

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 12, 2017

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 Nos. 2016AP1509-CR
2016AP1510-CR**

**Cir. Ct. Nos. 2015CF2119
2015CF2974**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVON T. ALLEN,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Devon T. Allen appeals the judgments of conviction entered on his guilty pleas and the order denying his postconviction motion to withdraw those pleas.¹ He argues that he is entitled to an evidentiary hearing on his *Bangert* motion because it makes a prima facie showing that the circuit court failed to fulfill its duty to ensure that he understood his constitutional rights to subpoena witnesses and to remain silent at trial.² We conclude an evidentiary hearing was not required because there was no defect in the plea colloquy and affirm the judgments and order.

I. BACKGROUND

¶2 In Milwaukee County Case No. 2015CF2119, the State charged Allen with one count of battery by a person subject to a domestic abuse injunction as an act of domestic abuse. Shortly thereafter, in Milwaukee County Case No. 2015CF2974, the State charged Allen with the following: count one, possession of a firearm by a person subject to a domestic abuse injunction; count two, felony bail jumping; count three, possession of a firearm by a person adjudicated delinquent for an act that would have been deemed a felony if committed by an adult; and count four, felony bail jumping. The charges in Case No. 2015CF2974 occurred while Allen was out on bail in Case No. 2015CF2119 and stemmed from his continued contact with the victim in that case.

¹ We granted Allen's motion to consolidate these appeals for briefing and disposition.

² *State v. Bangert*, 131 Wis. 2d 246, 271-75, 389 N.W.2d 12 (1986), summarizes the circuit court's duties designed to ensure that a defendant's guilty or no-contest plea is knowing, intelligent, and voluntary. If the circuit court fails at one of the duties, it is called a *Bangert* violation and a motion raising the alleged error is called a *Bangert* motion. *State v. Cross*, 2010 WI 70, ¶19, 326 Wis. 2d 492, 786 N.W.2d 64.

¶3 Allen entered guilty pleas in both cases as part of a single agreement. A separate plea questionnaire and waiver of rights form with attached addendum and jury instructions was filed in each case on the date of the plea hearing. The forms indicated that Allen had a high school diploma and had completed a half year of college. Both forms had all of the boxes under the “Constitutional Rights” portions checked to indicate Allen’s understanding that by entering his pleas, he was giving up the rights that were listed. One of the forms had certain rights underlined, including the right to subpoena witnesses. Allen signed and dated both forms, as did his attorney.

¶4 Pursuant to the agreement, Allen pled guilty to the lone charge in Case No. 2015CF2119 and to count three in Case No. 2015CF2974. In exchange, the State moved to dismiss and read in the remaining counts. The parties were otherwise free to argue at Allen’s sentencing hearing.

¶5 The circuit court conducted a plea colloquy with Allen and ultimately accepted his pleas.

¶6 The circuit court subsequently sentenced Allen to twelve months in the House of Correction in Case No. 2015CF2974. In Case No. 2015CF2119, the circuit court imposed and stayed a sentence of fourteen months of initial confinement and fourteen months of extended supervision and placed Allen on a consecutive three-year-term of probation.

¶7 Allen filed a postconviction motion requesting plea withdrawal in both cases on the grounds that the circuit court failed to explain, and he did not

understand, his constitutional rights to subpoena witnesses and to remain silent at trial.³ He sought an evidentiary hearing.

¶8 The circuit court denied Allen’s postconviction *Bangert* motion for plea withdrawal without holding an evidentiary hearing.

II. DISCUSSION

¶9 During a plea hearing the circuit court has the duty to “[i]nform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights.” *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. An evidentiary hearing must be held on a motion to withdraw a plea if the motion establishes a prima facie violation of the court’s duties and alleges “that the defendant did not know or understand the information that should have been provided at the plea hearing.” *Id.*, ¶39. Whether a postconviction motion establishes a violation of the court’s mandatory duties is a question of law which we review *de novo*. *Id.*, ¶21.

¶10 Allen’s postconviction motion alleged that at the plea hearing the circuit court failed to explain, and he did not understand, his constitutional rights to subpoena witnesses and to remain silent at trial. Allen asserted that the only question related to his constitutional rights asked by the circuit court during the plea hearing was the following: “And you are going to be waiving those constitutional rights that are contained in the guilty plea questionnaire and waiver

³ In his postconviction motion Allen also asked that, if the circuit court denied his motion for plea withdrawal, it enter an order vacating the domestic abuse surcharge in Milwaukee County Case No. 2015CF2119. He does not pursue his challenge to the imposition of the domestic abuse surcharge on appeal.

of rights form that you've signed?" He submits that the only other relevant question the circuit court asked was of his attorney: "Counsel, you're satisfied the defendant's intelligently and voluntarily waiving those constitutional rights?"

¶11 According to Allen, the circuit court improperly substituted the plea questionnaire form for a substantive in-court colloquy. We disagree.

¶12 The circuit court was dealing with an educated defendant who was represented by an attorney. The following exchange shows the context of the circuit court's remarks relative to constitutional rights during the plea colloquy:

THE COURT: And you are going to be waiving those constitutional rights that are contained in the guilty plea questionnaire and waiver of rights form that you've signed?

[ALLEN]: Yes, sir.

THE COURT: You're going to be waiving your rights to a trial by jury, and all twelve jurors must agree unanimously as to a verdict. That means they must all agree as to the elements of the offense. That the victim had petitioned for a domestic abuse injunction. At the time [of] the alleged offense, you were subject to that injunction. That you intentionally caused bod[il]y harm to the victim who didn't consent to the bodily harm. And you knew that the petition for the injunction [sic], and you knew that the victim did not consent to the causing of the bodily harm.

[ALLEN]: Yes, sir.

THE COURT: And on the other case, that you possessed a firearm. That you had been convicted of a felony before the date of the offense. Do you understand that?

[ALLEN]: Yes, sir.

THE COURT: You'll be waiving any possible defenses that you may have to the offenses charged in the criminal complaints, waiving your rights to challenge the sufficiency of the criminal complaints, waiving your right to challenge the constitutionality of any police actions such

as any stop, arrest, search or seizure or any statement that may have been made by yourself. Do you understand that also?

[ALLEN]: Yes, sir.

....

THE COURT: Counsel, you're satisfied the defendant's intelligently and voluntarily waiving those constitutional rights?

[ALLEN'S ATTORNEY]: Yes.

¶13 The circuit court asked Allen if he was waiving the constitutional rights contained in the plea questionnaire that he had signed, enumerated some of those rights on the record, and asked Allen's attorney if he was satisfied that Allen was intelligently and voluntarily waiving those rights. The circuit court's incorporation of the plea questionnaire was proper because the circuit court did not entirely rely on the questionnaire as a substitute for a substantive in-court plea colloquy. See *State v. Hoppe*, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794 (circuit court may, in its discretion, use the plea questionnaire when discharging its plea colloquy duties but the plea colloquy may not be reduced to determining whether the defendant has read and filled out the form).

¶14 Our supreme court rejects a "formalistic application of the *Bangert* requirements that would result in the abjuring of a defendant's representations in open court for insubstantial defects" and recognizes that "requiring an evidentiary hearing for every small deviation from the circuit court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights." *State v. Cross*, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64. Here, the circuit court was not required to specifically mention the right to remain silent at trial and the right to subpoena witnesses and specifically ask if Allen understood

those rights. *See State v. Moederndorfer*, 141 Wis. 2d 823, 828-29, 416 N.W.2d 627 (Ct. App. 1987).

¶15 Allen did not make a prima facie showing that the plea colloquy was deficient. Because he failed to establish the first prong of the *Bangert* plea withdrawal analysis, we need not address the second prong, that is, the allegation that he in fact did not know or understand his right to subpoena witnesses and to remain silent at trial. *See Brown*, 293 Wis. 2d 594, ¶39.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2015-16).

