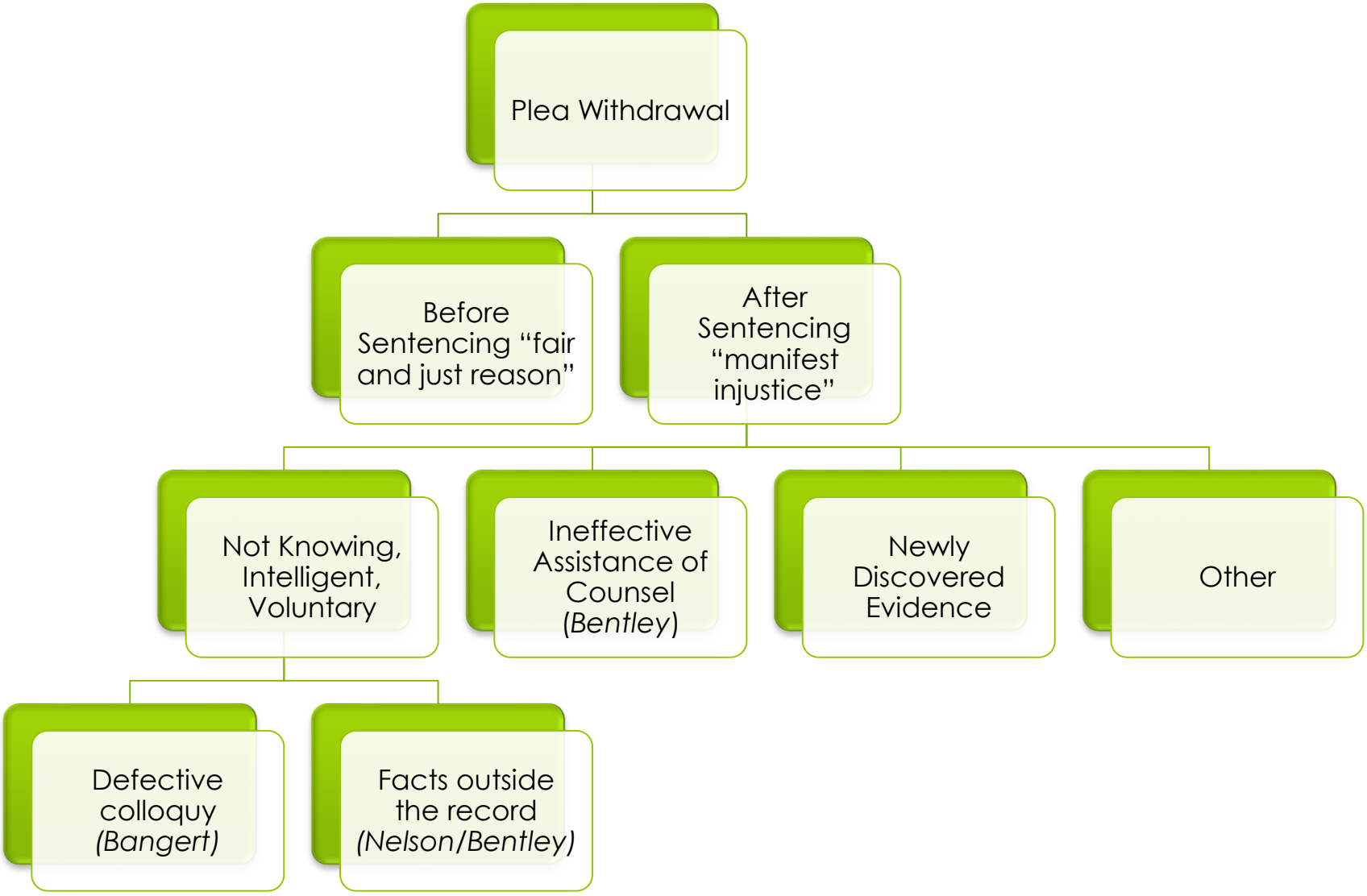
Appealing Plea Cases:

Substantive Claims and New Developments


Plea Withdrawal
Before Sentencing "fair and just reason"
After Sentencing "manifest injustice"
Not Knowing, Intelligent, Voluntary
Ineffective Assistance of Counsel (*Bentley*)
Newly Discovered Evidence
Other
Defective colloquy *(Bangert)*
Facts outside the record *(Nelson/Bentley)*

BEFORE sentencing

- A defendant ***should*** be allowed to withdraw a guilty plea before sentencing when
  - A "fair and just reason" exists
  - The prosecution is not "substantially prejudiced"
  - ***State v. Canedy***, 161 Wis.2d 565, 469 N.W.2d 163 (1991); ***State v. Jenkins***, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24, discusses history of presentence plea withdrawal cases.

Discretionary Decision

- Although liberal rule for allowing plea withdrawal before sentencing, courts do not grant very often.
- As long as court examines the relevant facts, applies the correct law, and uses a demonstrated rational process, a court’ s decision to deny plea withdrawal before sentencing will be upheld on appeal.
- Not an absolute right

What is a fair and just reason?

- A fair and just reason is "some adequate reason for defendant's change of heart … other than the desire to have a trial." *Canedy,* at 583.
- The burden is on the defendant to prove a fair and just reason for withdrawal of the plea by a preponderance of the evidence. *Canedy,* at 584.
- Once the defendant presents a fair and just reason, the burden shifts to the state to show substantial prejudice.

Examples of "fair and just" reasons

- Defendant misunderstood the consequences of plea, was confused about options, and received misleading advice from his attorney. ***State v. Manke***, 230 Wis.2d 421, 602 N.W.2d 139 (Ct. App.1999).
- Defendant said it was not his intention to plead guilty, things were happening very fast, he was confused, and confusion led to plea. ***Libke v. State***, 60 Wis. 2d 121, 129, 208 N.W.2d 331 (1973).

More Examples…

- Claim of innocence is not required, nor is it a stand-alone reason for plea withdrawal before sentencing, but would help the court evaluate the defendant's reason for plea withdrawal.
- If court failed to conform to required duties at plea hearing and defendant misunderstood because of it.
- Defendant's lack of knowledge that plea could result in Chapter 980 commitment or sex offender registration. (***State v. Nelson***, 2005 WI App. 113, 282 Wis.2d 502, 701 N.W.2d 32).

AFTER sentencing

- Must show plea withdrawal is necessary to avoid a "manifest injustice"
  - Meaning, a "serious flaw in the fundamental integrity of the plea"
- Several ways to show a manifest injustice
  - (1) Not knowing, intelligent or voluntary plea
    - If defective plea colloquy raise as *Bangert*
    - If relying on facts outside the record raise as *Nelson/Bentley*
  - (2) Ineffective Assistance of Counsel
  - (3) Newly Discovered Evidence
  - (4) Other

Bangert Claim

- Not knowing, intelligent, or voluntary because:
  - (1) defective plea colloquy, and
  - (2) defendant did not understand what was omitted by the court
    - ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986);
    - ***State v. Brown***, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906;
    - Wis. Stat. 971.08(1);
    - Wis JI Criminal SM-32 summarizes duties and prescribes recommended procedure.

Prima Facie Case

- Must make *prima facie* case to get a hearing on the motion, by alleging that:
  - 1) the court did not conform to the requirements mandated at a plea hearing, set forth in Wis. Stat. § 971.08(1), or other court mandated requirements
  - 2) the defendant did not understand the information that should have been provided (affidavit is not required)

After PF case, burden shifts to the state

- Once prima facie case is made the court must hold an evidentiary hearing.
- State must prove that despite the court's omission, the defendant did understand what he/she is alleging he/she did not understand
  - State can rely on the totality of the evidence, which may consist of evidence outside the plea hearing record
  - State can call defendant and trial attorney to testify
  - State can refer to the plea questionnaire and waiver of rights form, documents, recorded statements and transcripts of prior hearings

Court's Duties

- Did the court address the defendant's age, education, general comprehension?
- Was the plea agreement stated accurately on the record and understood by the defendant?
- Were there any promises or threats made in connection with the plea, other than the plea agreement?
- Did the court inform the defendant that it is not bound by the agreement ***State v. Hampton***, 2004 WI 107, 274 Wis.2d 379, 683 N.W.2d 14.

Nature of the Offense

- Did the defendant understand the nature of the offense(s) to which he was pleading?
  - were the elements explained?
  - did the defendant understand the elements?
- Understanding the nature of the charge includes an awareness of the elements of the offense. The court may:
  - summarize elements by reading from the jury instructions or statute;
  - ask defense counsel to summarize conversation with the defendant regarding the elements;
  - court may also refer to a prior hearing where complaint was read to defendant, or to any other evidence regarding the defendant's understanding of the nature of the charge.
  - ***Bangert***, at 267-68.

Maximum Penalties

- Was the defendant informed of the range of punishments?
  - ***State v. Cross***, 2010 WI 70, ¶4, 326 Wis. 2d 492, 786 N.W.2d 64 (no error when the court tells defendant he faces a higher penalty, "but not substantially higher". Cross was told he faced 25 in, 15 out, when actual max was 20 in:10 out.)
  - ***State v. Taylor***, 2013 WI 34, ¶28, 347 Wis. 2d 30, 829 N.W.2d 482 (no error when the court did not tell the defendant he faced a lesser penalty when the record made clear that the defendant knew the max that he was facing. Taylor was not told that he faced an additional 2 years from the repeater enhancement. He was told he faced 6 years, and received the 6 years)

Factual Basis

- Was there a factual basis to support the plea?
  - Requirement "protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." ***State v. Thomas,*** 2000 WI 13, ¶ 14, 232 Wis.2d 714, 605 N.W.2d 836.
  - Defense counsel can stipulate to facts; defendant does not have to admit in his/her own words. ***Thomas***, ¶ 18.
  - A factual basis exists when a defendant pleads to a lesser charge, even if there was not a factual basis for the lesser charge, as long as there was a factual basis for the more serious charge. ***State v. Harrell***, 182 Wis. 2d. 408, 519 N.W.2d 676 (Ct. App. 1994),

Constitutional Rights

- Was the defendant informed of the constitutional rights he waives by entering a plea and did the court verify that the defendant is giving up those rights?
  - The court can refer to a plea questionnaire, without going over each right, but must make sure defendant understands he is giving up rights by entering the plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987).

Direct Consequences

- Did the court advise the defendant of the direct consequences of entering the plea?
  - A direct consequence is "one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment." *State v. Bollig*, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199.
  - Collateral consequences are “indirect”, “do not flow from the conviction” or when the consequences rest in the hands of another tribunal.

Other duties of Court

- Did the court give the deportation warning, under 971.08(1)(c), if the defendant was not a citizen?
- If defendant *pro se*, did the court determine that the defendant knowingly, voluntarily waived right to counsel and was competent to proceed *pro se*. ***State v. Klessig***, 211 Wis. 2d 194, 203 (1997).

Nelson/Bentley

- *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)
- Facts outside the record
- Motion
  - Must allege sufficient facts that, if true, would entitle defendant to withdraw his plea
  - Who, what, where, when, why, how
  - Non-conclusory
  - If the motion is insufficient the court can deny without a hearing
- Defense burden – clear and convincing evidence
  - Some claims can be raised under multiple theories (i.e. IAC and not KIV)
  - Need to raise both to preserve both for appeal

Not Knowing, Intelligent, Voluntary

- If claim is based on facts outside the record then raise under *Nelson/Bentley*
- Same theory as *Bangert* but not based on a defective plea colloquy (unrelated to court's duty)
- Burden on defendant to show not knowing, intelligent, or voluntary by clear and convincing evidence
- If possible it is preferable to raise as a *Bangert* claim because the burden shifts to the state
- Discussion of *Bangert* and *Nelson/Bentley* (*State v. Hoppe*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W. 794)
- If defendant misinformed about collateral consequence can still raise as not knowing, intelligent, voluntary

KIV Examples

- Affirmatively misinforms defendant (acquiescence by court/state)
  - Sex offender registration (*State v. Brown*, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543)
  - Right to appeal/waiver (*State v. Reikkoff*, 112 Wis. 2d 119, 332 N.W.2d 744 (1983))
- Unenforceable plea agreement (acquiescence by court/state)
  - Ability to reopen and amend (*State v. Dawson*, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12)
- Legally impossible plea agreement (acquiescence by court/state)
  - Ability to make consecutive (*State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992))

Ineffective Assistance of Counsel

- *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996)
- *Strickland* test applies (*Strickland v. Washington*, 466 U.S. 668 (1984))
  - Deficient – below an objective standard of reasonableness
  - Prejudice – "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted going to trial" *Hill v. Lockhart*, 474 U.S. 52 (1985)

IAC examples

- Failure to present plea offer - *State v. Ludwig*, 14 Wis. 2d 600, 369 N.W.2d 722 (1985)
  - Prejudice – would have taken the offer
  - Remedy – new trial/maybe specific performance
- Failure to raise suppression motion
  - Prejudice – suppression motion would have been successful
  - If not dispositive - allege would have insisted on going to trial
- Affirmatively misinformed defendant
  - Also not knowing, intelligent, voluntary

Newly Discovered Evidence

- Must show by clear and convincing evidence:
  - (1) the evidence was discovered after conviction,
  - (2) the defendant was not negligent in seeking evidence,
  - (3) the evidence is material to an issue in the case, and
  - (4) the evidence is not merely cumulative.
- Then, the circuit court must determine "whether a reasonable probability exists that a different result would be reached in a trial." *State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997)
- Recantations must be corroborated by other newly discovered evidence

Plea Breach

- Since plea offers induce defendants to give up the right to a jury trial due process demands fulfillment of the bargain. *State v. Williams*, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733.
- Breach must be "material and substantial"
  - "a violation of the terms of the agreement that defeats the benefit for which the accused bargained"
- Cannot be "less than a neutral recitation" of the agreement. *State v. Poole*, 131 Wis. 2d 359, 394 N.W.2d 909 (1986)
- If no objection, must raise as IAC in circuit court (prejudice is presumed if breach found)
- Remedy - vacate the plea or resentencing (before a different judge)

Risks of Plea Withdrawal

- Original plea agreement is gone
- Dismissed and Read-in charges reinstated
- Additional charges?
- State not bound by original plea offer
- Can be sentenced to maximum