DISSECTING A GUILTY PLEA HEARING ON APPEAL

AMELIA L. BIZZARO
Henak Law Office, S.C.
316 North Milwaukee Street, Suite 535
Milwaukee, WI 53202
414-283-9300
abizzaro@sbcglobal.net

Part I: The Plea Hearing

I. Validity

A. The validity of a guilty plea turns on whether or not it was entered knowingly, voluntarily and intelligently. *Bangert*, 131 Wis.2d 246, 257, 262, 389 N.W.2d 12, 21 (1986) *citing Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

1. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction." *Boykin*, 395 U.S. at 242.

II. Wis. Stat. §971.08

A. Purpose

1. "[I]nform the defendant of the nature of the charges, to ascertain the defendant's understanding of the charge, and to ensure that the defendant is aware of the constitutional rights being waived." *State v. Howell,* 2007 WI 75, ¶26, 301 Wis.2d 350, 734 N.W.2d 48; Wis. Stat. §971.08.

2. §971.08(1)(a) – inform the defendant of the nature of the charge and the potential punishment, if convicted. *See also State v. Bangert*, 131 Wis.2d at 262.

> When a defendant is not aware of the potential punishment, the plea is not entered knowingly, voluntarily, and intelligently, and the result is a manifest injustice. *State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 635-36, 579 N.W.2d 698 (1998).

3. §971.08(1)(b) – ensure that there is a factual basis to support the plea.

4. §971.08(1)(c) – inform the defendant of the possible deportation consequences.

III. Trial Court's Duties. *See State v. Brown*, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906.

A. Assess the defendant's capacity to understand by examining the defendant's educational background and ability to comprehend. *State v. Bangert*, 131 Wis.2d at 246.

B. Ensure that no threats, promises, agreements were made in exchange for defendant's plea. *Bangert*, 131 Wis.2d at 262.

C. Inform the defendant that an attorney (if there is not one) would be able to determine defenses the defendant himself may not know about. *Bangert*, 131 Wis.2d at 262.

D. Inform the defendant that an attorney will be appointed to represent him if he is indigent. *Bangert*, 131 Wis.2d at 262.

E. Establish the defendant's understanding of the nature of the crime charged and the range of punishments. *Bangert*, 131 Wis.2d at 262; Wis. Stat. §971.08(1)(a).

1. An understanding of the nature of the charge must include an awareness of the essential elements of the crime. *Bangert*, 131 Wis.2d at 267 (citation omitted).

F. Determine whether a factual basis exists to support the plea. *Bangert*, 131 Wis.2d at 262; Wis. Stat. §971.08(1)(b).

1. The circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. §971.08(1)(b); *see also White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978).

2. Purpose = "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that this conduct does not actually fall within the charge." *Id. quoting McCarthy v. United States*, 394 U.S. 459, 467 (1969). *See also Ernst v. State*, 43 Wis. 2d 661, 673, 170 N.W.2d 713 (1969) *overruled in part on other grounds by Bangert*, 131 Wis. 2d at 260.

3. Procedure

a. The trial court must conduct an inquiry either with counsel or the defendant in order to establish that the conduct to which the defendant is admitting constitutes the offense charged. *Ernst*, 43 Wis. 2d at 674.

1. Does not meant that the trial court must question the defendant. *State v. Thomas*, 2000 WI 13 ¶ 21, 232 Wis. 2d 714, 605 N.W. 2d 836.

2. May be established "through witnesses' testimony, or a prosecutor reading police reports or statements of evidence...Finally, a factual basis is established when counsel stipulate[s] on the record to facts in the criminal complaint." *Id.* (citation omitted) (assuming the facts in the complaint establish all elements of the offense charged).

b. Defendant does not have to agree to the proffered factual basis for the court to find that one exists and accept the plea. *State v. Garcia*, 192 Wis. 2d 845, 532 N.W.2d 111 (1995).

G. Inform the defendant of the constitutional rights he will be waiving by entering a plea and make sure that the defendant understands that he is giving up these rights. *State v. Hampton*, 2004 WI 107, ¶24, 274 Wis.2d 379, 683 N.W.2d 14; *Bangert*, 131 Wis. 2d at 270-272.

1. To be a valid waiver, the plea must be an intentional relinquishment of known rights. *Bangert*, 131 Wis. 2d at 265,389 N.W.2d 12 *citing McCarthy v. United States*, 394 U.S. 459, 466, (1969); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

2. A plea will not be voluntary unless the defendant understands the nature of the constitutional rights he is waiving. *Bangert*, 131 Wis.2d at 265, 389 N.W.2d 12.

3. The rights:

a. Right to remain silent/against self-incrimination

b. Right to confront/cross-examine witnesses

c. Right to compel witnesses testimony/present evidence

d. Right to a 12-person jury and unanimous jury

e. Right to make the state prove guilt beyond a reasonable doubt on every element of the crime

H. Make sure that the defendant understands that the court is not bound by any plea agreement or recommendations by the state. *Hampton* at ¶¶20, 29; *State ex rel White v. Gray*, 57 Wis.2d 17, 24, 203 N.W.2d 638 (1973).

I. Notify the defendant of the direct consequences of the plea. *State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 579 N.W.2d 698 (1998); Wis. JI-Criminal SM-32. *See also Bollig*, 2000 WI 6, ¶16, 232 Wis.2d 561, 605 N.W.2d 199 (due process right to be notified of the direct consequences); *Brady*, 397 U.S. 742, 755 (1970); *Lewandowski v. State*, 140 Wis. 2d 405, 408, 411 N.W.2d 146, 148 (Ct. App. 1987).

1. Plea should be entered "with sufficient awareness of the relevant circumstances and likely consequences" that could follow. *Brady*, 397 U.S. at 748.

2. A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment. *Bollig* at ¶16; *State v. Byrge*, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477. If a defendant is not aware of the direct consequences of a plea, he or she is not appraised of "the potential punishment" under Wis. Stat. §971.08(1)(a).

3. The Court need not inform the defendant of the collateral consequences. *State v. Santos*, 136 Wis. 2d 528, 531, 401 N.W.2d 856, 858 (Ct. App. 1987).

a. Collateral consequences are indirect and do not flow from the conviction. *Byrge,* 2000 WI 101 ¶61. *See State v. Warren*, 219 Wis.2d 615, 637-38, 579 N.W.2d 698 (consequences are contingent on a future proceeding in which a defendant's subsequent behavior affects the determination); *State v. Kosina*, 226 Wis.2d 482, 486, 595 N.W.2d 464 (Ct. App. 1999) (consequence that rests not with the sentencing court, but instead with a different tribunal or government agency.

4. "The distinction between 'direct' and 'collateral' consequences of a plea . . . turns on whether the result represents a definite, immediate, and largely automatic effect on the range of the defendant's punishment." *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366

(4th Cir.), *cert. denied*, 414 U.S. 1005 (1973).

J. Court must inform the defendant that: "[i]f you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law." Wis. Stat. §908.01(1)(c).

1. Merely failing to advise the defendant is not enough. Defendant is entitled to withdraw his plea if:

a. Court failed to warn *and*

b. the defendant can demonstrate that his plea is likely to result in his deportation. *State v. Douangmala,* 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1. *See* Wis. Stat. §971.08(2) requiring the court to "vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea."

IV. Entering the Plea

A. Defendant should say the words himself.

> "A defendant expressly and personally pleading guilty or no contest on the record in open court is the best way for a circuit court to assure itself that the defendant has personally made the decision to so plead." *State v. Burns*, 226 Wis. 2d 762, 594 N.W.2d 799 (1999)

B. Not a procedural requirement.

> Based on the totality of the circumstances, the failure of the court to inquire the defendant personally as to his or her plea is an error of form over substance and not grounds for withdrawal of the plea. *Burns*, 226 Wis.2d at 762.

Part II: Standards for Plea Withdrawal

I. Pre-Sentencing

A. Must demonstrate that there is a "fair and just reason" for allowing the defendant to withdraw his plea. *State v. Kivioja*, 225 Wis. 2d 271, 283, 592 N.W.2d 220 (1999) (citation omitted).

B. A fair and just reason is "'some adequate reason for defendant's change of heart[,]' ... other than the desire to have a trial." *State v. Canedy*, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991) (citation omitted).

C. The burden is on the defendant to prove a fair and just reason for withdrawal of the plea by a preponderance of the evidence. *Cannedy*, 161 Wis.2d at 583-84.

1. If a defendant makes the necessary showing, "the court should permit the defendant to withdraw his or her plea unless the prosecution would be substantially prejudiced." *Kivioja*, 225 Wis. 2d at 283-84.

2. "[O]nce the defendant presents a fair and just reason, the burden shifts to the State to show substantial prejudice so as to defeat the plea withdrawal." *Bollig* at ¶34.

D. The circuit court must apply this test liberally. *Kivioja*, 225 Wis. 2d at 284.

II. Post-Sentencing

A. A defendant must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in a "manifest injustice." *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis.2d 714, 605 N.W.2d 836.

1. A manifest injustice exists where a defendant demonstrates that the plea was coerced, uninformed, or unsupported by a factual basis, and where counsel provided ineffective assistance, or the prosecutor failed to fulfill the plea agreement. *State v. Krieger*, 163 Wis.2d 241, 249-51 and n. 6, 471 N.W.2d 599 (Ct. App. 1991). *See also Bentley Claims*, *infra*.

2. Examples (from *State v. Washington*, 176 Wis.2d 205, fn. 2, 500 N.W.2d 331 (1993) *citing* American Bar Association's (ABA) Standards for Criminal Justice (2d ed. supp. 1986) §§14-2.1(b)(ii)(A)-(F)):

a. Ineffective assistance of counsel.

b. The defendant did not personally enter or ratify the plea.

c. The plea was involuntary.

d. The prosecutor failed to fulfill the plea agreement.

e. The defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement.

f. The court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

Part III: *Bangert* Claims

I. The Attack

A. The plea colloquy did not conform with Wis. Stat. §971.08 and judicial mandates, and the defendant did not know or understand information that should have been given at the plea hearing. Thus, his plea was not knowing, intelligent, and voluntary. *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986)

B. Defendant is entitled to withdraw the plea as a matter of right because such a plea "violates fundamental due process" *State v. Van Camp*, 213 Wis.2d 131, 139, 569 N.W.2d 577 (1997), unless the state can show the plea was entered knowingly, intelligently, and voluntarily, despite the deficiencies in the plea hearing. *Trochinski*, 253 Wis.2d 38, ¶17, 644 N.W.2d 891; *Van Camp*, 213 Wis.2d at 139.

II. The Motion

A. Can only be invoked if the defendant alleges that the circuit court failed in the plea colloquy. *State v. Brown*, 2006 WI 100, ¶36, 293 Wis.2d 594, 716 N.W.2d 906; *State v. Howell* at ¶27.

B. Source of the defendant's misunderstanding ought to be clear from the transcript of the hearing. *Howell* at ¶28.

> *Bangert* "requires something less to support the defendant's allegation of his understanding at the time of the plea [because] the court can head off the problem with a sufficient plea colloquy." *Hampton* at ¶65.

C. An evidentiary hearing is only warranted ***if***

1. The motion makes a *prima facie* showing that the court failed to follow the requirements of §971.08 or other mandatory procedures ***and***

2. The motion alleges that, in fact, the defendant did not know or understand the information that should have been provided at the plea colloquy. *Bangert*, 131 Wis.2d at 274; *Hampton*, ¶46, ¶57; *Howell*, ¶27.

D. Just the (Specific) Facts, Ma'am

1. The motion must point to a "specific defect in the plea hearing which constitutes an error by the court. The defendant **will not** satisfy this burden merely by alleging that 'the plea colloquy was defective' or 'the court failed to conform to its mandatory duties during the plea colloquy.'" *Hampton* at ¶57 (emphasis added).

2. A defendant is not required to submit a sworn affidavit to the court, but he is required to plead in his motion that he did not know or understand some aspect of his plea that is related to a deficiency in the plea colloquy. *Brown* at ¶62.

3. A defendant must identify deficiencies in the plea colloquy, state what he did not understand, and connect his lack of understanding to the deficiencies. *Brown* at ¶67. *See Hampton* at ¶57; *State v. Giebel*, 198 Wis.2d 207, 217, 541 N.W.2d 815 (Ct. App. 1995).

   a. *Note Howell* at ¶7: "In keeping with *Bangert*, we examine the record at the plea hearing; we do not confabulate about facts and conversations not on the record. We stay focused. A defendant's right to an evidentiary hearing under *Bangert* cannot be circumvented by either the court or the State asserting that based on the record as a whole the defendant, despite the defective plea colloquy, entered a constitutionally sound plea."

III. The Hearing

A. If the defendant meets the pleading test, the burden shifts to the state, which must show (at the hearing) that the plea was knowing, intelligent and voluntary. *Bangert*, 131 Wis.2d at 274-75.

1. In meeting its burden, the state may rely "on the totality of the evidence, much of which will be found outside the plea hearing record." *Hampton*, 274 Wis.2d 379, ¶47, 683 N.W.2d 14. For

example, the state may present the testimony of the defendant and defense counsel to establish the defendant's understanding. *Bangert*, 131 Wis.2d at 275, 389 N.W.2d 12. The state may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden. *Brown* at ¶40.

Part IV: *Nelson/Bentley* Claims

I. The Attack

A. Some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm.

B. Key: Something outside of the colloquy.

1. "The State is simply incorrect that a good and sufficient plea colloquy, one that concededly complies with the requirements of *Bangert*, can be relied on to deny an evidentiary hearing for a defendant who seeks to withdraw his or her plea on non-*Bangert* grounds. The entire premise of a *Nelson/ Bentley* plea withdrawal motion is that something not apparent from the plea colloquy may have rendered a guilty or no contest plea infirm." *State v. Basley*, 2006 WI App 253, ¶15, 298 Wis.2d 232, 726 N.W.2d 671.

II. The Motion

A. Must allege nonconclusory facts that, if true, would entitle the defendant to relief. *Howell* at ¶76

1. Higher standard than a *Bangert* claim.

B. Entitlement to an Evidentiary Hearing

1. Even if the motion is well-pled, the circuit court may deny the request for an evidentiary hearing if the "record as a whole conclusively demonstrates that relief is not warranted." *Howell* at ¶77.

a. If the record does not so demonstrate, the defendant is entitled to a hearing. But all a well-pled motion gets the defendant is a review of the record – not necessarily a hearing. *Howell* at ¶77.

2. However, the trial court may exercise its discretion and grant the defendant an evidentiary hearing even if the record conclusively

demonstrates that the defendant is not entitled to relief. *Howell* at ¶77.

C. Sufficiency of the Motion

1. Whether the defendant's motion "on its face alleges facts which would entitle the defendant to relief," *Bentley*, 201 Wis.2d at 310, is a question of law that is reviewed *de novo*. *Howell* at ¶78.

2. Whether the record conclusively demonstrates that the defendant is not entitled to relief is a question of law that is reviewed *de novo*. *Howell* at ¶78.

Part V: Appellate Review

I. Sufficiency of the Motion/Denial of Hearing

A. *Bangert* Claims

1. Whether a motion sufficiently points to deficiencies in the plea colloquy that establish a violation of Wis. Stat. §971.08 or other mandatory duties at a plea hearing is a question of law reviewed *de novo*. *See State v. Brandt*, 226 Wis.2d 610, 618, 594 N.W.2d 759 (1999).

2. Whether the defendant has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing is also a question of law that is reviewed *de novo*. *See State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996).

B. *Nelson/Bentley* Claims

1. The decision to grant or deny an evidentiary hearing is reviewed under the erroneous exercise of discretion standard. *Howell* at ¶79 *citing State v. Nelson*, 54 Wis.2d 489, 497-98, 195 N.W.2d 629 54 (1972).

a. "[T]he exercise of discretion is not the equivalent of unfettered decision-making." *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981). To be upheld on appeal, a discretionary act "must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." *Id*. Moreover, "a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable

determination." *Id.*

II. Entitlement to Relief after Hearing

A. Plea was not knowing, voluntary and intelligent

1. Question of constitutional fact; *see Trochinski*, 253 Wis.2d 38, ¶16, 644 N.W.2d 891.

2. The reviewing court will accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but will determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *Id.*