**COURT OF APPEALS DECISION DATED AND FILED**

**July 22, 2014**

**Diane M. Fremgen**
**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 No. 2013AP1856-CR**

**Cir. Ct. No. 2000CF3097**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TORANCE D. JACKSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Torance D. Jackson appeals from an order denying his WIS. STAT. § 974.06 (2011–12) postconviction motion.[1] He argues that he should be allowed to withdraw his guilty plea because it was not knowingly, intelligently, and voluntarily entered. He also argues that he is entitled to sentence modification. We reject his arguments and affirm the order.

## BACKGROUND

¶2 This case concerns the June, 2000 shooting death of Eric Dortch at a Milwaukee bar. The criminal complaint charged Jackson with first-degree intentional homicide, as party to a crime, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.05 (1999–2000). The complaint alleged that two witnesses saw Jackson shoot a gun. The complaint also alleged that Jackson told a detective that Dortch robbed Jackson one week before Dortch was killed. The complaint stated that Jackson told the detective that on the night Dortch was shot, Jackson was with his cousin, Terrence Wholf, when they saw Dortch at the bar. Jackson and Dortch began to fight. As they struggled, Jackson "pulled his gun out from his waistband and he shot Mr. Dortch in the stomach two times." The complaint continues:

> Mr. Dortch was still coming at [Jackson] after he shot him two times and a struggle occurred between him and Mr. Dortch over [Jackson's] gun. [Jackson] said he kept firing the gun off as they struggled all the way out of the bar. Mr. Dortch then grabbed the gun away from [Jackson]. [Jackson] stated that he was trying to get away from Eric Dortch because he did not know what Eric Dortch was going to do with the gun that he had taken away from [Jackson]. [Jackson] stated at this point, Mr. Dortch went back inside the bar with the gun…. Jackson stated that just he and Wholf were outside of the

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

> bar at this time, and he then told Wholf, "He got my gun." Wholf then ran back inside the bar, and [Jackson] … then ran back to his van. [Jackson] stated that he then heard two shots coming from inside the bar…. Wholf came running up to the van … and got in. Once in the van, Wholf said, "I think I killed him."

(References to Wholf's first name omitted.)

¶3 After Jackson was charged, he retained a lawyer, Martin E. Kohler.[2] According to electronic court records, Jackson waived the preliminary hearing and there were several pretrial conferences that included at least one adjournment "to allow further discussions with the [S]tate."[3] The electronic court records indicate that on October 13, 2000, Kohler and the State appeared at a final pretrial and scheduled the case for a plea on October 18, 2000, with Kohler's law partner Michael F. Hart scheduled to appear for Jackson.

¶4 On October 18, 2000, Hart appeared in the trial court and indicated that Jackson was "not prepared to accept" the plea bargain. The trial court had Jackson brought to the courtroom and told him that it would schedule the case for trial and would not accept a plea bargain on a future date. Hart asked "for a minute" to speak with Jackson, and after the case was passed and then reconvened, Hart told the trial court that Jackson would accept the plea bargain and enter a guilty plea.

[2] Wholf was not immediately charged. According to Jackson, Wholf was apprehended and charged after Jackson's sentencing. This is consistent with the appellate Record and online court records, which indicate that Wholf was charged with first-degree intentional homicide, as party to a crime, in August 2001.

[3] The original court file in this case was lost and had to be reconstructed. The Record does not contain transcripts from the pretrial conferences.

¶5 Jackson agreed to plead guilty to the reduced charge of first-degree reckless homicide, as party to a crime, contrary to WIS. STAT. §§ 940.02(1) and 939.05 (1999–2000). In exchange, the State agreed to recommend a period of initial confinement of twenty to twenty-five years, with the length of extended supervision left to the trial court. The trial court conducted a plea colloquy, during which Jackson answered the trial court's questions and affirmed his understanding of the plea and the crime. At no time did Jackson indicate that he was confused or had any questions for the trial court. The trial court accepted Jackson's plea and found him guilty.

¶6 At sentencing, the State asked the trial court to impose twenty to twenty-five years of initial confinement. Jackson's lawyer suggested an initial confinement period of "15 but no more than 20 [years] in terms of incarceration, with extended supervision left up to the Court." The trial court sentenced Jackson to twenty years of initial confinement and fifteen years of extended supervision. Jackson did not appeal.

¶7 About a year after Jackson pled guilty, Wholf went to trial for first-degree intentional homicide, as party to a crime. The jury found Wholf guilty of the lesser-included offense of second-degree reckless homicide, as party to a crime. He was sentenced to ten years of initial confinement and five years of extended supervision.

¶8 Twelve years after Jackson pled guilty, the public defender's office appointed a lawyer for Jackson, who filed the WIS. STAT. § 974.06 motion that is at issue in this appeal. The motion argued that Jackson should be allowed to withdraw his guilty plea because: (1) "he did not understand the elements of and the maximum penalty for the crime to which he pled guilty and an insufficient

colloquy was conducted to ensure his understanding"; and (2) the plea was "the result of his trial counsel's failure to adequately advise him of the elements of or the maximum penalty for the offense to which he pled guilty, which constitutes ineffective assistance." In the alternative, Jackson sought sentence modification based on "[t]he trial testimony, conviction, and sentence of Terrence Wholf," which Jackson claimed constituted a new factor.

¶9 The trial court ordered briefing and later granted Jackson's request for an evidentiary hearing.[4] At the hearing, the State elicited the testimony of Kohler and Hart. Kohler testified that he was "the primary attorney representing Mr. Jackson on this homicide matter" and indicated that there were ongoing plea negotiations with the State while the case was pending. Kohler said he remembered meeting with Jackson "[c]ertainly more than once prior to his decision to plead."

¶10 Kohler recalled one time when he met with Jackson in the bullpen. Kohler said he and Jackson discussed "the case, pros, the cons, [and Jackson's] feelings." Kohler said that he went over the elements of the crime with Jackson, including party-to-a-crime liability, and discussed the maximum penalties. When asked whether Kohler remembered telling Hart that Jackson was going to accept the plea bargain, Kohler stated: "I wouldn't have asked somebody to cover a plea that the defendant hadn't agreed to."

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[4] The Record does not contain a written order explaining the trial court's reasons for ordering a hearing. Online court entries indicate that the parties set the motion hearing date at a scheduling conference, but no transcript of that scheduling conference has been provided.

¶11 Hart testified that he did not have a "specific direct recollection of interaction with Mr. Jackson" on the day of the plea hearing. He testified that his "general practice" was to "review the plea questionnaire and waiver of rights form, make certain that the defendant understands what he's pleading to, what the maximum penalties are, [and] what the elements of the offense are." Hart also testified that he and his law firm have a practice of attaching the applicable jury instructions to the plea questionnaire form.[5] Hart indicated that even though he did not have a specific recollection of his meeting with Jackson, he was "comfortable in indicating that in this case … the standard instructions were attached to the plea questionnaire" because he had checked the box stating "See attached sheet" on the plea questionnaire and because the transcript of the trial court's colloquy with Jackson indicated that "the standard instructions were, in fact, attached to the plea questionnaire."[6]

¶12 Jackson testified on his own behalf and also presented the testimony of an expert who said that at the time Jackson entered his plea, he was reading at a first-grade level and would not have been able to "read that complaint himself."[7] Jackson testified that Kohler never went over the elements of the crime or maximum penalties with him and did not discuss the plea bargain with him.

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[5] As previously noted, the original court file in this case was lost and had to be reconstructed. The copy of the plea questionnaire provided by Jackson did not contain the attached jury instructions.

[6] The trial court referenced the attached jury instructions in the course of asking Jackson about the elements of the crime, stating: "In fact, attached to the Guilty Plea Questionnaire and Waiver of Rights Form is the jury instruction; is that correct?" Jackson answered: "Yes, Your Honor." The trial court then asked Jackson if he had "gone over the jury instruction, [and] the elements of the offense with [his] lawyer," and Jackson replied that he had.

[7] On cross-examination, the expert acknowledged that she could not testify as to whether Jackson understood the information that may have been read to him.

Jackson said that he planned on going to trial and that when he appeared for court on October 18, 2000, he thought that the case would be postponed or that they would pick a jury.

¶13 Jackson said that Hart did not discuss the plea bargain, the elements of the crime, or the maximum penalties with Jackson in the bullpen prior to the hearing on October 18, 2000. He said that when he was brought to court, the trial court started talking and then there was a break in the proceedings, during which Hart said that "if I didn't plead guilty that I was going to get life." Jackson said that was when Hart told him about the plea bargain. Jackson testified that Hart told him that he "would be facing 20 years" and that Jackson replied that he would "take the deal because I didn't want to spend the rest of my life in prison." Jackson said that Hart "showed [him] two pieces of paper" and instructed Jackson "to sign one," which Jackson did. Jackson said Hart never went over the document with him.

¶14 Jackson testified that at the time he pled guilty, he "didn't even know [he] had constitutional rights," did not know the crime to which he was pleading guilty, and did not understand party-to-a-crime liability. When asked why he answered affirmatively when the trial court asked him whether he understood party-to-a-crime liability, Jackson testified: "Based on advice of my attorney…. He told me to say yes to the [questions]." When asked why he indicated that he understood that the maximum penalty was sixty years with forty years of confinement time, Jackson said: "Because I thought that I was only subjected to 20 years not 60 years … [b]ecause I thought that was part of the plea agreement."

¶15 Jackson was also asked about his prior involvement in the criminal justice system. Jackson agreed that he "had been arrested and talked to by police many times" and acknowledged that on two occasions in the past, he had entered guilty pleas to misdemeanor charges.

¶16 After considering the testimony and the parties' post-hearing briefs, the trial court denied Jackson's motion in an oral ruling. The trial court stated that it did not find Jackson "to be credible based upon that court's observations in what he testified to." The trial court also found "that the testimony of both Mr. Hart and Mr. Kohler was credible in the recollection of how they represented the defendant and finds that representation was adequate." The trial court further found that Jackson "was fully informed of the plea negotiations, the penalties, [and] the jury instructions, and that he entered his plea knowingly, intelligently and voluntarily." Later, when asked to clarify its ruling, the trial court said that in addition to finding that the plea was voluntarily entered, the trial court had determined that the plea colloquy "was in fact sufficient."

¶17 The trial court also concluded that "there's no new factors for any sentence modification," noting that "[w]hat happened to the co-defendant who went to trial separately is not a new factor."

## DISCUSSION

¶18 On appeal, Jackson argues that he is entitled to plea withdrawal or sentence modification. We examine each issue in turn.

### I. Plea withdrawal.

¶19 Jackson seeks plea withdrawal pursuant to ***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). The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson/Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 166, 765 N.W.2d 794, 796. The burden of proof for these two types of challenges differs. "Once the defendant files a ***Bangert*** motion entitling him to an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Hoppe***, 2009 WI 41, ¶44, 317 Wis. 2d at 185, 765 N.W.2d at 805. Conversely, "[t]he burden at a ***Nelson/Bentley*** evidentiary hearing is on the defendant," who "must prove by clear and convincing evidence that withdrawal of the guilty plea is necessary to avoid a manifest injustice." ***Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d at 193, 765 N.W.2d at 809 (footnotes omitted). One way that a defendant "may demonstrate a manifest injustice [is] by showing that his guilty plea was not made knowingly, intelligently, and voluntarily." ***Id.***, 2009 WI 41, ¶60, 317 Wis. 2d at 193, 765 N.W.2d at 810. Another way that the manifest injustice test can be satisfied is by showing that the defendant's lawyer provided constitutionally deficient representation. *See* ***Bentley***, 201 Wis. 2d at 311, 548 N.W.2d at 54; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687, 697 (1984) (To prove constitutionally deficient representation, a defendant must show deficient performance and prejudice, and a court need not discuss both prongs "if the defendant makes an insufficient showing on one.").

¶20 In determining whether plea withdrawal is warranted, "[w]e accept the [trial] court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that

the defendant's plea was knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 611, 716 N.W.2d 906, 914. Similarly, we will not disturb the trial court's findings of fact concerning the performance of Jackson's lawyers unless they are clearly erroneous, but the ultimate determination of whether the lawyers' performance fell below the constitutional minimum is a question of law we review independently. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714–715 (1985).

¶21 With those standards in mind, we consider Jackson's arguments concerning plea withdrawal, beginning with his ***Bangert*** challenge. Jackson argues that he is entitled to plea withdrawal because the trial court "failed to advise him of the elements of the offense to which he pled guilty, and he did not understand those elements." (Capitalization omitted.) In response, the State asserts that "any alleged violation of the [trial] court's plea colloquy duties is not cognizable under a [WIS. STAT.] § 974.06 motion" because "[m]otions filed under § 974.06 are limited to issues of constitutional or jurisdictional dimension." Further, the State argues, Jackson received the benefit of an evidentiary hearing, and based on the testimony presented, the trial court "was correct in concluding that Jackson understood the crime to which he pled."

¶22 We decline to address whether Jackson's ***Bangert*** claim was properly brought under WIS. STAT. § 974.06 or whether the plea colloquy was sufficient, because the trial court chose to grant Jackson an evidentiary hearing. Assuming the burden of proof shifted to the State to demonstrate "by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy," *see* ***Hoppe***, 2009 WI 41, ¶44, 317 Wis. 2d at 185, 765 N.W.2d at 805, we conclude that the State satisfied its burden. First, Jackson does not specifically challenge the trial court's

factual findings, although he continues to cite his testimony, which the trial court found not credible. Jackson has not shown that the trial court's findings of fact were clearly erroneous. Second, based on the facts found by the trial court—including the trial court's rejection of Jackson's testimony that he did not know the crime's elements or penalties and the trial court's finding that Jackson "was fully informed of the plea negotiations, the penalties, [and] the jury instructions"—the State demonstrated that Jackson's plea was knowingly, intelligently, and voluntarily entered. Jackson is not entitled to plea withdrawal based on his ***Bangert*** challenge.

¶23 Next, we turn to Jackson's ***Nelson/Bentley*** challenge. Jackson argues that his lawyers provided constitutionally deficient representation by "not advising him of the elements of the offense, which resulted in his plea." Jackson also contends that his lawyers failed to tell him "the maximum penalty for the offense to which he pled guilty." (Capitalization omitted.) He further asserts that he did not understand party-to-a-crime liability, explaining: "When he pled guilty, Jackson 'believed that [he] could be found guilty of Dortch's murder because [he] was Terrence Wholf's cousin and had been at the bar with him on the night that he shot Dortch.'" (Bracketing in original; quoting Jackson's testimony.)

¶24 In short, Jackson contends that his lawyers performed deficiently by "fail[ing] to explain to him things that he had to understand in order to enter a constitutionally valid plea." Once again, Jackson relies on facts that are contrary to the findings made by the trial court. Noting that "Hart's testimony was corroborated by the guilty plea questionnaire," the trial court specifically found that "Hart went over with [Jackson] the charge, the maximum penalties, the rights that [Jackson] was giving up and the applicable jury instructions … [including] party to [a crime]." Jackson has not shown that these findings are clearly

erroneous. Based on the trial court's findings, we agree with the trial court that Jackson has not proven that his lawyers provided constitutionally deficient representation. He is not entitled to plea withdrawal based on his ***Nelson/Bentley*** challenge.

**II. Sentence modification.**

¶25 Jackson contends that sentence modification is warranted based on the conviction and sentencing of Wholf. A defendant may be entitled to sentence modification if he or she can prove, by clear and convincing evidence, the existence of a new factor, which is:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 74, 797 N.W.2d 828, 838 (citation omitted). "[I]f a court determines that the facts do not constitute a new factor as a matter of law, 'it need go no further in its analysis' to decide the defendant's motion." ***Id.***, 2011 WI 28, ¶38, 333 Wis. 2d at 73, 797 N.W.2d at 838. On appeal, whether the facts proffered by the defendant constitute a new factor presents a question of law that this court reviews *de novo*. ***Id.***, 2011 WI 28, ¶33, 333 Wis. 2d at 71, 797 N.W.2d at 837.

¶26 Jackson argues that because Wholf was convicted and sentenced after Jackson pled guilty, those facts were obviously not in existence at the time of Jackson's sentencing. We agree. The issue is whether the information about Wholf constitutes "'a fact or set of facts highly relevant to the imposition of [Jackson's] sentence.'" *See* ***id.***, 2011 WI 28, ¶40, 333 Wis. 2d at 74, 797 N.W.2d

at 838 (citation omitted). Jackson contends that "Wholf's conviction and sentence are highly relevant to the imposition of Jackson's sentence," for two reasons. He explains:

> First, this Court has recognized that "a sentence given to a similarly situated codefendant is relevant to the sentencing decision." ***State v. Giebel***, 198 Wis. 2d 207, 220–21, 541 N.W.2d 815, 820 (Ct. App. 1995). Second, Wholf's conviction and sentence are relevant in light of the comments at Jackson's sentencing hearing. The State made Wholf out to be the primary actor, telling the court, "I think from the evidence available here, in light of the fight that was taking place before the shooting, I think the evidence is that Mr. Jackson didn't mean to kill Mr. Dortch." The [trial] court then commented on Wholf's role in the shooting saying, "And because of the acts that you've done and what the other young man did before you came into this courtroom, look at the aftermath of what occurs when somebody is involved in drugs, alcohol, and guns." Jackson pled guilty as a party to Wholf's crime and references were made to Wholf's culpability during Jackson's sentencing hearing; Wholf's conviction and sentence were thus highly relevant to Jackson's sentencing.

(Record citations, italics, and one typographical error omitted.)

¶27 Jackson's arguments are not convincing. First, we take issue with Jackson's suggestion that the State "made Wholf out to be the primary actor." The State noted that Dortch was "shot eight times … by two guns, and witnesses identified two shooters"—Jackson and Wholf. The State suggested that Jackson's statement to the presentence investigation writer "minimizes the events based on all the witness statements."[8] The State also pointed out that when Jackson was arrested, he told the detective that he shot Dortch. The State continued:

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[8] The presentence investigation report is not in the appellate Record and the only reference in the transcript describing what Jackson told the writer states that Jackson "admits that he cocked the gun and provided the gun."

> It's clear that he kept firing. He said that the victim, Mr. Dortch, got his gun. He went out and told Mr. Wholf that Mr. Dortch had the gun, and Mr. Wholf went inside and there were more gunshots.
>
> There is certainly an argument … that you don't fire a gun unless you are going to kill somebody. I think from the evidence available here, in light of the fight that was taking place before the shooting, I think the evidence is that Mr. Jackson didn't mean to kill Mr. Dortch, he was in part of a fight that … got out of control because the defendant went armed with a gun looking for trouble inside a crowded bar.

These comments do not indicate that the State argued that Wholf was the primary actor, suggest that Wholf was more culpable than Jackson, or assert that Jackson should receive a lower sentence than Wholf. Similarly, Jackson's lawyer did not even mention Wholf, much less suggest that Wholf's actions should influence Jackson's sentence.

¶28 When the trial court pronounced sentence, it did not reference Wholf by name. The trial court's single reference to Wholf's involvement was its statement urging Jackson to consider the damage caused "because of the facts that you've done and what the other young man did before you came into this courtroom." The trial court did not offer any comparison of each man's culpability or imply that Wholf was the primary actor. In short, we are not convinced that Wholf's culpability or expected punishment was even a factor in the trial court's decision, much less a fact "'highly relevant to the imposition of sentence.'" *See* ***Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d at 74, 797 N.W.2d at 838 (citation omitted).

¶29 We also agree with the State that even if "a sentence given to a similarly situated codefendant is relevant to the sentencing decision," *see* ***Giebel***, 198 Wis. 2d at 220–21, 541 N.W.2d at 820, Jackson has not shown that he and

Wholf were similarly situated. Jackson's postconviction motion claimed that Wholf "never implicated Jackson as being involved in the struggle with Dortch" and that Wholf's jury found him "to be the person who fired the shots that killed the victim in this case," but Jackson has not provided copies of Wholf's trial transcripts or any other information documenting his bald assertion that only Wholf caused Dortch's death.[9] As noted, the Record in this case indicates that Jackson told a detective that he fired at least two shots at the victim, that two witnesses saw him shoot a gun, and that Dortch died "from the multiple shotgun wounds." It is unknown whether these facts were introduced at Wholf's trial and how the jury may have resolved conflicts in the testimony. Also unknown is whether the jurors heard mitigating testimony that led them to convict Wholf—who was charged with first-degree intentional homicide—of the lesser-included offense of second-degree reckless homicide.

¶30 The fact that Wholf was convicted of second-degree reckless homicide, rather first-degree reckless homicide like Jackson, also demonstrates that they were not similarly situated at sentencing. Finally, Jackson has not provided any information about Wholf's criminal history, so it is unknown whether they have similar criminal backgrounds, which may have influenced the sentence imposed in each case.

¶31 In summary, we conclude that Jackson has not shown, by clear and convincing evidence, that Wholf's conviction and sentence constitute a new factor.

[9] Jackson's motion included citations to transcripts from Wholf's trial, but he did not include those transcripts with his motion and they are not part of the appellate Record.

*See* ***Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d at 71, 797 N.W.2d at 837. He is therefore not entitled to sentence modification. *See* ***ibid.***

*By the Court*.—Order affirmed.

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