STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III



Appeal No. 2014AP625
(Outagamie County Cir. Ct. Case No. 2013CF38)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSE R. MORALES,

Defendant-Appellant.

**MOTION OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN TO VACATE THE CIRCUIT COURT'S ORDER DENYING PLEA WITHDRAWAL AND TO REMAND WITH INSTRUCTIONS**

Plaintiff-respondent State of Wisconsin moves the court to vacate the circuit court's order (26) denying defendant-appellant Jose R. Morales's motion to withdraw his no-contest plea to an amended information (17) charging him with one count of the Class G felony of possession with intent to deliver one gram or less of cocaine. The State further requests that the court remand the case with instructions that the circuit court grant the plea-withdrawal motion, vacate the judgment of conviction, reinstate

the original information, and schedule further proceedings accordingly.

The State agrees with Morales that the circuit court erred when, at the change-of-plea hearing, it failed to comply with Wis. Stat. § 971.08(1)(c), which requires the court to

> [a]ddress the defendant personally and advise the defendant as follows: "If 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. § 971.08(1)(c). The transcript of the hearing shows that the court warned Morales about the risk of deportation and the risk of denial of naturalization, but the court failed to warn him about the risk of exclusion of admission to the United States (34:8). Consequently, the court failed to provide Morales with one of the three required substantive warnings.

Based on the circuit court's failure to provide all three warnings as required by section 971.08(1)(c), Morales moved to withdraw his plea (21), relying on Wis. Stat. § 971.08(2), which provides:

> If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in

> the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

The circuit court denied the motion (26). At the motion hearing, the court explained its decision:

> Mr. Morales now challenges that colloquy and claims that he did not intelligently enter a plea because he didn't know he could be deported or denied re-entry into the country.
>
> While the Court recognizes that I did not quote the statute verbatim, a verbatim statement is included in the plea questionnaire; and, the Court's colloquy with the defendant substantially complied with the general warning that is required to be given. Under State v. Mursal[1] "substantial compliance occurs where the difference in wording does not alter the general meaning of the warning in any way, and fulfills the purpose of notifying the defendant of immigration consequences of a criminal conviction."
>
> I, therefore, find that the colloquy that occurred with Mr. Morales met the requirements of the law; particularly, accompanied with the language on the plea questionnaire, which Mr. Morales indicated he reviewed with his counsel and interpreter. As a result, the defense motion to withdraw the plea and to vacate the conviction is denied.

(35:4-5.)

Based on its review of the change-of-plea colloquy and applicable statutes and court decisions, the State respectfully disagrees with the circuit court's conclusion. In ***State v. Mursal***,

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[1] ***State v. Mursal***, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173.

2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173, the circuit court did not use the exact language set out in section 971.08(1)(c) but did provide the full substance of the required warning. As this court wrote:

> [T]he trial court's warning given at the plea hearing complied completely with the statute's substance, but its language deviated—very slightly—from the exact language expressed by the statute. We note the linguistic differences:
>
> a) The trial court said "*you're* not a citizen" instead of "*you are* not a citizen";
>
> b) The trial court said "United States" instead of "United States of America";
>
> c) The trial court said "*can* result" instead of "*may* result," and
>
> d) The trial court said "your plea" instead of "you are advised that a plea of guilty or no contest" and omitted "the offense with which you are charged" that would have followed "guilty or no contest."

***Mursal***, 351 Wis. 2d 180, ¶ 14. In Morales's case, however, the circuit court's warning deviated in substance: unlike in ***Mursal***, the court failed to provide one of the three substantive warnings.

But for section 971.08(2), the State could have plausibly defended the circuit court's order denying plea withdrawal. The rationales for plea withdrawal in Wisconsin derive from two lines of cases, one flowing from ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the other flowing from ***Nelson v. State***, 54

Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See* ***State v. Howell***, 2007 WI 75, ¶¶ 73-74, 301 Wis. 2d 350, 734 N.W.2d 48 (discussing dual-purpose *Bangert* and *Nelson/Bentley* motions); ***State v. Brown***, 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906 (same). *See also* ***State v. Hoppe***, 2009 WI 41, ¶ 3 & n.3, 317 Wis. 2d 161, 765 N.W.2d 794. The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson/Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his or her plea infirm. *See* ***Hoppe***, 317 Wis. 2d 161, ¶ 3.

The burden of proof for these two types of challenges differs. "Once the defendant files a ***Bangert*** motion entitling him to an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Hoppe***, 317 Wis. 2d 161, ¶ 44.

Here, Morales raised a ***Bangert***-based claim: the circuit court conducted a defective colloquy by omitting a statutorily required component of the deportation/exclusion/naturalization warning

under section 971.08(1)(c). Typically, the State could respond to a *Bangert*-based challenge by showing that the defendant actually entered a knowing, intelligent, and voluntary plea despite the defect. For instance, the State could point to other parts of the colloquy or to admissions in the plea questionnaire as evidence that the defect did not result in an invalid plea.

In the context of the warning required by section 971.08(1)(c), however, the Wisconsin Supreme Court has foreclosed that possibility. In the court's unanimous decision in ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, the court explicitly prohibited a harmless-error or no-prejudice response to a challenge to an inadequate warning. The court specifically overruled four cases to the extent they approved harmless-error analysis with respect to challenges to proven defective warnings under section 971.08(1)(c): ***State v. Chavez***, 175 Wis. 2d 366, 498 N.W.2d 887 (Ct. App. 1993), which first applied harmless-error analysis to a defective warning; ***State v. Issa***, 186 Wis. 2d 199, 209, 519 N.W.2d 741 (Ct. App. 1994); ***State v. Lopez***, 196 Wis. 2d

725, 732, 539 N.W.2d 700 (Ct. App. 1995); and ***State v. Garcia***, 2000 WI App 81, ¶ 1, 234 Wis. 2d 304, 610 N.W.2d 180.

> As we have explained, we conclude that the *Chavez* harmless-error interpretation of Wis. Stat. § 971.08(2) is objectively wrong under the language of the statute. Accordingly, we overrule *Chavez, Issa, Lopez,* and *Garcia* to the extent that these cases hold that harmless-error principles apply to a defendant who satisfies the conditions set forth in § 971.08(2).

***Douangmala***, 253 Wis. 2d 173, ¶ 42 (footnotes omitted).

Overruling ***Chavez*** highlights the seriousness with which the supreme court takes the remedial language of section 971.08(2). In ***Chavez***, the circuit court "fail[ed] to inform [Chavez] of the likelihood of deportation as required by sec. 971.08(2), Stats. [*sic*]." ***Chavez***, 175 Wis. 2d at 368. "[I]t [was] undisputed that Chavez was aware of the potential for deportation when he entered his plea." ***Id.*** *See also* ***id.*** at 369 ("Chavez . . . does not contest the state's contention that he was aware of the likelihood of deportation when he entered his plea"). On appeal, this court declared that "[a]s is true of a defendant who asserts ineffective counsel, prejudice is an essential component of the inquiry" regarding the application of section 971.08(2) when a circuit court fails to provide the warning required by section 971.08(1)(c). ***Id.***

at 371. By overruling this holding in ***Chavez*** (the fountainhead for applying harmless-error principles when a defendant satisfies the requirements of section 971.08(2)), the supreme court has precluded the State, in the face of a warning that fails to comply with substance of section 971.08(1)(c), from proving a defendant's actual knowledge of the deportation/exclusion/naturalization consequences of a guilty or no-contest plea: ***Douangmala*** makes clear that actual knowledge does not cure a substantive defect in the oral warning.[2]

Here, the transcript of the change-of-plea hearing does not leave any doubt that when the circuit court personally addressed Morales, the court failed to provide him with the required exclusion-from-admission component of the warning.

In his plea-withdrawal motion, Morales satisfied the requirements of section 971.08(2): he pled the defect in the warning, and he pled a likely deportation/exclusion/naturalization impact as a

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[2] Indeed, three of the four overruled cases concerned defendants who, despite the defective warning, actually knew the risk (a deportation risk in each instance) when they entered their pleas.

result of the plea (21:1 "Mr. Morales is currently in deportation proceedings in the Executive Office of Immigration Review as a result of this conviction ('EOIR' aka 'immigration court')."). At the motion hearing, the State did not dispute either of those contentions. Under section 971.08(2), the circuit court did not have the option of denying plea withdrawal.

In light of Wis. Stat. § 971.08(2) and the supreme court's interpretation of that statute in ***Douangmala***, the State concedes that the circuit court erred when it denied Morales's plea-withdrawal motion and that the error required the circuit court to grant Morales's plea-withdrawal motion. The State therefore requests that this court vacate the circuit court's order denying the plea-withdrawal motion and remand the case with instructions that the circuit court

- grant the plea-withdrawal motion,
- vacate the judgment of conviction,
- reinstate the original information, and
- schedule further proceedings accordingly.

The State also requests that the instructions direct that a different judge conduct any resentencing. Sentencing by a different judge will minimize the risk of a subsequent claim of judicial vindictiveness if resentencing results in a more severe sentence. *See* ***Texas v. McCullough***, 475 U.S. 134, 140 (1986) (where resentencing occurs before a different judge and the defendant receives an increased sentence, presumption of judicial vindictiveness does not apply); ***State v. Naydihor***, 2004 WI 43, ¶¶ 48-54, 270 Wis. 2d 585, 678 N.W.2d 220.

Date: August 21, 2014.

Respectfully submitted,

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**DISTRICT III**

September 11, 2014

*To:*

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You are hereby notified that the Court has entered the following opinion and order:

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2014AP625 State of Wisconsin v. Jose R. Morales (L.C. # 2013CF38)

Before Hoover, P.J., Stark and Hruz, JJ.

The State has filed a motion for summary disposition, vacating the order denying Morales' postconviction motion, and remanding with direction to grant the motion to withdraw his no contest plea, vacate the judgment of conviction, reinstate the original information, schedule further proceedings accordingly, and direct that a different judge conduct any resentencing proceeding. Morales has not filed a response to the motion, but in his brief on appeal requests reversal of the order denying his postconviction motion and a remand for further proceedings. We conclude that summary reversal is appropriate, but the State's requests to reinstate the original information and to compel substitution of judge for any resentencing are not properly before this court.

Morales must be allowed to withdraw his no contest plea because the court failed to provide all of the notices required by WIS. STAT. § 971.08(1)(c). Unlike ***State v. Mursal***, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173, the court's notice was substantively deficient and not just a question of linguistic differences. The court failed to warn Morales of the risk of exclusion from admission into the United States. This omission cannot be subject to a harmless error analysis based on providing the complete warning in the Plea Questionnaire and Waiver of Rights form. *See* ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1.

We will not direct reinstatement of the original information. That is a matter for the district attorney and/or the circuit court to consider. We also reject the State's request to direct that a different judge conduct any resentencing. Upon reversal either party may request substitution of judge within twenty days of remittitur. *See* WIS. STAT. § 801.58(7). There is no basis for this court to interfere with that process at this time.

IT IS ORDERED that the order denying postconviction relief is summarily reversed and the cause remanded with direction to grant the motion to withdraw the plea, vacate the judgment of conviction and conduct further proceedings consistent with this order.

IT IS FURTHER ORDERED that the State's motion to direct the circuit court to reinstate the original information and to substitute judge for any subsequent sentencing is denied.

*Diane M. Fremgen*
*Clerk of Court of Appeals*


This document is a true and correct copy of the document on file in my office.

Clerk of Supreme Court/Court of Appeals, State of Wisconsin

3/31/2015
Date