COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1118-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HASAN A. SADIKOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Hasan A. Sadikoff appeals from a judgment of conviction of first-degree sexual assault of a child and from an order denying his postconviction motion to withdraw his no contest plea. The issues are whether Sadikoff should be allowed to withdraw his plea because due to the absence of an interpreter of his native language, Sadikoff did not understand the plea colloquy

and potential deportation consequences. We conclude that the record demonstrates that Sadikoff understood what he was doing and that no manifest injustice exists to support plea withdrawal. We affirm the judgment and the order.

Sadikoff was charged with two counts of first-degree sexual assault of a minor for touching a friend's daughter while in a car on two separate occasions. At Sadikoff's initial appearance, it was determined that he needed the services of an interpreter.[1] Sadikoff indicated that he spoke Bulgarian, Turkish and Macedonian. A Macedonian interpreter was obtained. That interpreter appeared with Sadikoff when Sadikoff waived a preliminary examination, at the arraignment when a not guilty plea was entered, and at a motion hearing held on April 10, 1997.

Sadikoff entered a no contest plea to one count on August 26, 1997. The Macedonian interpreter had failed to appear that day. Luba Kutschma, who regularly acts as a Spanish interpreter in Walworth county courts, appeared with Sadikoff and his attorney. Kutschma did not speak any of the languages Sadikoff had earlier identified. Rather, she and Sadikoff conversed in Russian, a language Sadikoff acknowledged that he could speak and understand. At the suggestion of Sadikoff's attorney and because Sadikoff appeared to understand English better than he spoke it, the plea colloquy was conducted in English. Matters on which Sadikoff had questions were addressed by the interpreter via Russian.

[1] Sadikoff was born in Bulgaria and immigrated to the United States in 1973. When asked if he understands English well, Sadikoff replied, "Not too good, but I understand." To "be on the safe side," the trial court directed that an interpreter be located for the next court appearance.

Following sentencing, Sadikoff moved to withdraw his no contest plea. He alleged that he does "not speak or understand English or Russian very well" and that he entered his plea in the belief that he would receive no more than a year in jail. He claimed that he did not understand that his conviction could cause him to be deported. After an evidentiary hearing, the trial court found that Sadikoff's command of English was "adequate" and concluded that Sadikoff was fully informed of his rights, "entered the plea will full comprehension," and fully understood the consequences.

A plea may be withdrawn if the defendant establishes the existence of a manifest injustice by clear and convincing evidence. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. *See* ***State v. Booth***, 142 Wis.2d 232, 237, 418 N.W.2d 20, 22 (Ct. App. 1987).

Litigants may withdraw pleas on a postjudgment basis if they were not made intelligently and voluntarily. *See* ***State v. James,*** 176 Wis.2d 230, 236-37, 500 N.W.2d 345, 348 (Ct. App. 1993). This rule rests on the premise that whatever misapprehensions plea makers may have had must concern their substantial rights. The misunderstanding must have advanced a manifest injustice. *See* ***State v. Woods,*** 173 Wis.2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992).

The trial court found that Sadikoff had a sufficient understanding of English to understand the plea proceeding. This is a finding of fact that will not be

upset on appeal unless clearly erroneous. *See* ***State v. Bangert***, 131 Wis.2d 246, 283-84, 389 N.W.2d 12, 30 (1986).[2]

At the plea hearing, Sadikoff personally agreed that he could understand the court in English and that if he did not understand, he would ask the interpreter. Sadikoff gave appropriate answers to preliminary questions from the court about his educational and employment background. He expressed that he had a green card but had not yet obtained citizenship. He related how he had been shot in a holdup the same year that President Reagan was shot. He was able to explain the pain medication he took at night. Sadikoff indicated that he understood the many points the trial court made during the plea colloquy. Although Sadikoff does not read English, his attorney indicated that the content of the police reports had been gone over with him verbally. Sadikoff affirmed that he had talked about such matters with his attorney, including the waiver of rights form that he signed.[3]

At the postconviction hearing, Sadikoff testified that he did not understand Russian. An expert witness testified that the Russian and Bulgarian languages are significantly different and there would be no fluent understanding between a person who spoke Russian and one who only spoke Bulgarian. This witness indicated that when she spoke to Sadikofff, he repeatedly indicated that he did not speak Russian. The expert observed that Sadikoff's English was "very

[2] The standard stated in ***State v. Bangert***, 131 Wis.2d 246, 283-84, 389 N.W.2d 12, 30 (1986), that findings will be upheld unless they are contrary to the great weight and clear preponderance of the evidence is the same as the clearly erroneous standard. *See* ***Noll v. Dimicelli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

[3] Sadikoff's attorney indicated that most of his discussions with Sadikoff were without an interpreter and that Sadikoff understood conversations with the attorney and his investigator. At the plea hearing, the interpreter went over the elements of the offense with Sadikoff.

broken" and that she was not impressed with his command of English. However, when asked to express whether she had formed an opinion as to whether Sadikoff's English was good enough to grasp legal concepts, she only replied, "My gut reaction would be not, that he would not have grasped legal concepts particularly well in English." The expert expressed an "intuitive feeling" that Sadikoff understands "more than he can himself express."

Kutschma, who had served as the interpreter at both the plea and sentencing hearings, testified that Sadikoff said he did understand Russian and that she was able to communicate with Sadikoff in Russian with no problems. Sadikoff had told her that he needed an interpreter not so much as to understand the English language, but for him to explain what he wanted to say to people because he found it hard to find all the right words in English. She indicated that when going over the waiver of rights form, Sadikoff would raise a question on something he misunderstood and that she would translate until he understood it.

Sadikoff had been in the United States for twenty-four years. He was married to an American woman who did not speak any of his native languages. They raised their children speaking English in the household. The plea hearing was conducted linguistically in a manner that both Sadikoff and his attorney approved of. At no point did Sadikoff, who seemed quite verbal in response to the court's inquiries, indicate a misunderstanding. We give great weight to the trial court's opportunity to observe Sadikoff at the hearings in assessing his linguistic abilities. *See* ***State v. Yang***, 201 Wis.2d 725, 741-42, 549 N.W.2d 769, 775 (Ct. App. 1996). The trial court's finding that Sadikoff understood what was being said at the plea hearing is not clearly erroneous.

The finding that Sadikoff understood disposes of his claim that he was denied his right to an interpreter in his native language. Here, the method employed to aide Sadikoff's understanding of the proceeding was effective. Nothing more was required. *See* ***State v. Neave***, 117 Wis.2d 359, 366, 375, 344 N.W.2d 181, 184, 189 (1984) (criminal defendant must have an interpreter when needed). No manifest injustice was created by employing a method of interpretation and assistance which was successful.

Sadikoff's ability to understand English also disposes of his claim that he believed the plea agreement included only a one-year jail sentence. Both the trial court and the plea questionnaire indicated that the maximum penalty was forty years. The plea agreement, in which the State agreed to stand moot at sentencing, was read into the record. Sadikoff has not established a misunderstanding sufficient to give rise to a manifest injustice to support plea withdrawal.

We turn to Sadikoff's claim that the trial court failed to adequately advise him of the possibility that he could be subject to deportation as required by § 971.08(1)(c), STATS.[4] Because the trial court failed to personally advise Sadikoff by the specific language quoted in the statute, Sadikoff has made a prima

[4] Section 971.08(1)(c), STATS., provides:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> ....
>
> (c) Address 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."

facie showing that the plea was defective. *See* ***State v. Issa***, 186 Wis.2d 199, 209, 519 N.W.2d 741, 745 (Ct. App. 1994). Thus, the burden shifts to the State to show by clear and convincing evidence that despite the omission the plea was knowingly and voluntarily entered. *See* ***id.*** at 211, 519 N.W.2d at 746. If a defendant has actual knowledge of the deportation consequences of his or her plea, the defendant is not entitled to withdraw the plea because the omission was harmless error. *See* ***State v. Chavez***, 175 Wis.2d 366, 371, 498 N.W.2d 887, 889 (Ct. App. 1993). Evidence outside the plea hearing record may be used to demonstrate Sadikoff's awareness of the likelihood of deportation when he entered his plea. *See* ***State v. Lopez***, 196 Wis.2d 725, 732, 539 N.W.2d 700, 703 (Ct. App. 1995).

Although the trial court did not use the exact language quoted in the statute, it did ask Sadikoff if he was aware of the possibility that he could be subject to deportation. Sadikoff replied that he understood that he could be deported after being convicted. The trial court also specifically called Sadikoff's attention to paragraph eighteen of the plea questionnaire which gave the deportation warning in the exact language of the statute. So twice during the plea hearing, Sadikoff was referred to and acknowledged the possibility that he could be deported. Further, at the postconviction hearing, interpreter Kutschma described how the paragraph about deportation had been reviewed with Sadikoff. She specifically recalled discussing deportation because Sadikoff had initially expressed that it would not happen because he had a green card. Kutschma indicated that it was explained to Sadikoff, two or three times, that even with a green card, deportation was a possibility in this case. The trial court implicitly rejected as incredible Sadikoff's self-serving explanation that he thought he could

be deported only if he was guilty of the crimes charged but not because of his no contest plea.

The trial court's failure to use the exact statutory language during the plea colloquy with respect to the deportation warning was harmless. Sadikoff had an actual understanding that even with a green card, he could be subject to deportation. The trial court properly exercised its discretion in denying Sadikoff's motion to withdraw his plea.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.