

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1469

Cir. Ct. No. 1995CF954600

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICO SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and JEFFREY A. WAGNER, Judges. *Affirmed.*

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Rico Sanders appeals from a judgment of conviction for five sexual assaults and one armed robbery, and from a motion

summarily denying his postconviction motion for plea withdrawal.¹ The issue is whether Sanders is entitled to an evidentiary hearing on his postconviction motion for plea withdrawal. We conclude that Sanders has failed to make a *prima facie* showing that the trial court failed to comply with WIS. STAT. § 971.08 (1995-96); consequently, he is not entitled to an evidentiary hearing to explore whether he understood the nature of the charges to which he was pleading.² Therefore, we affirm.

¶2 Incident to a plea-bargain, Sanders entered *Alford* pleas to four counts of first-degree sexual assault, in violation of WIS. STAT. § 940.225(1)(b), one count of second-degree sexual assault, in violation of § 940.225(2)(a), and one count of armed robbery, in violation of WIS. STAT. § 943.32(2), in exchange for the dismissal and reading-in of two counts of armed burglary and two counts of aggravated battery, and a global sentencing recommendation in the range of fifty to seventy years in prison for the five sexual assaults, and a stayed sentence with a “lengthy [term of] probation” for the armed robbery, to run consecutive to the sexual assault sentences.³ The trial court imposed an aggregate sentence of one hundred forty years: four consecutive thirty-year sentences for each of the first-

¹ The Honorable David A. Hansher presided over the plea and sentencing hearings, and entered judgment against Sanders. The Honorable Jeffrey A. Wagner decided Sanders’s postconviction motion.

² All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

³ An *Alford* plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant’s claim of innocence. See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970); accord *State v. Garcia*, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an *Alford* plea is discretionary in Wisconsin).

degree sexual assaults, and two consecutive ten-year sentences for the second-degree sexual assault and for the armed robbery.

¶3 Over nine years later, we granted Sanders's petition for a writ of habeas corpus pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), and reinstated his appellate rights. Sanders then filed a postconviction motion for plea withdrawal, which the trial court summarily denied. Sanders appeals from that postconviction order.

¶4 In Sanders's postconviction motion, he seeks plea withdrawal, alleging that the trial court failed to comply with the requisites of WIS. STAT. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and that he did not understand the elements of the crimes to which he was pleading, rendering his *Alford* pleas invalid. Sanders challenges the adequacy of the plea colloquy; we therefore analyze his allegations pursuant to *Bangert*.

¶5 In a claim for plea withdrawal based on an inadequate plea colloquy,

the defendant [must] 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 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.

Bangert, 131 Wis. 2d at 274 (citations omitted). The *Bangert* analysis was recently addressed and applied in *State v. Howell*, 2007 WI 75, ¶7, 301 Wis. 2d 350, 734 N.W.2d 48, where the issue was whether the defendant was entitled to an evidentiary hearing on his plea withdrawal motion alleging that his plea was

invalid because the plea colloquy was defective. *See id.* We review the trial court's summary denial of Sanders's plea withdrawal motion as a question of law. *See id.*, ¶¶30-31.

¶6 Sanders's threshold allegation is that the plea colloquy was inadequate. We examine the record, the transcript of the plea hearing, and the plea questionnaire and waiver of rights form ("plea questionnaire") to determine the adequacy of the plea colloquy. We focus on the nature and elements of the offenses to which Sanders ultimately pled because his challenge is to that aspect of the plea colloquy.

¶7 Sanders ultimately entered *Alford* pleas to four counts of first-degree sexual assault involving three different victims (the last two counts involving two distinct assaults on the same date and at the same location against the same victim), to second-degree sexual assault, and to armed robbery. For the first three of the four first-degree sexual assault charges, the trial court recited each charge individually, stating the date and address where each assault occurred, and that Sanders had **sexual intercourse** with the victim, who the trial court identified by first and last name, **without each victim's consent**, and **by the use of a dangerous weapon**, except the first charge, which was **by using an article used or fashioned in a manner to lead the victim to reasonably believe that the article was a dangerous weapon**. The bolded phrases satisfy the legal elements necessary to prove first-degree sexual assault. *See* WIS. STAT. § 940.225(1)(b). Although the trial court did not complete its recitation of the elements of the fourth sexual assault, that assault was on the same date and location against the same victim, but involved different incidents of sexual intercourse (third count: penis to mouth; fourth count: penis to vagina). The trial court did not recite two of the three legal elements of first-degree sexual assault a fourth time, although those

same elements were recited for the first three first-degree sexual assaults. We consequently conclude that, under these circumstances, failing to recite two of the three elements for the second offense against the same woman, which had just been recited previously, does not render this plea colloquy inadequate when Sanders was charged with four of the same type of offenses against three different women, and the trial court identified each incident of first-degree sexual assault by victim, date, and address.

¶8 For the second-degree sexual assault charge, the trial court identified the date, address, and the victim by name, and recited that Sanders had **sexual intercourse** with that victim, **without her consent** and **by the use or threat of violence**. The bold phrases satisfy the legal elements necessary to prove second-degree sexual assault. *See* WIS. STAT. § 940.225(2)(a).

¶9 For the armed robbery, the trial court identified the date, address, and the victim by name, and recited that Sanders had **used an article leading the victim to reasonably believe that it was a dangerous weapon, took property from her with the intent to steal that property**, and threatened her with the imminent use of force to compel her acquiescence. The bolded phrases satisfy the legal elements necessary to prove armed robbery with the threat of force. *See* WIS. STAT. § 943.32(2) (1995-96).

¶10 The trial court also asked Sanders if he had read the criminal complaint or if it was read to him, explaining that was the document charging him; Sanders responded that the complaint “was read to me.” The trial court then confirmed with Sanders that he understood what he was charged with (which was what the court had just recited to him), and confirmed with defense counsel that he had discussed “what the state would have to prove in each count in order to

convict [Sanders],” to which defense counsel confirmed that he had. Defense counsel stipulated to the use of the criminal complaint as a factual basis for Sanders’s pleas, and the prosecutor elaborated in common everyday language on the testimony the State would present if this case proceeded to trial.

¶11 Defense counsel explained why Sanders was entering an *Alford* plea and accepting the plea-bargain, as opposed to pleading guilty, or proceeding to trial despite his potential defenses. The trial court also explained the concept of an *Alford* plea and its ramifications. It explained the rights that Sanders would forfeit by entering an *Alford* plea. It also explained the maximum potential penalties for these offenses, that it was not required to follow anyone’s sentencing recommendation, and that it could impose the maximum consecutive sentences for these offenses, which would total 210 years.

¶12 The trial court also referred to Sanders’s signed plea questionnaire, asking Sanders if he had “go[ne] through this with [his] attorney,” to which Sanders responded that he had. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent, and voluntary plea); see also *State v. Brown*, 2006 WI 100, ¶¶35-41, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Trochinski*, 2002 WI 56, ¶23, 253 Wis. 2d 38, 644 N.W.2d 891. Sanders confirmed his understanding of what was being said, and repeatedly confirmed that he had no questions of defense counsel or the trial court.

¶13 Sanders asserts that his intellectual limitations and mental problems warranted more than a rote recitation of “yes” or “no” answers to the trial court’s inquiries to constitute an adequate plea colloquy, as supported by *Howell*, 301 Wis. 2d 350, ¶¶64-65 and *Brown*, 293 Wis. 2d 594, ¶51. The transcript of the plea

hearing, and the discussions that preceded the parties' agreement to the plea-bargain, distinguish this situation from *Howell* and *Brown*. In *Howell*, the trial court offered only a "curt explanation" of the defendant's criminal liability. *Howell*, 301 Wis. 2d 350, ¶47. In *Brown*, the defendant had not filed a plea questionnaire, and the trial court did not "enumerate or discuss elements of the crimes[, which] may have shortchanged the defendant." *Brown*, 293 Wis. 2d 594, ¶¶53-55. The trial court's plea colloquy and Sanders's signed plea questionnaire far exceed what occurred in *Howell* and *Brown*.

¶14 We conclude that the trial court complied with *Bangert* and the statutory requisites in reciting the elements of each offense (five of which were sexual assaults, four of which were first-degree sexual assaults), and describing each offense by date and address, and identifying each victim by first and last name. The prosecutor explained in everyday language specifically what witnesses the State intended to call to prove the charges. The trial court explained the ramifications of an *Alford* plea, and the rights Sanders would forfeit by entering a plea to each charge. The trial court also acknowledged that it was "well aware of the history of this case and the treatment," and recalled the doctors' reports and Sanders's background, but confirmed directly with defense counsel that "there's no question though, today, [Sanders is] aware of what's going on today and he's mentally competent to enter this plea," to which defense counsel responded, "I have no such question." We conclude that the plea colloquy was constitutionally adequate. See WIS. STAT. § 971.08; *Bangert*, 131 Wis. 2d at 266-72.

¶15 Sanders alleged that he did not understand the nature and elements of the offenses to which he pled, and that therefore his pleas were unknowingly, unintelligently, and involuntarily entered. As the supreme court held in *Bangert* and re-affirmed in *Howell*, however, the defendant must first "make[] 'a *prima*

facie showing that [the] plea was accepted without the trial court’s conformance with [WIS. STAT.] § 971.08 or other mandatory procedures.” *Howell*, 301 Wis. 2d 350, ¶27 (citing *Bangert*, 131 Wis. 2d at 274) (alterations in *Howell*). Sanders has not made that *prima facie* showing; consequently, we do not consider his allegations that he did not understand the nature and elements of the offenses to which he pled. Therefore, Sanders is not entitled to an evidentiary hearing on his postconviction allegations for plea withdrawal. *See Howell*, 301 Wis. 2d 350, ¶27; *Bangert*, 131 Wis. 2d at 274.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

