96-0600
96-1509

STATE OF WISCONSIN
IN SUPREME COURT

Case Nos. 96-0600-CR & 96-1509-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD J. VAN CAMP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION
OF THE COURT OF APPEALS

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

ROBERT R. HENAK
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Attorney for Defendant-Appellant-Petitioner

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ISSUES PRESENTED FOR REVIEW

1. Whether the state established by clear and convincing evidence that Van Camp's no contest plea was knowingly and voluntarily entered and that withdrawal is not necessary to correct a manifest injustice.

The circuit court denied Van Camp's motion to withdraw his no contest plea and the court of appeals affirmed.

2. Are the feelings of the alleged victim and what the court perceives as the probable outcome upon trial relevant considerations in determining whether withdrawal of a no contest plea is

required under *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

In denying Van Camp's motion to withdraw his no contest plea, the circuit court relied in large part upon these considerations. The court of appeals did not address this issue, finding that the other factors relied upon by the circuit court could have justified its decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court having deemed the issues in this case significant enough to warrant review, both oral argument and publication are appropriate. *See* Wis. Stat. (Rules) 809.22 & 809.23.

STATEMENT OF THE CASE

On September 7, 1994, the state filed a criminal complaint charging one count of kidnapping as party to a crime against Gerald Van Camp, a man 62 years old, with a fourth grade education, an IQ of 84, and no prior arrests (R1; *see* R18:62-63).[1] *See* Wis. Stat. §§939.05 & 940.31. The charge was based upon the claim that Van

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[1] Throughout this brief, references to the appeal record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as App. __.

Camp and Raphael Rottier drove to the Eau Claire home of Ronald Geurts and forced him to accompany them in Van Camp's automobile for approximately three hours of abuse, all under the mistaken belief that Geurts was seeing Van Camp's ex-girlfriend (R1).

The state filed an information reflecting this charge on November 15, 1994 (R4), and subsequently filed an amended information on November 18, 1994, adding a count of false imprisonment in violation of Wis. Stat. §940.30 (R7). Just prior to trial, the state filed yet another amended information, modifying the intent allegation of the kidnapping count (R10).

The case proceeded to a jury trial on April 18, 1995, before Hon. Eric J. Wahl, Circuit Judge, and the state presented its case that day (R12). After the jury left for the day, the prosecutor offered to resolve the case with a plea to the false imprisonment charge (R41:39), and Van Camp's defense counsel, Attorney Owen Williams, agreed to recommend that offer to his client (R41:47).

The next morning, counsel for the parties informed the court that they had reached an agreement under which Van Camp would plead no contest to the false imprisonment count, and the kidnapping count would be dismissed and read-in for purposes of sentencing (R15:2). After a brief colloquy, during which the court determined

that Van Camp in fact said he would plead no contest to false imprisonment, that no threats or promises were made, and that he understood that the court could impose "the maximum sentence," the court accepted the plea (R15:2-4; App. 33-35). After the prosecutor noted "some ... reticence" on the part of Mr. Van Camp, the court also discussed the necessary elements and factual basis for the plea (R15:5-6; App. 36-37).

On July 21, 1995, the court withheld sentence and placed Van Camp on probation for a period of three years, with the condition that he serve nine months jail time with Huber privileges for work and counseling. The court also imposed a fine of $1,000 plus costs and ordered restitution. (R18:87-88; R20:1; R21).

Van Camp timely filed his Notice of Intent to Pursue Post-Conviction Relief on August 10, 1995 (R22). *See* Wis. Stat. (Rule) 809.30(2)(b).

By motion dated December 20, 1995, Van Camp sought to withdraw his no contest plea on the grounds of manifest injustice and as a matter of right on the grounds that it was not freely, voluntarily and knowingly entered. He also sought to withdraw that plea as the result of ineffective assistance of trial counsel. (R28, 29, 31). Following an evidentiary hearing on February 9, 1996 (R41), the

circuit court, Judge Wahl, presiding, denied the motion (R41:69-84; R42; App. 9, 15-31).

At the post-conviction hearing, the prosecutor conceded that the plea colloquy was inadequate, so that Van Camp had made out a *prima facie* case under *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986) (R41:32). The state called Attorney Williams to testify in an attempt to meet its burden to show that the plea nonetheless was knowingly, voluntarily and intelligently entered (R41:32-34; *see* R41:36-61).

Attorney Williams testified that he eventually was able to overcome his client's reluctance to plead (R41:41-42). Williams did not recall discussing Van Camp's constitutional rights at that time, nor did he go through a guilty plea questionnaire and waiver of rights form with him (R41:43, 46-47). He claimed, however, to have gone through a "litany" of rights with Van Camp when they first met on September 10, 1994, some seven months prior to the plea (R41:49-50, 53). Williams also claimed to have discussed both the maximum penalty for false imprisonment and the effect of the read-in with Van Camp during the meeting on April 19, 1995, just prior to entering the plea (R41:55, 56).

Van Camp proffered the testimony of his two sons. Van

Camp's sons were present when Attorney Williams presented the plea offer to their father the morning of April 19, 1995. The entire discussion that day took only about ten minutes, and there was no mention of the maximum penalty for false imprisonment. Rather, the entire inducement for the plea mentioned by Attorney Williams was that Van Camp's insurance company would cover any civil claim if he accepted the plea. Mr. Williams did not advise Van Camp of the rights he would waive by pleading no contest, such as the right to a unanimous verdict, the right to testify and the right to call witnesses. Nor did he advise Van Camp of the legal effect of a read-in. (R41:62-65; App. 11-14).

In addition to the facts set forth in that proffer, which the court accepted as "true fact" with the agreement of the prosecutor (R41:65; App. 14), the circuit court found that the plea was entered after a full day of trial, during which Van Camp did exercise many of his constitutional rights (R41:73-74; App. 19-20). The court found that the state had presented a strong case *(id.)*.

The court also found that, while it did not inform Van Camp of the possible penalties for false imprisonment, they were set forth in the amended information (R41:75; App. 21). While noting that "maybe these arguments would have more merit" if it had imposed

a longer sentence than Van Camp thought was available (R41:75; App. 21), the court made no findings regarding Van Camp's knowledge on that point and no evidence was presented concerning it.

The court found that Van Camp was not informed of the effect of the read-in. The court concluded, however, that such lack of knowledge was irrelevant. (R41:75; App. 21).

Throughout its oral decision, the circuit court emphasized its belief that decision on withdrawal motions should be outcome based. In other words, according to the circuit court, such motions should not be granted where, as the court believed the case to be here, a trial likely would result in conviction anyway (R41:74, 78, 81, 83; App. 24, 27, 29):

> I believe before a withdrawal is a reasonable possibility, before withdrawal should be reasonably granted, rather there should be some indication that the ultimate outcome of the case will be affected.

(R41:78; App. 24).

This said, the court stated its belief, in conclusory terms, "that Mr. Van Camp entered his plea knowingly and voluntarily" (R41:80; App. 26), and that the *Bangert* test was met (R41:84; App. 30). The court explained that this did not constitute a finding that Van Camp

knew any particular fact or right, but rather that he generally knew what he was doing:

> That does not mean that he necessarily understood every nuance of what this all meant or that what exactly a read-in could do or how that would reflect, but overall, he entered it knowingly and voluntarily.

(R41:80; App. 26).

On or about February 26, 1996, Van Camp filed with the circuit court his notice of appeal from the final judgment and from the "order denying postconviction relief on February 9, 1996" (R34).[2] It subsequently was discovered, however, that the circuit court had not entered a written order denying Van Camp's postconviction motion. The circuit court finally entered such an order on May 17, 1996 (R42; App. 9), Van Camp filed a new notice of appeal from that order on or about the same date (R60),[3] and the court of appeals ordered the cases consolidated.

By unpublished decision dated December 3, 1996, the court of appeals affirmed (App. 1-6). Apparently overlooking the circuit court's express findings to the contrary (R41:62-65, 75; App. 11-14, 21), that court asserted that Van Camp's counsel in fact informed

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[2] That appeal became Appeal No. 96-0600-CR.

[3] That appeal became Appeal No. 96-1509-CR.

him of both the two-year maximum sentence for false imprisonment and the effect of the read-in (App. 4).

ARGUMENT

THE LOWER COURTS ERRED IN DENYING VAN CAMP'S MOTION TO WITHDRAW HIS NO CONTEST PLEA UNDER *STATE v. BANGERT*, 131 Wis.2d 246, 389 N.W.2d 12 (1986)

In *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986), this Court reviewed the law regarding the requirements for accepting guilty pleas and set forth the analysis to be applied when a defendant seeks to withdraw such a plea based upon the court's failure to comply with those requirements. Van Camp's request to withdraw his no contest plea was premised upon that analysis. The lower courts, however, failed properly to apply that analysis. First, they failed to hold the state to its burden of proving that Van Camp's plea in fact was knowingly and voluntarily entered. Second, in denying Van Camp's motion, the circuit court injected into the *Bangert* analysis consideration of the complainant's feelings and the probability of conviction at trial. Neither of those considerations is proper on such a motion.

A. The Applicable Legal Standard Under *Bangert*

The analysis in *Bangert* enforces the statutory requirements for

the taking of a plea in Wis. Stat. §971.08, as well as the additional mandatory requirements imposed under the Court's supervisory powers. Under that standard, the defendant first must show that the trial court failed to comply with those requirements and allege that he or she did not know or understand the information which should have been provided. 389 N.W.2d at 26. The burden then shifts to the state to prove by clear and convincing evidence that the plea in fact was knowing, voluntary and intelligent. *Id.*:

> Whenever the Section 971.08 procedure is not undertaken or whenever the court-mandated duties are not fulfilled at the plea hearing, the defendant may move to withdraw his plea. The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with Sec. 971.08 or other mandatory procedures as stated herein. . . . Where the defendant has shown a *prima facie* violation of Section 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance. . . . The state may then utilize any evidence which substantiates that the plea was knowingly and voluntarily made. In essence, the state will be required to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him.

389 N.W.2d at 26.

Van Camp's motion to withdraw his plea, however, was based not simply upon state criminal procedure as expressed in *Bangert*, but upon his state and federal rights to due process as well. As the Court recognized in *Bangert*, 389 N.W.2d at 19, "the constitutional validity of a plea must be measured in terms of whether it was entered knowingly, voluntarily, and intelligently." "If a defendant shows that he has been denied a relevant constitutional right, he may withdraw his plea as a matter of right." *State v. Carter*, 131 Wis.2d 69, 389 N.W.2d 1, 5, *cert. denied,* 479 U.S. 989 (1986). "The trial court reviewing the motion to withdraw has no discretion in the matter in such an instance." *Bangert*, 389 N.W.2d at 30; *Carter*, 389 N.W.2d at 5.

"On appellate review, the issue of whether a plea was voluntarily and intelligently entered is a question of constitutional fact." *Bangert*, 389 N.W.2d at 30. Such questions are reviewed *de novo*, although "[t]he trial court's findings of evidentiary or historical facts will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence." *Id.* To the extent the trial court failed to make express findings of fact,

> this court on appeal may adopt one of three courses: (1) Affirm the judgment if clearly supported by the preponderance of the evidence, (2) reverse if not so

supported, or (3) remand for the making of findings and conclusions.

Chuck Wagon Catering, Inc. v. Raduege, 88 Wis.2d 740, 277 N.W.2d 787, 791 (1979).

B. The State Failed To Meet Its Burden Of Proving Van Camp Entered His Plea Knowingly, Voluntarily and Intelligently

As the state conceded below, the plea colloquy was woefully inadequate (R41:32; *see* App. 3). The colloquy was perfunctory at best, with the circuit court failing to advise Van Camp of any of the rights he would waive,[4] the permissible range of punishments,[5] or the effect of the read-in of the kidnapping charge (*see* R15:2-6; App. 33-37).

The controlling question under *Bangert*, therefore, is whether the state bore its burden of proving by clear and convincing evidence

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[4] As the Court explained in *Bangert*, "[a] person must know and understand that constitutional rights are waived by the plea in order for the plea to be voluntarily and intelligently made." 389 N.W.2d at 24. Accordingly, "[i]t is incumbent upon the trial court to inform the defendant of his rights and ascertain that he understands they are being waived." *Id.* at 25.

[5] "At the time of entry of plea, a defendant is entitled to know what might or could happen to him or her." *State v. Mohr*, 201 Wis.2d 690, 549 N.W.2d 497, 500 (Ct. App. 1996) (citation omitted). *See* Wis. Stat. §971.08(1)(a) (obligation of court to inform defendant of "potential punishment if convicted"). *See also Birts v. State*, 68 Wis.2d 389, 228 N.W.2d 351, 354 (1975) (manifest injustice, entitling plea withdrawal, where plea entered without knowledge sentence actually imposed could be imposed).

that Van Camp's plea nonetheless was knowingly, voluntarily, and intelligently entered, *i.e.*, that he in fact knew and understood the possible penalty, the nature and effect of the read-in, and the constitutional rights he was waiving as a result of his plea. *Bangert*, 389 N.W.2d at 26.

Despite its ultimate legal conclusion, the circuit court's express factual findings demonstrate that the state failed to meet this burden. The circuit court expressly held that Van Camp was not informed of the effect of the read-in (R41: 75; App. 21). With the state's concurrence, the court also accepted as "true fact" the proffer of the defendant's sons that Williams did *not* inform Van Camp during the plea discussions of either the possible penalties upon conviction of false imprisonment or the effect of the read-in (R41:62-65; App. 11-14).

The circuit court's actual findings thus implicitly rejected Attorney Williams' allegations to the contrary (*see* R41:55-56) and the court of appeals' reliance upon those allegations (*see* App. 4) is misplaced. The circuit court's express findings are amply supported by credible evidence in the record, as well as the state's stipulation, and thus cannot be dismissed as "contrary to the great weight and

clear preponderance of the evidence." *Bangert*, 389 N.W.2d at 30.[6]

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[6] The court of appeals' decision in this regard appears to be based not simply upon a misreading of the record, but upon a misunderstanding of law as well. That court never actually recites the circuit court's findings of historical fact, but instead reasons backwards from the lower court's legal conclusion that the plea was knowing and voluntary to a determination that it must have found facts necessary to support that legal conclusion:

> The trial court in this case heard the testimony and implicitly but unmistakably accepted trial counsel's testimony because the court concluded that Van Camp's plea was knowing and voluntary.

(App. 4).

Such an analysis, simply presuming legally sufficient factual findings from an ultimate legal conclusion, would virtually destroy the concept of appellate review and, not surprisingly, is not the law. Where, as here, the circuit court makes express findings of historical fact, the appellate court must credit those findings unless they are "contrary to the great weight and clear preponderance of the evidence." *Bangert*, 389 N.W.2d at 30; *see, e.g., Wurtz v. Fleischman*, 97 Wis.2d 100, 293 N.W.2d 155, 159 (1980). *See also McMurtrie v. McMurtrie*, 52 Wis.2d 577, 191 N.W.2d 43, 45 (1971) (remand for more detailed factual findings inappropriate where trial court made express findings of fact contrary to its legal conclusions).

Where, on the other hand, the circuit court failed to make the necessary findings of fact the proper appellate course of action depends on the record. "In appropriate circumstances, even though a trial court did not make a particular finding, [the appellate court] may assume that such a finding was made implicitly in favor of its decision." *Ritt v. Dental Care Associates, S.C.*, 199 Wis.2d 48, 543 N.W.2d 852, 865 (Ct. App. 1995), *citing State v. Hubanks*, 173 Wis.2d 1, 27, 496 N.W.2d 96, 105 (Ct. App. 1992), *cert. denied*, 510 U.S. 830 (1993). Accordingly, if the unstated factual conclusion necessary to support the lower court's legal conclusion is "clearly supported by the preponderance of the evidence," then the Court may affirm. *Chuck Wagon Catering*, 277 N.W.2d at 791. *See, e.g., Matter of Estate of Villwock*, 142 Wis.2d 144, 418 N.W.2d 1, 3 (Ct. App. 1987) (implicit finding where neither expert witness' qualifications nor his opinion were challenged).

If such a finding would not be so supported by the record, then the Court may reverse. *Chuck Wagon Catering*, 277 N.W.2d at 791 (reversing where unstated factual findings necessary to support trial court's legal conclusions "were against the great weight and clear preponderance of the evidence"). However, "[w]hen an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings." *Wurtz*, 293 N.W.2d at 159 (citations omitted). *See also Ritt*, 543 N.W.2d at 865

(continued...)

Given the circuit court's express factual findings, the state failed to meet its burden. Van Camp did not know the effect of the read-in and neither the court nor his attorney told him the possible penalties upon conviction for false imprisonment. While the circuit court noted that the amended information states the maximum penalty for that charge (R41:75; App. 21), the record contains no evidence that Van Camp ever read that document. Indeed, it does not even appear that he was officially arraigned on that charge.[7] Speculation that Van Camp may have read that document cannot substitute for the requisite proof by clear and convincing evidence that he in fact knew the potential penalties. *Bangert*, 389 N.W.2d at 24 ("knowledge ... cannot be inferred or assumed on a silent record"). Accordingly, Van Camp was entitled to withdraw his plea under *Bangert*.

The circuit court's express findings, as well as the insufficiency of the evidence on this point, also demonstrate that the state failed to meet its burden of proving that Van Camp knew and

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[6](...continued)
(refusing to assume circuit court made necessary factual finding when it rested its decision on a different basis and there were conflicting reasonable inferences to be drawn from the evidence).

[7] The circuit court's suggestion that the maximum penalty for the false imprisonment count was stated in the original complaint (R41:75; App. 21) is inaccurate as that document included only the kidnapping charge (R1; *see* R41:54). That suggestion thus is clearly erroneous.

understood the constitutional rights he was waiving by his plea. Once again, the court found as "true fact" the proffer that Attorney Williams did not explain those rights to Van Camp at the time he discussed the plea with his client (R41:62-65; App. 11-14). Williams did not dispute that (R41:43), testifying that he could not recall discussing those rights at the time of the plea, and that he did not use a plea questionnaire and waiver of rights form at that time (R41:43, 46-47).

Based upon his "invariable" practice, however, Williams claimed to have gone through the "litany of rights" with Van Camp when they first met soon after his arrest some seven months earlier (*id.*:49-50, 53):

> Q. Could you please relate to the Court what you include in that litany?
>
> A. Sure. They have a presumption of innocence. They have the right to remain silent throughout the entire prosecution. They have a right to have an attorney represent them. If they cannot afford one, they have a right to presumption of innocence. Trial by jury of twelve. Right to unanimous verdict of that. Right to have their guilt proved beyond a reasonable doubt. Right to compel the attendance of witnesses by writ of subpoena. That's -- unanimous verdict, twelve, oh, they have the right to have their guilt proved beyond a reasonable doubt and, in fact, there is a presumption of innocence that must be overcome by proof beyond a reasonable doubt.

(R41:49-50).

The circuit court made no express finding in this regard. Reliance upon Williams' allegations of having provided Van Camp a "litany of rights" some seven months prior to the plea, however, does not satisfy the state's burden of proving Van Camp's knowledge and understanding of those rights at the time of the plea. As this Court explained in *State v. Bartelt*, 112 Wis.2d 467, 334 N.W.2d 91, 94 n.2 (1983), "the fact that a defendant was told sometime earlier of his rights is not necessarily determinative of whether he understood those rights at a later time."

Reliance upon Williams' claimed litany to Van Camp would not satisfy the state's burden in any event. "For a waiver of constitutional rights to be valid, the plea must be based on '"an intentional relinquishment or abandonment of a known right or privilege."'" *Bangert*, 389 N.W.2d at 22 (citations omitted). Accordingly, "[w]hether a plea is voluntary will in part depend on whether the defendant understands the nature of the constitutional protections he is waiving." *Id.* at 25.

The state is required to prove that the defendant possessed *both* the knowledge *and* the understanding of the relevant constitutional rights. *Bangert*, 389 N.W.2d at 24-25, 26. As this Court

explained:

> Understanding must have knowledge as its antecedent; knowledge, like understanding, cannot be inferred or assumed on a silent record. [Citation omitted]. Conversely, it is not enough merely to inform the defendant or point to a portion of the transcript or other evidence which indicates that the defendant possesses knowledge of the nature of the charge; the court must also ascertain the defendant's understanding of that information.

Id. at 24.

Thus, even if the record were sufficient to demonstrate that, at some point in time, Attorney Williams gave him a complete and accurate litany of his rights, nothing suggests that Van Camp in fact had the necessary understanding of those rights. "[U]nderstanding[] cannot be inferred or assumed on a silent record," *Bangert*, 389 N.W.2d at 24 (citation omitted), and such is especially true here. Van Camp is but a simple farmer with an IQ of 84 and a fourth grade education, and who had never before been in trouble with the law (R18:62-63). Williams' litany, moreover, is at best a conclusory, incomplete,[8] and confusing muddle which even those educated in the law would have a difficult time following (R41:49-50). *See supra.*

To the extent that the circuit court implicitly found that Van

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[8] The litany, for instance, omits Van Camp's rights to testify on his own behalf and otherwise to put on a defense other than by subpoenaing witnesses (*see* R41:49-50).

Camp in fact did know and understand the constitutional rights he was giving up, therefore, that "finding" is not supported by a preponderance of the evidence. The proper course thus is to reverse denial of Van Camp's motion to withdraw his no contest plea. *E.g.*, *Chuck Wagon Catering*, 277 N.W.2d at 791.

C. Concern For The Complainant's Feelings And A Perception That The Defendant Would Have Been Convicted Anyway Are Not Appropriate Considerations on a Motion to Withdraw a Plea

The circuit court made clear from the beginning of the post-conviction hearing that it viewed Mr. Geurts' feelings and its perception that Van Camp had no viable defense to the false imprisonment charge as major factors contributing to its decision whether to permit withdrawal of Van Camp's plea:

> THE COURT: Ms. Robinson, if I grant your motion what happens? Does the process that you're discussing. is it outcome-based at all? Does Mr. --
>
> MS. ROBINSON: Van Camp? Have I reviewed that with him? Is that your --
>
> THE COURT: No. Does Mr. Van Camp have some defenses?
>
> * * *
>
> THE COURT: . . . I understand your

> argument. I read those cases very carefully. But I'm troubled generally by where would we go? We'd start all over. I heard the, essentially the jury trial, from the State's case was all but completed. I don't know if Mr. Pelrine had formally rested but from reviewing back in the transcript, if he hadn't, there might have been some small details left to testify to. And I can' [sic] imagine that this is going to accomplish anything other than just simply start the process all over, create more delays. So I'm curious to know. I mean is there just kind of a ["]captain may I["] process? If we don't do it quite right, then we get to start all over?

(R41:7-10).

The court returned to this theme as the primary emphasis in denying the motion:

> And, Ms. Robinson, I'm more result driven than I should be by this case because you make very good arguments and got all the nice constitutional arguments but I still have to go back in my mind and say what will be the practical outcome? We'll start all over. Whether a jury would convict Mr. Van Camp on kidnapping I don't know. You're right, there is some problem with that language. But they certainly in my judgment beyond all reasonable doubt would convict Mr. Van Camp on the false imprisonment.
>
> * * *
>
> It may not be necessary but I believe, it may not be necessary under the cases, but I believe before a withdrawal is a reasonable possibility, before withdrawal should be reasonably granted, rather there should be some indication that the ultimate outcome of the case will be affected. . . . There should be some underlying contention that if the case starts over, Mr. Van Camp would be exonerated or if he isn't exonerated, there would be a different outcome in the penalty.

> Mr. Van Camp's new attorney has carefully examined all the relevant cases, found all of the language which puts Mr. Williams' actions and my actions in question. But there has not been the slightest claim today that anything would change. . . .
>
> * * *
>
> . . . Mr. Geurts has been punished by all of these delays and I know you told me at the outset it's not a balancing test and perhaps from a legal standpoint you're right.
>
> On the other hand, I do think at some point the rights of others have to be looked at in the process of making legal decisions. And I do think that Mr. Geurts' rights have not been fully taken care of in this matter because the man who tormented him, who terrorized him for a period of several hours in a car way back in September of 1994 is still looking for more justice.
>
> And as I indicated, I don't know if a jury would have convicted Mr. Van Camp of kidnapping. That last bit of intent would have posed I think significant problems for the prosecution. But I believe the evidence on the false imprisonment was overwhelming and that these technical objections are just delaying the ultimate disposition of the case.
>
> And for those reasons I'm going to deny the motions. And let matters proceed as they should.

(R41:74, 78, 81; App. 20, 24, 27).

When Van Camp's post-conviction counsel sought leave to supplement the record to address this novel harmless error theory (R41:81-83; App. 27-29), the court denied the request, noting that

"again, I'm struck with just the simple reality that regardless of what Mr. Williams or any other lawyer could have or would have done the false imprisonment case was as strong a prosecution case as I've seen in some thirty years of legal work" (R41:83; App. 29).

When the prosecutor attempted to recharacterize the court's reasoning into a finding that the *Bangert* test was met, the court agreed. However, it expressly did not disavow defense counsel's interpretation of the court's reasoning as adding an outcome determinative/harmless error aspect to the analysis dictated by this Court. (R41:84; App. 30).

While obviously substantial, if not controlling considerations to the circuit court, the fact of the matter is that the complainant's feelings and the perceived lack of a defense at trial are irrelevant to the question of whether a defendant must be permitted to withdraw a plea under *Bangert*. Rather, the sole focus in such a motion is on whether the plea was knowingly, voluntarily and intelligently entered. *See Bangert*, 389 N.W.2d at 19. If it was not so entered, the defendant is absolutely entitled to withdraw the plea and go to trial:

> A defendant must ordinarily show a manifest injustice in order to be entitled to withdraw a guilty or no contest plea. . . . When a defendant establishes a denial of a relevant constitutional right, withdrawal of the plea is a matter of right. The trial court reviewing

> the motion to withdraw has no discretion in the matter in such an instance.

Id. at 30 (citation omitted). Neither the complainant's desires nor the perceived strength of the state's case has any legitimate tendency to make more likely that a plea was entered knowingly and voluntarily.

The circuit court's outcome-determinative analysis, moreover, is directly contrary to long-standing Wisconsin law. In 1967, this Court adopted the "manifest injustice" standard of the American Bar Association Project on Minimal *Standards for Criminal Justice Relating to Pleas of Guilty* (Tentative Draft, February, 1967), Part II. *State v. Reppin*, 35 Wis.2d 377, 151 N.W.2d 9, 13-14 (1967). That standard is now contained in III *ABA Standards for Criminal Justice* §14-2.1 (2d ed. 1980), and provides that "the court should allow the defendant to withdraw the [guilty] plea whenever the defendant, upon timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice." *Id.* §14-2.1(b). The standard sets forth a number of nonexclusive grounds for which withdrawal would be necessary to correct a manifest injustice. *Id.* §14-2.1(b)(ii).[9]

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[9] Pursuant to III *ABA Standards for Criminal Justice* §14-2.1(b)(ii),

> (ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves, for example, that:

(continued...)

Both now and at the time this Court adopted the ABA Standard in *Reppin*, that standard further made clear that the probable outcome at trial is totally irrelevant to the question whether a defendant should be allowed to withdraw his or her guilty plea. Under that standard:

> The defendant may move for withdrawal of the plea without alleging that he or she is innocent of the charge to which the plea has been entered.

Id. §14-2.1(b)(iii). As the Comment to that provision explains:

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[9](...continued)

> (A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule;
>
> (B) the plea was not entered or ratified by the defendant or a person authorized to so act in the defendant's behalf;
>
> (C) the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed;
>
> (D) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement; or
>
> (E) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement, which was either tentatively or fully concurred in by the court, and the defendant did not affirm the plea after being advised that the court no longer concurred and after being called upon to either affirm or withdraw the plea; or
>
> (F) the guilty plea was entered upon the express condition, approved by the judge, that the plea could be withdrawn if the charge or sentence concessions were subsequently rejected by the court.

> [I]f a manifest injustice has occurred, the defendant should be allowed to withdraw the plea even though the defendant may actually be guilty of the offense and without regard to whether innocence is alleged. In the view of subparagraph (iii), even assuming the defendant's guilt, fairness requires that withdrawal of the plea be allowed [under the circumstances constituting manifest injustice].

III *ABA Standards* at 14-58 to 14-59.

This Court held likewise in adopting those standards in *Reppin*:

> Reppin's contentions fall within the exemplified scope of the "manifest injustice" rule. He argues he was denied effective assistance of counsel and that his plea of guilty was involuntary in the sense it was not intelligently made. *True, the defendant has not alleged as a ground for withdrawing his plea that he is innocent of the charge to which the plea was entered, but such an allegation is not a condition precedent to the granting of the motion if manifest injustice is shown.*

151 N.W.2d at 14 (emphasis added). The Court went on to state directly that "[t]he test at this stage is not whether the defendant is guilty but whether he was fairly convicted." *Id.*

The outcome-determinative analysis applied by the court below essentially holds that a defendant is not entitled to a trial if the judge concludes that he probably would be convicted anyway. Approving such an analysis would be the moral and legal equivalent of directing a verdict of guilt, which the courts may not do regardless how strong

the state's case may be. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275 (1993); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149, 154 (1994). The right of an accused to a trial simply does not turn on the perceived strength of the defense to be raised. *See also Carpenters v. United States*, 330 U.S. 395, 408 (1947).

Applying a slightly different analysis reaches the same result. The United States Supreme Court has distinguished between "structural defects" which defy harmless error analysis and mere "trial errors." *Sullivan*, 508 U.S. at 281-82; *Arizona v. Fulminante*, 499 U.S. 279, 306-312 (1991). "Structural errors" are those which "transcend[] the criminal process" by affecting the framework in which the determination of guilt or innocence is made rather than simply an error in the trial process itself. *Fulminante*, 499 U.S. at 310-11.

Not surprisingly, the Supreme Court has held that improper denial of a jury trial is a type of structural defect, mandating reversal without regard to the probable results of such a trial, rather than a mere trial error:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basis protectio[n]"

> whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. . . . The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." . . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Sullivan, 508 U.S. at 281-82 (citations omitted).

Of course, the fact that withdrawal is required when, as here, the plea was not knowingly, voluntarily and intelligently entered does not mean that the defendant receives some kind of unjustified windfall. It merely places the issue of resulting prejudice in the proper context; when a plea is not knowingly, voluntarily and intelligently made, the defendant suffers actual prejudice from the denial of the opportunity for a trial, regardless of what the ultimate result of that trial might be. *Cf. Sullivan, supra.*

The Court recently explained this fact in an analogous context. *See In Interest of Kywanda F.*, 200 Wis.2d 26, 546 N.W.2d 440 (1996). There, the trial court failed to inform the juvenile accused of the right to substitution as required by statute at the time it accepted her admission to a delinquency petition. Reversing the court of appeals' holding that such failure deprived the circuit court of competency to proceed, 546 N.W.2d at 444-46, this Court held

that noncompliance with the statutory requirement should be considered harmless unless the accused establishes "actual prejudice resulting from the error." *Id.* at 446. The Court made clear, however, that the "prejudice" to which it referred concerned not the likely ultimate resolution of the petition but the juvenile's loss of the opportunity for judicial substitution:

> In the case of the right to substitution, we conclude that actual prejudice is shown if it is established that the juvenile was not told of the right and did not know of that right. [Citations omitted]. Therefore, the prejudice suffered by the juvenile in such an instance is the loss of the opportunity to exercise the right to substitution due to the lack of knowledge of that right.

546 N.W.2d at 446; *see id.* at 446-48 (applying *Bangert* standard to juvenile's post-disposition motion to withdraw her admission to delinquency petition).

To paraphrase this Court in *Kywanda F.*, the prejudice suffered by a pleading defendant when the circuit court fails to comply with the requirements set forth in *Bangert* is the loss of the opportunity to make a knowing, voluntary and intelligent decision whether to plead guilty or to proceed to trial.

Returning the proper focus of the prejudice question to the denial of an opportunity for a trial rather than on the likely results of such a trial likewise returns the issue of "harmless error" to the

proper context. *Bangert* sought to insure that guilty pleas are entered knowingly, voluntarily and intelligently by mandating certain procedures at the guilty plea hearing. 389 N.W.2d at 20-21. The Court went on to hold, however, that those procedures themselves are not constitutional requirements, *id.* at 20, and that a plea is not necessarily rendered unknowing or involuntary, and therefore unconstitutional, by the failure to comply with those procedures where the defendant in fact knows the information which the circuit court failed to provide. *Id.* at 25-27. Accordingly, if the state is able to prove by clear and convincing evidence that the pleading defendant actually had the constitutionally required knowledge and understanding, the circuit court's failure to provide that information is harmless.[10] While such a failure violates the statutory and judicial mandates recognized in *Bangert*, it does not result in a constitutional violation under those circumstances.

Issues of resulting prejudice and "harmless error" thus apply

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[10] Although not directly relevant to the issues on this appeal, Van Camp notes that the harmless error analysis in *Bangert*, requiring a state showing of harmlessness by only "clear and convincing evidence," 389 N.W.2d at 26-27, appears to be at odds with the holding in *State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (state must prove harmlessness beyond a reasonable doubt). *See, e.g., State v. Klessig*, 199 Wis.2d 397, 544 N.W.2d 605, 608 n.2 (Ct. App. 1996) (applying *Bangert* rather than *Dyess* standard to question whether defendant validly waived right to counsel), *rev. granted*, 201 Wis.2d 435, 549 N.W.2d 732 (1996).

fully to non-constitutional issues in the *Bangert* context and the required analysis under that decision already incorporates the appropriate considerations of "harmless error." *See also Klessig*, 544 N.W.2d at 608; *State v. Lopez*, 196 Wis.2d 725, 539 N.W.2d 700 (Ct. App. 1995); *State v. Issa*, 186 Wis.2d 199, 519 N.W.2d 741, 745-46 (Ct. App. 1994); *State v. Chavez*, 175 Wis.2d 366, 498 N.W.2d 887, 888-89 (Ct. App. 1993). No further question of "harmlessness" is required or appropriate. "The test at this stage is not whether the defendant is guilty but whether he was fairly convicted." *Reppin*, 151 N.W.2d at 14.

The circuit court's conclusion that a motion to withdraw a guilty plea should be denied absent a showing that an acquittal is likely thus was wrong as a matter of law. Because the issue of whether a plea was voluntarily and intelligently entered is one of constitutional fact reviewed *de novo*, this Court itself may apply the appropriate legal standard to the historical facts as found by the circuit court. *Bangert*, 389 N.W.2d at 30. As already demonstrated in the preceding section, such an application mandates reversal with directions to permit Mr. Van Camp to withdraw his plea.

CONCLUSION

By importing improper considerations of harmless error and the complainant's feelings into the analysis mandated by this Court in *Bangert*, the circuit court committed an error of law and misused its discretion. Under the proper legal standard, the circuit court's factual findings required it to grant Van Camp's motion to withdraw his plea.

Van Camp therefore respectfully asks that the Court reverse the decisions below and remand with directions to grant Van Camp's motion to withdraw his plea.

Dated at Milwaukee, Wisconsin, April 9, 1997.

Respectfully submitted,

GERALD J. VAN CAMP, Defendant-Appellant-Petitioner

SHELLOW, SHELLOW & GLYNN, S.C.

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

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RULE 809.18(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the includable portions of this brief is 7,450 words.

Robert R. Henak

Robert R. Henak

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STATE OF WISCONSIN
IN SUPREME COURT

Case Nos. 96-0600-CR & 96-1509-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD J. VAN CAMP,

Defendant-Appellant-Petitioner.

APPENDIX TO PETITION FOR REVIEW

COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 3, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-0600-CR & 96-1509-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD J. VAN CAMP,

Defendant-Appellant.

APPEAL from an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Gerald J. Van Camp appeals an order denying his motion for postconviction relief following a conviction and sentence to a charge of false imprisonment for which sentence was withheld and a term of probation imposed. Van Camp seeks to withdraw his plea of no contest on grounds that it was not entered knowingly and voluntarily and also asserts a claim of ineffective counsel. We

conclude that the trial court acted within its discretionary authority in denying the motion to withdraw the plea, and that Van Camp waived his right to pursue the alleged ineffective counsel claim by entry of his plea. We therefore affirm the order.

Postconviction motions to withdraw a plea are addressed to the discretion of the trial court and are permitted "only when necessary to correct a manifest injustice." *State v. Clement*, 153 Wis.2d 287, 292, 450 N.W.2d 789, 790 (Ct. App. 1989). This standard applies equally to no contest pleas. *State v. Harrell*, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). A manifest injustice is established when a plea is involuntary or entered without knowledge of the charge or the potential penalties. *State v. Rock*, 92 Wis.2d 554, 558-59, 285 N.W.2d 739, 741-42 (1979). The defendant has the burden of proving grounds for withdrawal by clear and convincing evidence. *Id.* at 559, 285 N.W.2d at 742.

A guilty plea must be made knowingly, voluntarily and intelligently. *State v. Bangert*, 131 Wis.2d 246, 260, 389 N.W.2d 12, 19 (1986).

> The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08, STATS., or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of sec. 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was

> knowingly, voluntarily and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance .... The state may also utilize the entire record to demonstrate by clear and convincing evidence that the defendant knew and understood the constitutional rights which he would be waiving.

Id. at 274-75, 389 N.W.2d at 26 (citations omitted).

Whether a plea was entered correctly is a question of constitutional fact and is examined independently on appeal, while the circuit court's findings of historical facts are viewed under the clearly erroneous standard. *See State v. Kywanda F.*, 200 Wis.2d 26, 42, 546 N.W.2d 440, 448 (1996).

The State concedes that the plea colloquy is inadequate because Van Camp was not informed of the constitutional rights he was waiving by entry of the plea, the maximum penalty for the false imprisonment charge or the effect of having a kidnapping charge that was dismissed "read in" for purposes of sentencing.

We conclude, however, that an examination of the entire record demonstrates a knowing, voluntary and intelligent plea because that record supports the trial court's finding of historical facts.

Van Camp does not directly state what constitutional rights he was, in fact, unaware of at the time of his plea. In any case, his trial attorney testified at the postconviction hearing that he was certain that he had fully reviewed Van Camp's constitutional rights with him at some point prior to trial. Whether a defendant was

advised of his rights is a matter of historical fact. *Harrell*. The trial court in this case heard the testimony and implicitly but unmistakably accepted trial counsel's testimony because the court concluded that Van Camp's plea was knowing and voluntary.

The statutory penalty for false imprisonment was set forth both in the amended complaint and the information. Trial counsel testified unequivocally that he discussed the two-year maximum sentence for this crime during the discussion of the plea bargain immediately preceding the plea hearing. Counsel also testified that he also told Van Camp that the read-in of the kidnapping charge meant they could not be reinstated, and that while the judge could consider it for purposes of sentencing, the read-in would not subject Van Camp to any additional penalty beyond the maximum for the false imprisonment. Counsel's testimony was similarly implicitly accepted as credible by the trial court.

Apparently Van Camp is also contending that the trial court failed to obtain an independent and express admission of guilt to the read-in kidnapping charge. According to *State v. Cleaves*, 181 Wis.2d 73, 78, 510 N.W.2d 143, 145 (Ct. App. 1993), "when a defendant agrees to the read-in, he or she admits that the crime occurred." Here, Van Camp expressly agreed at the plea hearing to the plea agreement whereby the kidnapping was to be dismissed but considered a read-in.

The trial court concluded that Van Camp merely regretted his plea and sought to delay proceedings by bringing the motion to withdraw his plea. In any

case, Van Camp has failed to show a manifest injustice that required the trial court to permit a plea withdrawal.

Van Camp argues in the alternative that a manifest injustice is demonstrated by ineffective trial counsel. We agree with the State's contention that the no contest plea waived any challenge to the alleged grounds for ineffective counsel. Van Camp contends that counsel failed to adequately research issues relating to the elements of kidnapping, and should have realized the charge would ultimately fail.

A no contest plea, knowingly and intelligently made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of constitutional rights violations. *State v. Skamfer*, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993). Further, Van Camp has failed to make a proper record to preserve the claim by presenting the testimony of trial counsel in this respect. *See State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 909 (Ct. App. 1979).

Van Camp's ineffective counsel arguments on appeal do not go to the validity of his plea, but to the performance of counsel prior to the plea bargain. At the postconviction hearing, in fact, it was the State who called trial counsel over a relevancy objection by Van Camp. There was no attempt to examine trial counsel regarding the lack of preparation now claimed, and the trial court was advised that the motion of ineffective counsel was included in the postconviction motion "only to

preserve the issue for appeal." There is therefore no need to address the matter further. The order denying postconviction relief is therefore affirmed.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | EAU CLAIRE COUN

State vs Gerald J. VanCamp

JUDGMENT OF CONVICTION

Sentence Withheld, Probation Ordered

Date of Birth: 11-28-1933

Case No.: 94CF000329

The ☒ Court ☐ Jury found the defendant guilty of the following crime(s):

Ct.	Crime(s)	Wis Stat. Violated	Plea	Fel. or Misd.	Date(s) Crime Committed
2	False Imprisonment (939.05 Party To)	940.30	No Contest	FE	09-06-1994

IT IS ADJUDGED that the defendant is convicted on 04-19-1995 as found guilty and is sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
2	07-21-1995	Withheld, Probation Ordered	3 YR		DOC

Conditions of Sentence/Probation

Conditions

Ct.	Condition	Length	Agency	Begin Date	Begin Time	Comments
2	Jail Time	9 MO	ECJ			Stayed 30 days Service in an institution most convenient to defendant's activities

Miscellaneous Conditions:

Ct.	Condition	Comments
2	Work Release / Huber Law	Work release granted, release for counseling & any other release the probation dept. feels is in order. Release permitted for 7 days & for 12 hrs.
2	Prohibitions	FINE + ASSESSMENTS: $1,230.00 COSTS: $20.00 VICTIM/WITNESS SCHG: $70.00 RESTITUTION: $141.38 - Mr. Geurts' out of pocket expenses & $603.70 - Blue Cross of Illinois Sentence credit pur. 973.155 to be determined.
2	Prohibitions	No contact, whatsoever, with Mr. Geurts or any of his relatives

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | EAU CLAIRE COUNTY

State vs Gerald J. VanCamp

JUDGMENT OF CONVICTION

Sentence Withheld, Probation Ordered

Date of Birth: 11-28-1933

Case No.: 94CF000329

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

BY THE COURT:

Eric J Wahl, Judge
Raymond L Pelrine , District Attorney
Owen R Williams, Defense Attorney

Lois Macke
~~Circuit Court Judge~~/~~Clerk~~/Deputy Clerk

7-21-95
Date

STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | EAU CLAIRE COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

Case No. 94CF329

GERALD J. VAN CAMP,

Defendant.

ORDER

The defendant having previously filed a motion to withdraw plea of no contest, the matter having been brought on for hearing on February 9, 1996, and the Court having considered the testimony presented at that hearing as well as the arguments, authority, and supporting documents submitted by the parties;

IT IS HEREBY ORDERED, that the defendant's motion to withdraw plea of no contest is hereby denied. Defendant's further request to supplement the record, made at the hearing of February 9, 1996, is also denied.

Dated this 16th day of May, 1996.

Honorable Eric J. Wahl

cc: Attorney Mary Lou Robinson
Suite 1005, 103 E. College Avenue
Appleton, WI 54911

FILED
CIRCUIT COURT
EAU CLAIRE COUNTY
MAY 17 1996
DIANA J. MILLER
CLERK OF CIRCUIT COURT

STATE OF WISCONSIN CIRCUIT COURT Branch 2 EAU CLAIRE COUNTY

STATE OF WISCONSIN, -

Plaintiff, -

vs. - MOTION

GERALD J. VAN CAMP, - CASE NO. 94CF329

Defendant. -

The above-entitled matter coming on to be heard before the Honorable Eric J. Wahl, judge of the above-named court, without a jury, on the 9th day of Febrvery, 1996, commencing at the hour of 9:00 a.m., in the Courthouse in the City of Eau Claire, County of Eau Claire, State of Wisconsin.

A P P E A R A N C E S

RAYMOND L. PELRINE, District Attorney, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin, 54703, appearing as counsel for and on behalf of the State.

MARY LOU ROBINSON, Robinson Law Firm, 103 East College Avenue, Appleton, Wisconsin, 54911, appearing as counsel for and on behalf of the defendant.

GERALD J. VAN CAMP, the defendant, appearing personally.

JAN M. BETTHAUSER
Court Reporter, Branch 2
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire, WI 54703

record, we have under the prevailing record of Bangert establishing clearly satisfactorily and convincingly that the Court informed the defendant of the nature of the charge, and the components of the offense and also that the Court has before it a record from which it could conclude to that requisite degree of proof that the defendant's plea was knowingly, voluntarily and intelligently made and he should not now be allowed to withdraw it.

MS. ROBINSON: I'd like to call a couple of witnesses.

THE COURT: This was set for two hours or I mean an hour as I believe. Are your witnesses going to be the sons who are going to essentially testify that they did not hear the, Mr. Williams give Mr. Van Camp his rights?

MS. ROBINSON: Yes. I could state it real succinctly. Your Honor, the sons would testify on the evening before, on April the 18th, after Jerry Van Camp, the defendant, called his attorney back and insisted that he was not going to plead, Jerry was angry on the phone with the lawyer and the lawyer wanted one of the sons to call. Then one of the sons called back. I believe it was at the Best Western. And he talked to him, who is called Buddy, which is Jerry, Junior, and in that conversation said that's what he has to do and your father is cracking up.

App. 11

The next morning they went to the courthouse early. That is, the three of them went to the courthouse early thinking Mr. Williams made it clear he'd have to talk more in the morning. He did not accept no for an answer. They went very early and waited at various doors trying to find Mr. Williams and couldn't find him. And Mr. Van Camp, the defendant, was on the first floor. They were trying to float around. The two young men ran into Mr. Williams on the second floor and he asked if they could speak to him. They would testify today the entire conversation they had with him from the time he saw them was about five to nine in the morning until he walked into the courtroom was ten minutes. And that from the time they met with him, first alone, the door was open and Jerry, the defendant, came down the hall. He was summoned in. Mr. Williams said you have to plead. I mean it's the right thing to do, whatever -- I'm not purporting those were the words -- and Jerry said I don't want to plead.

They had a brief colloquy in which there was no mention even of what the maximum penalty was for false imprisonment but the inducement to plead was that which had been stated the evening before that Drew Ryberg had said, the insurance company's lawyer, there would be no civil suit, that Jerry would have to pay if he pled to

App. 12

this other charge, which by the way we're not asserting to the truthfulness of it but this was their understanding but that isn't, of course, what happened. But that was, inducement was related to the civil suit not to what the penalty was going to be if he was found guilty.

And that, in fact, Mr. Williams that morning didn't, simply didn't have time to perhaps, among other things, but didn't talk at all about rights that were being waived, maximum penalty for the crime, unanimous verdict, the effect of a read-in, the right to take the witness stand in your own case, calling on the witnesses, and the only ones that were there were the ones Jerry had brought from his own area around the state who were there as character witnesses. Mr. Williams hadn't, in fact, subpoenaed any nor had he prepared Jerry.

But the fact is that this would be the substance of their testimony and you might, if you want to, if you can swear them, have them acknowledge in this shortened time or whatever that's essentially it. And it's William Van Camp whose age is --

VOICE: Thirty-three.

MS. ROBINSON: Thirty-three. And Gerald, Junior, whose age is --

VOICE: Thirty.

MS. ROBINSON: Is thirty. Both of whom are the

two younger sons of Mr. Van Camp.

THE COURT: I don't think it's necessary to swear them because I don't think that that is in particular great contradiction to what Mr. Williams testified. So I accept that as being a true fact unless Mr. Pelrine has a problem.

MR. PELRINE: No.

MS. ROBINSON: Then I have two other exhibits I'd like to offer to the Court. I think they've been handed up. One is the initial bill and one is the second. I'm only offering them for the sole purpose of establishing that there weren't any conferences between Mr. Van Camp and his attorney -- well, it speaks for itself. There was an initial conference back in September and that there weren't additional as he indicated within the two weeks before trial. For example, he hadn't prepared him to testify. So just to get a little time perspective. I think Mr. Williams indicated that it's generally his practice to tell people these things. He didn't know just when he would have told this to him, didn't have specific recollection and I'm offering this to the Court to give you an opportunity to see whether or not there would have been prior to the 18th or 19th of April a sense of when he would have had, and according to that, his last time that he talked with the client was on the 28th of December

He chose to present them in the way he saw fit. I haven't cited a single case different than the defendant himself cites. What point does defendant have other than to delay these matters even further for an opportunity to do something he could have done in the past months?

THE COURT: And I think as you aptly pointed out did do.

I think in dealing with Mr. Van Camp's motions we have to review the file in its entirety. And this will be rather lengthy but I think it's important that the rationale and thought process be adequately expressed so that Appellate Courts, if that becomes the route the case goes, knows at least from my standpoint what I believe happened.

Mr. Van Camp was initially charged with a criminal complaint on September 7, 1994.

Is that an incorrect date?

MR. PELRINE: It was filed on the 7th. I believe he appeared on the 8th.

THE COURT: Right.

Originally, a preliminary was scheduled for November 7, 1994 but was not held until November 15th. At all times from the very beginning Mr. Van Camp was represented by Attorney Owen Williams of Amery, Wisconsin, and Mr. Williams was privately retained. And as was noted

here today in testimony and argument, Mr. Williams is a very experienced respected lawyer who's been involved in complex litigation in this part of the state for a long time.

Between the date of the preliminary and the trial date on April 18, 1995, there were several hearings on various matters. The first issue that we need to deal with in these proceedings is one of the claimed error that I should not have allowed Mr. Pelrine to amend count one of the Information shortly before the trial. Count one was the kidnapping complaint. And the amendment at that time sought to change a portion of the original charge to use the alternative language. And that is quote with intent to cause said person to be held to service against his will closed quote in lieu of with intent to cause said person to be secretly confined or imprisoned.

Mr. Williams received notice of the District Attorney's intention to amend the Information eight days before the trial and at the hearing for the postponement Mr. Williams professed that the amendment left him unprepared to defend the charge. There was no explanation then or now as to what additional preparation would or could be undertaken. The amendment didn't charge a new crime. It did not alter the nature of the proof or change

any of the potential defenses. It did not cause any new or unforeseen witnesses for either side.

And the only thing that I presume could have been altered was the argument because I remember Mr. Williams making the argument earlier and that is how could this man be secretly confined, meaning Mr. Geurts, when they drove him around in a car. And he wasn't stuffed in the trunk or something of that kind. So a new legal argument or a new argument to a jury might have been heard as a result of the amendment of the complaint but no new facts or evidence would have been adduced at trial to the court. 971.29 (2) allows amendment to an Information even during the trial so long as the defendant is not prejudiced.

Mr. Van Camp now claims prejudice but doesn't substantiate how so. I have to assume that there really is nothing different from what I have said and that is that the jury perhaps would have heard a different closing argument had the matter gone to trial than had the original unamended charge been presented.

On April 18, 1995 the jury was selected. Mr. Pelrine made his opening statement. And I believe Mr. Van Camp, Mr. Williams reserved his which is not uncommon. And testimony was taken until approximately four-thirty. And there's been some discussion on the record here today as to whether the State formally rested at the end of the

day and whether it did or didn't, it did appear at least from my vantage point that the State's case in chief was, had been presented or maybe there had been some little mop up testimony or production of documents or something.

Then on the next day as we know at nine o-five Mr. Williams indicated the plea agreement had been reached. While the jury was waiting for us in the jury room Mr. Van Camp changed his plea from not guilty to no contest on the charge of false imprisonment. The charge of kidnapping was dismissed but was read in for purposes of sentencing as we know here today.

The issue, so we're focused on it, is whether Mr. Van Camp's plea was voluntary and now whether he should be allowed to withdraw the plea. The difficulty that this whole procedure places is that at least initially it requires me to judge my conduct, grade my own performance in accepting the plea. I disagree with what Ms. Robinson said that the record allows Mr. Van Camp to withdraw it as a matter of right. I don't think that's been shown.

I do think what we need to focus on now is the second issue and that is the discretionary issue on whether manifest injustice would occur by not allowing it. In bringing this motion the defendant has searched the record thoroughly and has found precedent to question

much of what occurred on the morning of April 18th. But we have to keep in mind that, first of all, from the day of the initial charging until the trial approximately six months passed. A little more than six months.

Again, Mr. Van Camp was represented by experienced counsel of his own choosing. At the time he entered his plea the State's case was in or nearly in. The testimony of the victim, Mr. Geurts, which I heard on two occasions was compelling. He positively identified Mr. Van Camp as the man who came to his house, took him by force and drove him around the northern countryside.

The testimony of Lorraine Squires who appeared at the trial. Ms. Squires was essentially Mr. Geurts' alibi witness for the day in question when Mr. Van Camp thought Mr. Geurts was somewhere else. Mr. Geurts at some point in the rather lengthy ordeal persuaded Mr. Van Camp that Ms Squires could account for his whereabouts and explain that he wasn't with Mr. Van Camp's girlfriend. Ms. Squires identified Mr. Van Camp positively and stated the conversations that occurred in her presence.

The testimony of Mr. Geurts was totally corroborated by Mr. Van Camp's accomplice, Mr. Rottier. The testimony of police officers established that Mr. Van Camp admitted at least that he had taken Mr. Geurts so that the admissions would have been there. These witnesses were

examined and cross-examined.

In short, Mr. Van Camp did exercise many of his constitutional rights on April 18, 1995. He had a jury trial. He confronted his accusers. And at some point you have to conclude that certainly Mr. Williams recognized that this was, this case was a dead duck.

And, Ms. Robinson, I'm more result driven than I should be by this case because you make very good arguments and got all the nice constitutional arguments but I still have to go back in my mind and say what will be the practical outcome? We'll start all over. Whether a jury would convict Mr. Van Camp on kidnapping I don't know. You're right, there is some problem with that language. But they certainly in my judgment beyond all reasonable doubt would convict Mr. Van Camp on the false imprisonment.

The Appellate Courts have set forth the standards we are to use when we take a guilty plea. And the purpose of those standards is to ensure to the greatest possible extent defendants aren't deprived of valuable constitutional rights. And as I said at the outset, it seems to me most of these cases involve younger defendants. They involve people who are confused or underrepresented if not unrepresented. They involve usual people who are charged and very shortly thereafter or on the same day are brought to enter a plea. We have substantial time here.

Mr. Van Camp was not informed by me of the maximum penalties faced. Those maximums I would, however, point out were stated in the original complaint as well as in the criminal, amended criminal Information and also I would point out although you told me it didn't matter that those maximum penalties were never a factor in what went on here.

I would say if Mr. Van Camp had pled and was expecting based on whatever conversations he had with his attorney or others the type of sentence he received, and I did, in fact, give him a lengthy prison sentence, that maybe these arguments would have more merit.

Mr. Van Camp apparently was informed or wasn't informed of the effect of the read-in and, again, that penalty really had nothing to do or the potential penalty - there was no enhancement, in short, of the penalty.

Other errors that have been urged in these motions center around Mr. Williams' conduct which frankly I believe is unfair. I think it's easy for us all to sit back now with benefit of the record, with case law at our fingertips and muse over the possible decisions and strategies that could have been entered into. But we all faced on that morning rather the heat of the battle. That is, the evidence that had gone in. The jury was waiting. We had Mr. Van Camp who I assume even to this day is

reluctant to admit that he did anything wrong.

But as I noted, Mr. -- as I previously stated, Mr. Williams is experienced and respected. He is criticized by you for failing to subpoena witnesses. I have no idea how those witnesses or what witnesses could have appeared to have defeated the State's case. He's criticized for not having prepared a defense to the amended charge. Again, the charge was only the amended, only changed one of the intent sections which I presume Mr. Williams would have had to alter an argument but there was probably no difference in the evidence it would have produced, that would have been produced. He's criticized for not pursuing an alibi. I have no idea what alibi Mr. Van Camp could come up with. In view of the evidence that would even be remotely believable.

And Mr. Williams was right this morning when he said that at some point courts do look at sentencing as to whether there is remorse. And how the defendant is dealing with the crime committed. And had Mr. Van Camp testified that he wasn't there or that he was somewhere else or was doing something else, that would have been, I believe so unbelievable that it would not have been bought by anybody.

In your brief you claim that Mr. Williams failed to establish rapport. I frankly don't know what that means.

How to measure what rapport is adequate or how much rapport is sufficient or how more or less rapport would have improved the case. We all have been confronted in our practices, at least those of us who did defense work, with clients who don't want to accept reality. They still think that what they did was somehow justifiable.

I think the perfect example of this as an aside is quite often people who are charged with criminal gambling. They don't understand that gambling is wrong. They don't see that they're doing anything wrong. They're reluctant to admit they're doing something wrong because they've got all of these arguments how stockbrokers are nothing more than professional gamblers and so I'm taking bets on football games and so forth and sometimes as defense lawyers you do have to make them see the reality.

And I would imagine that was a tough decision in the morning because I can't imagine that Mr. Williams could have done anything but try to persuade his client that it was in Mr. Van Camp's best interest to accept the plea bargain rather than face the almost sure conviction, the sure conviction on the false imprisonment and a substantial likelihood of a conviction of a very serious forty-year felony.

You cited State v. Dugan and I read that case and I agree with you that Dugan cites a lot of language

about all the rights and everything that's supposed to go on during a plea hearing, but as I also noted earlier, Dugan decided that the failure, the trial court's refusal to allow a withdrawal was proper.

It may not be necessary but I believe, it may not be necessary under the cases, but I believe before a withdrawal is a reasonable possibility, before withdrawal should be reasonably granted, rather there should be some indication that the ultimate outcome of the case will be affected. That there would be a more moderate sentence, that there were facts that needed to be explained, so forth and so on. There should be some underlying contention that if the case starts over, Mr. Van Camp would be exonerated or if he isn't exonerated, there would be a different outcome in the penalty.

Mr. Van Camp's new attorney has carefully examined all the relevant cases, found all of the language which puts Mr. Williams' actions and my actions in question. But there has not been the slightest claim today that anything would change. That Mr. Geurts would somehow testify it never happened. That all the, that there would be a great alibi witness that would establish that Jerry Van Camp has a double or something that would affect the outcome. And, again, that's -- we're talking about the false imprisonment. The crime for which Mr. Van Camp

entered his plea.

It's mentioned also that Mr. Williams did not properly go over the presentence report with Mr. Van Camp. Nothing was brought up about that today. I did note on the sentencing hearing, however, that Mr. Williams made substantial references to it. And the sentencing hearing, in fact, lasted more than two hours because the defense called six separate witnesses to stand up for Mr. Van Camp and his reputation.

And, frankly, as I noted at that time, Mr. Van Camp had an excellent reputation. A man with no criminal past, a man who apparently was a piller in the community of Freedom, Wisconsin, who for some inexplicable reason apparently did a dumb thing. A dumb thing that was very harrowing and threatening and so forth but a thing nonetheless.

I believe also that Mr. Van Camp is attempting to delay this process. The trial was heard substantially after the initial charges. Then before we have the sentencing there was some question about Mr. Van Camp's mental status. So he was not sentenced until July 21, 1995. So that's several months after the plea.

In short, despite what you've represented here, Ms. Robinson, I don't believe Mr. Van Camp did not understand what he was doing on April 19, 1995. He was

reluctant to do it. He was reluctant I think to admit that he screwed up big time. And it's, as I said at the outset, it's true that he may not be a sophisticated man when it comes to legal matters and that his contacts with the legal system before were nonexistent, but he's a mature man. He's a successful businessman in a business which is competitive, requires being shrewd, being, knowing when to be cautious, when to take risks and all of those things. And he's a man who availed himself of every opportunity to defend himself in this case.

So it may be ultimately that the courts will find that my colloquy did not cover as much detail as recommended. Hindsight is a very valuable asset we all know. But I believe based on my observations of Mr. Van Camp having sat through the preliminary hearing, my knowledge of Mr. Williams and his abilities, having sat through the trial, having sat and read all of the transcripts over again, I believe that Mr. Van Camp entered his plea knowingly and voluntarily. That does not mean that he necessarily understood every nuance of what this all meant or that what exactly a read-in could do or how that would reflect, but overall, he entered it knowingly and voluntarily.

I believe now he wants to withdraw the plea because of, frankly, his unwillingness to accept the

penalties. We've been delaying these penalties now well into what should be the second year. Mr. Rottier has served his penalty. Mr. Geurts has been punished by all of these delays and I know you told me at the outset it's not a balancing test and perhaps from a legal standpoint you're right.

On the other hand, I do think at some point the rights of others have to be looked at in the process of making legal decisions. And I do think that Mr. Geurts' rights have not been fully taken care of in this matter because the man who tormented him, who terrorized him for a period of several hours in a car way back in September of 1994 is still looking for more justice.

And as I indicated, I don't know if a jury would have convicted Mr. Van Camp of kidnapping. That last bit of intent would have posed I think significant problems for the prosecution. But I believe the evidence on the false imprisonment was overwhelming and that these technical objections are just delaying the ultimate disposition of the case.

And for those reasons I'm going to deny the motions. And let matters proceed as they should.

MS. ROBINSON: May I make a motion?

THE COURT: Sure.

MS. ROBINSON: Your Honor, I would move the Court

for leave to supplement the record. I did take as careful notes as I could of your decision but it appears that, and I know the Court is careful in the expectation that I do intend to appeal the case, and the Court knows that from the previous record, but you did, when you said that you didn't know about the underlying thinking or whatever and that the result would be different and you had not seen in my motion in which I tried to at least allude to each issue that I would need to raise on my appeal, you did not see anything in regard to what his defense would be which was consistent with what you had asked me up there and the notion of how things would have been different.

So my motion is this. I'd like to ask the Court for leave to supolement the record if, and I'll file either a, very shortly a short trial brief or something that I -- because it's kind of a novel thing -- the best I can to supplement it so that I do have a response to that.

The reason I didn't do that before was because of all the cases I had presented on the subject I have never seen one in which the concept of harmless error was imposed and essentially the Court has ruled here today looking at a practical side of this as the Appellate Court often does, looking at -- but as they often do of cases generally, but on this particular issue, and we're talking about constitutional rights. I've never seen them

to find it harmless so I didn't put in anything about the practical result of how this would have been different or as you said before how he was prejudiced. For example, I would say if a defendant appears at trial and the attorney says they've changed the charge, I have no defense. If in his mind he believes that, I'd say at that point the defendant doesn't have an attorney. Okay?

THE COURT: Well, I'm not going to allow you to supplement the record. I think, first of all, we're essentially replicating it because then you put up this, that or another thing. Then Mr. Pelrine would have the opportunity to do that.

I think you have had the opportunity in preparing for this case to put in what you thought was important.

And, again, I'm struck with just the simple reality that regardless of what Mr. Williams or any other lawyer could have or would have done the false imprisonment case was as strong a prosecution case as I've ever seen in some thirty years of legal work. So though Mr. -- had that charge only been the only charge and Mr. Van Camp was, pled to it only because he was threatened with the forty years really doesn't have any merit as far as I'm concerned. So I don't think there's anything more to be added to this record. I think it's time for this case

to go forward.

MR. PELRINE: Your Honor, if I may, not to add any facts or anything but in the event that nuance or perception is missing from the printed word, Ms. Robinson just gave her perception of what the Court's legal basis for its ruling was and I didn't necessarily hear it the same way. I'm not asking you to clarify. What you said is what you said. But I believe from my perspective what I heard was a statement of the Court consistent with the ruling of Bangert as to what rights the defendant was entitled to have. What rights he either availed himself of or was made aware of and which he had in his possession at the time you accepted his plea. And that while many other concerns and observetions were made by the Court, I'm not willing to accept that I heard the legal ruling that Ms. Robinson just characterized.

THE COURT: Well, I don't know. Again, the Appellate Courts are probably going to look at how you characterize them as to what I've said. I believe the Bangert test was met and that was my intention and I didn't specifically say that in that many words but I believed it was met.

MR. PELRINE: Thank you.

MS. ROBINSON: It's the Court's position that the Bangert test is the test today in Wisconsin? I mean

is that --

THE COURT: Well, Ms. Robinson, at some point you have to accept what I've said and not try and create more record or more error.

(The hearing concluded at 11:14 a.m.)

STATE OF WISCONSIN)
) ss.
COUNTY OF EAU CLAIRE)

I, Jan M. Betthauser, Registered Professional Reporter, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of 85 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed to the best of my ability, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 22nd day of April, 1996.

Jan M. Betthauser
Jan M. Betthauser
Registered Professional Reporter

COPY

STATE OF WISCONSIN CIRCUIT COURT Branch 2 EAU CLAIRE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

GERALD J. VAN CAMP,

Defendant.

JURY TRIAL
(DAY TWO)

CASE NO. 94CF329

The above-entitled matter coming on to be heard before the Honorable Eric J. Wahl, judge of the above-named court, with a jury, on the 19th day of April, 1995, commencing at the hour of 9:05 a.m., in the Courthouse in the City of Eau Claire, County of Eau Claire, State of Wisconsin.

A P P E A R A N C E S

RAYMOND L. PELRINE, District Attorney, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin, 54703, appearing as counsel for and on behalf of the State.

OWEN R. WILLIAMS, Attorney at Law, P.O. Box 417, Amery, Wisconsin, 54001, appearing as counsel for and on behalf of the defendant.

GERALD J. VAN CAMP, the defendant, appearing personally.

JAN M. BETTHAUSER
Court Reporter, Branch 2
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire, WI 54703

P R O C E E D I N G S

MR. WILLIAMS: Your Honor, we request that you convene outside the presence of the jury. The defendant is present this morning. The District Attorney and I have reached an agreement which if accepted by you will obviate the need for further proceedings in front of the jury. We have a negotiated plea to present.

THE COURT: All right.

MR. WILLIAMS: Judge, the negotiated plea that I believe we have is as follows. In return for the defendant withdrawing his plea of not guilty to count two of the Information, which is false imprisonment, and entering his plea of no contest to the charge, the District Attorney has agreed to move to dismiss count one, the kidnapping. We jointly recommend to you that this charge be read in for purposes of sentencing. We will jointly recommend to you a presentence investigation be ordered on the count two, that bond continue pending that and that the matter be returned for sentence. At the time of sentence each party is free to argue that which they believe is appropriate.

MR. PELRINE: That's my understanding as well, Your Honor.

THE COURT: Mr. Van Camp, is that your understanding?

THE DEFENDANT: It is, Your Honor. That's what I

have to do, I guess.

THE COURT: Well, I want to be sure you know you don't have to do anything.

THE DEFENDANT: I know. But it's in their hands so I'll have to accept it, Judge, Your Honor. To the best knowledge with my lawyer.

THE COURT: All right. Anybody threaten you or promise you anything to get you to do this?

THE DEFENDANT: No.

THE COURT: You understand that by pleading no contest to a charge, that's the same as a guilty plea as far as what we're doing here?

THE DEFENDANT: Yeah.

THE COURT: Do you understand that?

THE DEFENDANT: There's nothing I can do about it. It's okay.

THE COURT: I want to know, Mr. Van Camp, if you understand what I'm telling you.

THE DEFENDANT: I understand, yeah.

THE COURT: And you understand that though there may be some agreement or discussion between the District Attorney and your lawyer about sentencing that if I see fit, I can sentence up to and including the maximum sentence? Do you understand that?

THE DEFENDANT: Yes, I suppose.

THE COURT: Is there any -- I don't want you to enter anything under pressure or duress here, Mr. Van Camp. I want you to -- do you need more time to talk it over with Mr. Williams or are you satisfied that won't do anything?

THE DEFENDANT: I don't think that will do anything at the time.

THE COURT: Do you know what the charges are that you, the false imprisonment charge, that's been explained to you?

THE DEFENDANT: Yes.

THE COURT: All right. How do you plead to that charge, Mr. Van Camp?

THE DEFENDANT: No contest.

THE COURT: Okay. And like I said earlier, you understand for purposes of this hearing that's the same as a guilty plea? Is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right, Mr. Van Camp, I will accept your plea of no contest, find you guilty thereon. We will dismiss count one of the Amended Information but have it read in for purposes of sentencing. I will order a presentence investigation.

MR. PELRINE: Your Honor, --

THE COURT: Yes.

MR. PELRINE: Excuse me. But because this is a felony and because of my detection of at least in some, I believe reticence of Mr. Van Camp, could the Court please go through the elements of the offense and make sure that the defendant understands those as part of his plea?

THE COURT: All right. Probably a good idea.

Mr. Van Camp, do you understand that false imprisonment, that by being charged with that, that it's alleged that you and Mr. Rottier did feloniously and intentionally confine Mr. Geurts? You understood that?

MR. WILLIAMS: Judge, I've explained to Mr. Van Camp that on a no contest plea he neither admits nor denies that. He is aware that that is an element of the offense.

THE COURT: That's what I am attempting to --

MR. WILLIAMS: Yes.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You understand that's what they've said you've done?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand they have said you did that without Mr. Geurts' consent or knowledge -- I'm sorry -- without his consent rather. You understand that's what the State says?

THE DEFENDANT: Yes.

THE COURT: And you understand that they said that, the State claims that you did that with the knowledge that you didn't have the lawful authority to confine someone?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Is there any question about what's going on here this morning as far as you are concerned?

THE DEFENDANT: Not really.

THE COURT: All right. How about May 31 for a sentencing date?

MR. WILLIAMS: The only reservation I'd ask, Judge, is if I'd have a conflict, but if I do, if I could call and ask you to reschedule that but that would seem to be an adequate amount of time to process the PSI and I will have my people call yours then and confer with Mr. Pelrine if I have any conflict with that day.

THE COURT: All right.

MR. WILLIAMS: Or I can get on the phone right away and tell you.

THE COURT: Would it be more expedient when you get back to your office for you and Mr. Pelrine to confer with Bonnie and get a date?

MR. PELRINE: The problem I have with that is as soon as I'm able to clear my desk I'm supposed to be at a conference right now in La Crosse.

THE COURT: All right. Well, why don't we --

MR. WILLIAMS: It'll take me about two minutes to get my people on the line here, Judge, and confirm that, if that's acceptable.

THE COURT: Do you have a lot of people?

MR. WILLIAMS: Well, it seems that way when I look at the overhead.

THE COURT: When you write out the paychecks.

MR. WILLIAMS: I'm number one on trial in Washburn on the 31st, Judge.

THE COURT: How about June 2nd?

MR. WILLIAMS: All day final hearing on a divorce in Barron, Judge.

THE COURT: June 5th?

MR. WILLIAMS: What time would you be able to consider that on the 5th, Judge, late in the day?

THE COURT: I could.

MR. WILLIAMS: If you could as late as possible.

THE COURT: Three-thirty?

MR. WILLIAMS: Yes.

THE COURT: Well, we'll go ahead and continue bond. I suppose the next step is to bring the jury back and tell them what happened.

(The jury entered the courtroom and the following proceedings were had:)

THE COURT: Well, I have news and I'll leave it up to you to decide whether it's good or bad news. First, I apologize for promising to get you in here right at nine o'clock but the news is that this case has been settled. Mr. Van Camp has entered a plea pursuant to an agreement with the District Attorney's office and so your services are no longer required on this case.

Now, if you have questions about what's happened or anything, I can meet you back in the jury room in a few minutes and attempt to answer any questions that you have about what you've done here or seen here. If you have no questions, you're excused with our thanks.

(The jury was excused.)

MR. PELRINE: Just one little housekeeping thing, Judge. Since I'm sure the clerk's office always shudders when I have the prospect of supporting things like this enlargement, do I have Court and counsel's permission to simply withdraw them at this time so the clerk doesn't have to worry about what to do with that?

MR.WILLIAMS: I have no objection.

THE COURT: Fine. I presume we don't want the blackboard preserved either.

MR. WILLIAMS: No, no, Judge.

(The hearing concluded at 9:18 a.m.)