COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP10-CR **Cir. Ct. No. 2011CF454**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA A. PEREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

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

¶1 PER CURIAM. Patricia Perez appeals a judgment, entered upon her no contest pleas, convicting her of arson and two counts of second-degree reckless endangerment, all counts as party to a crime (PTAC). Perez also appeals the order denying her postconviction motion for plea withdrawal. Perez argues the circuit

court erred by denying her plea withdrawal motion because she was not accurately informed of PTAC liability and did not otherwise understand the concept. Because the record supports the conclusion Perez understood PTAC liability at the time she entered her no contest pleas, we affirm the judgment and order.

BACKGROUND

¶2 A criminal complaint charged Perez with arson of a building and five counts of second-degree reckless endangerment, all six counts as party to a crime. The charges arose from allegations that Perez was involved in the fire-bombing of a Green Bay house in August 2010. Pursuant to a plea agreement, Perez entered no contest pleas to arson and two counts of second-degree reckless endangerment, all as party to a crime.[1] The court imposed concurrent sentences totaling fourteen years, consisting of eight years' initial confinement and six years' extended supervision.

¶3 Perez filed a postconviction motion for plea withdrawal, claiming her pleas were not knowing, intelligent and voluntary because the plea colloquy was deficient under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Specifically, Perez claimed the colloquy failed to adequately inform her of the concept of PTAC liability. Perez further alleged she did not otherwise know or understand PTAC liability, she did not know of the firebombing until after it occurred, and she mistakenly believed that her mere failure to report the

[1] Perez also entered no contest pleas to misdemeanor charges of bail jumping and retail theft arising from different cases. Her convictions for those charges are not relevant to this appeal.

perpetrators after-the-fact made her liable as a party to the crime. After a hearing, the court denied the motion. This appeal follows.

DISCUSSION

¶4 Pursuant to ***Bangert*** and its progeny, a defendant is entitled to an evidentiary hearing on his or her motion to withdraw a guilty plea after sentencing if the motion: (1) makes a prima facie showing of a violation of WIS. STAT. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) alleges "that the defendant did not know or understand the information that should have been provided at the plea hearing." ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. "Once the defendant files a ***Bangert*** motion entitling him or her 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." ***State v. Hoppe***, 2009 WI 41, ¶44, 317 Wis. 2d 161, 765 N.W.2d 794. If the State meets that burden, "the plea remains valid." ***Id.***

¶5 On appeal of an order denying a ***Bangert*** motion after an evidentiary hearing, the appellate court must determine whether the State met its burden of showing that the defendant's guilty plea was entered knowingly, intelligently, and voluntarily. ***Hoppe***, 317 Wis. 2d 161, ¶45. The appellate court accepts the circuit court's "findings of historical and evidentiary fact unless they are clearly erroneous," but it "independently determine[s] whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.***

¶6 Here, the circuit court initially declined to determine whether Perez made a prima facie showing for plea withdrawal, but proceeded to hold a hearing as if the burden had shifted to the State. After the hearing, the court concluded

Perez failed to make a prima facie showing, but nevertheless concluded the State met its burden to show Perez's plea was knowing, intelligent, and voluntary. Perez argues both that she made a prima facie case for plea withdrawal and that the State did not meet its burden to show she was otherwise aware of the concept of PTAC liability. We assume without deciding that Perez made a prima facie case for plea withdrawal, and conclude the State met its burden of proving Perez understood PTAC liability at the time she entered her pleas.

¶7 Based on the complaint's narrative, the State's theory was that Perez either directly committed the firebombing or directly assisted with it. The complaint identified several witnesses tying Perez to the firebombing, including one witness who indicated that Perez's then thirteen-year-old daughter told the witness that the daughter, along with Perez and another individual, firebombed the house. That same witness indicated that after she noticed a large bandage on Perez's leg, Perez said "someone was fucking with [Perez's daughter] so we had to bomb their house." The complaint further alleged Perez sought medical treatment for leg burns from two area hospitals after the incident. At the plea hearing, Perez, a high school graduate with some post-high school education, agreed that the facts in the criminal complaint were "essentially true and correct," such that the court could rely on them as a factual basis for the pleas.

¶8 The court also specifically asked Perez at the plea hearing if she had discussed with her attorney what it means to be party to a crime of arson, and Perez answered affirmatively.[2] The court continued:

> Okay. So you understand that to intentionally aid and abet arson of a building, you must know that another person is committing or intends to commit the crime of arson to a building and have the purpose to assist the commission of that crime. Do you understand that's what it means to be party to a crime?

Perez again answered affirmatively. Perez nevertheless emphasizes that the plea questionnaire form is missing a checkmark with regard to whether Perez understood the charges to which she entered no contest pleas; PTAC jury instructions are not attached to the plea questionnaire form; and trial counsel had no specific recollection or a "checklist" within her case file indicating she explained PTAC liability to Perez.

¶9 At the postconviction motion hearing, trial counsel testified she had been a criminal defense attorney for nine or ten years and estimated she represented sixty or seventy clients during that time who were charged as parties to a crime. Counsel further testified that although she did not have any specific recollection of explaining PTAC liability to Perez, her normal practice would have been to discuss PTAC liability and the elements of any charged offense with her client when trying to decide whether to go to trial and what kinds of defenses to

[2] Although the court did not discuss PTAC liability when explaining the elements of second-degree reckless endangerment, those charges derived from the arson charge and the risk it imposed on the house's residents. Moreover, the court's explanation of party to the crime of arson occurred minutes before it discussed the elements of second-degree reckless endangerment. That the court did not re-explain PTAC liability in context of the reckless endangerment charges does not undermine the conclusion that, based on the record, Perez understood PTAC liability at the time she entered her pleas.

mount, if any. Because the PTAC jury instructions were not attached to the plea questionnaire form, counsel doubted that she reviewed PTAC liability when reviewing the plea form with Perez, but counsel believed she did so earlier in the case.

¶10 Perez contends "mere speculation" that counsel discussed PTAC liability at some earlier point in the case is not clear and convincing evidence that Perez understood the concept. Citing ***State v. Van Camp***, 213 Wis. 2d 131, 149, 569 N.W.2d 577 (1997), Perez emphasizes "the operative time for determining whether a defendant understands the effects of a plea remains the plea hearing itself." The ***Van Camp*** court acknowledged, however, that when based on an adequate record, a defendant's past knowledge can support a voluntary and knowing plea and a court "must consider the totality of the circumstances when making such a determination." ***Id.*** Moreover, ***Van Camp*** is distinguishable on its facts.

¶11 There, Van Camp's trial attorney testified that based upon his "invariable" practice, he had gone through the "litany of rights" with Van Camp "most likely" when he first met with him "some seven months prior to the plea hearing." ***Id.*** at 146. In addition, Van Camp, a sixty-two-year-old man, had only a fourth-grade education, an IQ of 84, and no prior arrests. ***Id.*** at 136. Here, Perez's counsel explained, based on her normal practice, that she would use either the jury instructions or her own thorough explanation to describe PTAC liability—neither of which are akin to the "litany of rights" referenced in ***Van Camp***. Even if counsel discussed PTAC liability with Perez "earlier in the case," the time gap

was no more than two months before the plea hearing.[3] Further, unlike Van Camp, Perez had experience with the criminal justice system and did not have any obvious cognitive or intellectual difficulties that would have required counsel to deviate from her normal practice when explaining PTAC liability to Perez. Moreover, counsel acknowledged that if she had not discussed PTAC liability with Perez she "probably" would have corrected Perez when Perez indicated to the court that she had discussed the concept with counsel.

¶12 Based on the assertion she did not learn of the firebombing until twenty-four hours after it occurred, Perez nevertheless contends she did not understand PTAC liability, as she mistakenly believed she could be prosecuted as party to a crime by merely failing to report what she knew about it. Counsel, however, testified:

> I explained why I believed that the State would have a very strong case against her. I presented to her the evidence that I believe[d] the State would bring and discussed what I found to be problematic about the defenses that she wanted me to raise, why I didn't believe that they would be successful.

Moreover, as noted above, the complaint alleged Perez either directly committed or directly assisted in the firebombing, and Perez acknowledged during the plea colloquy that the complaint's narrative was "essentially true and correct." Because Perez's claim that she was an after-the-fact bystander is not supported by the record, her derivative claim that she was confused by PTAC liability based on her after-the-fact silence is not persuasive.

[3] Counsel was appointed approximately two months before the plea hearing.

¶13 Perez alternatively argues that counsel's discussion of both aiding and abetting and direct liability somehow confused her understanding of PTAC liability. Based on this record, we are not persuaded that counsel's reference to these two theories, both of which can form the basis for PTAC liability, altered Perez's understanding of the concept. *See* WIS. STAT. § 939.05(2) (one can be charged as party to a crime for directly committing crime; intentionally aiding and abetting in crime's commission; or being part of a conspiracy to commit it).

¶14 Ultimately, after considering the criminal complaint; Perez's education and experience; what the circuit court deemed to be credible testimony of trial counsel as to the substance of her conversations with Perez; Perez's responses during the plea colloquy, together with the information provided by the court concerning PTAC liability; and Perez's incredible claims as to how she understood PTAC liability, we conclude the State met its burden of proving that Perez understood PTAC liability when she entered her pleas.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).