdrawal under the ***Bangert*** framework unless the ***Taylor*** analysis leads to a different result. *See, e.g.*, ***State v. Byrge***, 2000 WI 101, ¶57, 237 Wis. 2d 197, 614 N.W.2d 477 (explaining that a plea is not knowing, intelligent, and voluntary when the defendant is not aware of the potential

penalties); ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999) (same).[3]

¶8 In ***Taylor***, the defendant was not advised during his plea colloquy that a repeater allegation increased his maximum sentence from six years to eight years. *See* ***Taylor***, 347 Wis. 2d 30, ¶¶2, 16. Taylor received a six-year sentence. ***Id.***, ¶¶3, 17. He moved for plea withdrawal, alleging that he was not informed of, and did not know, the correct maximum penalty. ***Id.***, ¶¶3, 18. In an apparent departure from ***Bangert***, the circuit court in ***Taylor*** denied Taylor's motion without an evidentiary hearing. *See* ***Taylor***, 347 Wis. 2d 30, ¶¶4, 20, 39. The supreme court affirmed. ***Id.***, ¶¶9, 55-56. That court reasoned that the existing record made clear that Taylor knew the correct maximum penalty and that Taylor had received a sentence that he was advised he could receive. ***Id.***, ¶¶8, 28, 35-39, 42, 53. The supreme court concluded that a ***Bangert*** hearing was unnecessary under the circumstances. *See* ***id.***, ¶42.

¶9 Ingle argues that ***Taylor*** does not apply here because, unlike Taylor, he did not know the actual maximum penalty that could be imposed and at his plea hearing was not verbally informed of any penalties he might receive. The State, in contrast, reads ***Taylor*** to stand for the proposition that, "[w]hen a defendant is informed that he faces a penalty less than the actual maximum, the 'error' does not

[3] In ***State v. Cross***, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, the supreme court concluded that the defendant was not entitled to plea withdrawal because the defendant was informed or understood that the maximum sentence was "higher, but not substantially higher," than the correct maximum sentence. *See* ***id.***, ¶¶4, 38, 44-45. The State does not rely on ***Cross*** here, presumably because Ingle understood that the maximum sentence was *lower*, not higher, than the correct maximum sentence. The court in ***Cross*** stated that "when the defendant is told the sentence is *lower* than the amount allowed by law, a defendant's due process rights are at greater risk." ***Id.***, ¶39 (emphasis added).

prevent the plea from being knowing, voluntary and intelligent where the total sentence imposed was not greater than the sentence the defendant was informed he could receive." Similarly, the State argues that, "[b]ecause Ingle's actual sentence did not exceed the term of imprisonment he knew he could receive, withdrawal of Ingle's plea is not necessary to correct a manifest injustice."

¶10 We are not persuaded by the State's argument. We instead agree with Ingle that ***Taylor*** does not apply when, as here, the circuit court finds that the defendant was unaware of the correct maximum penalty. As we read ***Taylor***, the supreme court's conclusion depended on its determination that Taylor knew the maximum penalty. The court in ***Taylor*** held that "[Taylor]'s plea was entered knowingly, intelligently, and voluntarily when the *record makes clear that [he] knew the maximum penalty that could be imposed and* was verbally informed at the plea hearing of the penalty that he received." ***Id.***, ¶8 (emphasis added). Similarly, the court in ***Taylor*** concluded that "it was not manifestly unjust to deny Taylor's motion to withdraw his no contest plea where (1) the circuit court informed Taylor at the plea colloquy that he could receive a six-year term of imprisonment; (2) Taylor actually received a six-year term of imprisonment; *and (3) the record is abundantly clear that Taylor was nonetheless aware of the two-year penalty enhancer from the alleged repeater*." ***Id.***, ¶54 (emphasis added).

¶11 We recognize that there is other language in ***Taylor*** that supports the State's position, but only when read in isolation. In particular, there is one place in ***Taylor*** where the supreme court states that Taylor's plea was knowing, intelligent, and voluntary because Taylor "knew of the eight-year maximum term of imprisonment, *and in any event*, he was verbally informed by the court at the plea hearing of the sentence that he actually received." *See* ***id.***, ¶39 (emphasis added). Reading ***Taylor*** as a whole and this statement in context, however, we

think it is clear that the ***Taylor*** court's conclusion and reasoning depended on the court's determination that Taylor knew the maximum penalty.

¶12 We observe that, if the State were correct about ***Taylor***, then it would not matter what Ingle thought the total maximum penalty was, as long as he thought it was at least seven years. Putting aside whether this result comports with due process, we do not see reasoning in ***Taylor*** to support it.

¶13 The State makes an alternative argument that focuses on the specific repeater context here. According to the State, because the sentence imposed on each charge was less than the maximum without the repeater enhancement, the repeater provisions were not applied to Ingle and, therefore, any failure to advise Ingle about repeater enhancement could not have affected Ingle's ability to enter knowing pleas. In support, the State points to paragraph 45 in ***Taylor*** and to ***State v. Harris***, 119 Wis. 2d 612, 350 N.W.2d 633 (1984). We conclude that the State's reliance on both cases is misplaced.

¶14 The portion of ***Taylor*** that the State cites does not suggest that it does not matter whether a defendant is informed of or understands that a penalty enhancer applies if the defendant receives no more than the maximum underlying sentence. Rather, in paragraph 45 of ***Taylor***, the court rejects the argument that Taylor's "entire plea" should be withdrawn because he alleged he did not know he faced an additional two years based on the repeater allegation. The ***Taylor*** court again relied on its determination that "Taylor knew that the charges carried a maximum eight-year term of imprisonment," consisting of six years plus a two-year repeater penalty enhancement. *See* ***Taylor***, 347 Wis. 2d 30, ¶45.

¶15 ***Harris*** does not support the State's alternative argument because ***Harris*** does not deal with the topic of whether plea withdrawal should be

permitted because a plea was not knowingly entered. There was no issue about the knowing or voluntary nature of Harris's plea. Rather, in ***Harris*** the issue was whether Harris was entitled to sentence modification because the circuit court relied on a repeater statute to increase Harris's sentence without imposing the maximum underlying penalty. *See* ***Harris***, 119 Wis. 2d at 615-17, 620, 622, 625-26.

¶16 In sum, we find no basis in the case law the State presents to affirm the circuit court's denial of plea withdrawal and, therefore, we conclude that Ingle is entitled to withdraw his pleas. We reverse the judgments of conviction and the postconviction order, and we remand for the circuit court to allow Ingle to withdraw his pleas.

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

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