COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2882-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL STRUTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DESJARDINS, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. Michael Strutz appeals a judgment of conviction for three counts of homicide by negligent operation of a vehicle and two counts of recklessly causing great bodily harm to a child. Strutz pled no contest to those charges as part of a plea agreement. Before sentencing, however, he moved to withdraw his pleas on the grounds that he did not understand the elements of the

offenses and, because of a severe cognitive disability, he was not competent to knowingly, voluntarily and intelligently enter the pleas. The court denied the motion.

On appeal, Strutz contends that the court erred because: (1) he did not understand the elements of the offenses; and (2) his severe cognitive disability prevented him from understanding either the pleas or the plea process. We reject his arguments because the plea colloquy reflects that Strutz understood the elements of the offenses, and because the trial court found that Strutz's claims that he did not understand the plea proceedings or the offenses' elements were not credible. Accordingly, we affirm the judgment.

BACKGROUND

On May 5, 1997, Strutz suffered a seizure while driving and collided with another vehicle, causing the death of three people. At the time of impact, Strutz was traveling between eighty and eighty-five miles per hour in a thirty-mile-per-hour zone. On July 10, he was charged with three counts of recklessly causing the death of another human being. The State's basis for charging the counts as reckless homicide was its theory that Strutz had seizures of increasing frequency and severity, yet reported none of them to his medical providers, one of whom he had seen several days before the collision, because he knew if he did he would lose his license.

Throughout the case, Strutz and the State discussed a possible plea. Defense counsel had precharging discussions with the State and offered to have Strutz plead to three counts of homicide by negligent operation of a vehicle if the State agreed not to recommend prison. By letter dated January 30, 1998, the State offered Strutz the opportunity to plead to three counts of negligent homicide and

two counts of recklessly causing bodily harm to a child. Strutz discussed the offer with his attorney. Ultimately, the morning of trial, February 2, Strutz accepted the State's offer. The agreement reduced Strutz's potential exposure from thirty years to sixteen years.[1] The State filed an amended information, and Strutz pled no contest that day. Shortly thereafter, Strutz retained new counsel and moved to withdraw his pleas.

At the hearing on the motion to withdraw the pleas, Dr. Albert Ehle testified regarding the nature of Strutz's disorder and whether Strutz would have understood the concepts at plea hearings. He indicated Strutz had severe memory problems and needed repetition in order to remember.

The court denied Strutz's motion. The court recognized that misunderstanding of the pleas' consequences and elements of the offenses would constitute a reason for withdrawal, but concluded that reason did not exist here. In response to the medical testimony that Strutz needed repetition to remember, the court reviewed the record, including Strutz's court appearances and the parties' plea discussions. From the record, the court found that Strutz's counsel discussed the concepts of at least criminal negligence with Strutz on repetitive occasions. It further concluded that the criminal negligence concept is similar to criminal recklessness, differing as to the awareness of the risk of injury or death that would occur from the conduct. It also found that the trial was a central focus of Strutz's life, as well as his family's. The court noted no flaws in the plea proceedings.

[1] Recklessly causing the death of another human being is a class C felony, punishable by imprisonment up to ten years. Sections 940.06 and 939.50, STATS. Homicide by negligent operation of a motor vehicle is a class E felony, punishable by imprisonment up to two years. Sections 940.10 and 939.50, STATS. Recklessly causing great bodily harm to a child is a class D felony, punishable by imprisonment up to five years. Sections 948.03(3) and 939.50, STATS.

Finally, the court found that Strutz was disingenuous and lacked credibility regarding the extent of his memory impairment and his understanding of the proceedings. The court then sentenced Strutz, and this appeal ensued.

ANALYSIS

In ***State v. Van Camp***, 213 Wis.2d 131, 569 N.W.2d 577 (1997), the supreme court described the standard of review for withdrawing a plea claimed not to have been voluntarily, knowingly and intelligently entered. A no contest plea violates fundamental due process if it is not voluntarily, knowingly and intelligently entered, and withdrawal of the plea is a matter of right. ***Id***. at 139-40, 569 N.W.2d at 582. Whether a plea was voluntarily, knowingly and intelligently entered is a question of constitutional fact and is reviewed de novo. ***Id***.

Under the procedure the supreme court established in ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986), and restated in ***Van Camp***, we employ a two-step process to determine whether a defendant voluntarily, knowingly, and intelligently entered a plea. First, we determine whether the defendant has made a "*prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08, STATS., or other mandatory … [imposed by the supreme] court," and whether he has alleged that "he in fact did not know or understand the information ... provided at the plea hearing …." ***Van Camp***, 213 Wis.2d at 140-41, 569 N.W.2d at 582-83. If the defendant makes this initial showing, "the burden then shifts to the State, and we must determine whether the State has demonstrated by clear and convincing evidence that the defendant's plea was voluntarily, knowingly, and intelligently entered …." ***Id***. at 141, 569 N.W.2d at 583. A plea is not voluntary if the defendant did not

understand the essential elements of the charged offense when the plea was entered. *See* ***Bangert***, 131 Wis.2d at 267, 389 N.W.2d at 23.

We agree with the State's assertion that there are no flaws in the plea colloquy. Although Strutz on occasion demonstrated uncertainty, it did not relate to his understanding of the elements of the offenses to which he pled but rather to whether his behavior met the elements.

Strutz claims it is apparent from the plea hearing record that he did not understand the offenses' elements. We therefore begin our analysis by reviewing this record to determine whether it supports Strutz's claim.[2] Section

[2] The exchanges Strutz directs our attention to are:

> THE COURT: You've had enough time to discuss this whole matter regarding the plea with your attorney?
>
> THE DEFENDANT: I have. Its kind of quick, but—I do believe I have.
>
> THE COURT: Do you want more time now?
>
> THE DEFENDANT: I don't know if just—it takes me a while to understand stuff or—
>
> THE COURT: We'll take time if you need it.
>
> THE DEFENDANT: I'm talking like a day or so or whatever, but that's all right.
>
> MR. VETERNICK [defense counsel]: Can we have a brief recess, Judge?
>
> THE COURT: Okay. I'll indicate this to counsel, I am going to be asking Mr. Strutz to tell me what his conduct was that resulted in these charges so you need to discuss that with your client, and we are coming to that shortly, so how much time do you want, Mr. Veternick?
>
> MR. VETERNICK: I'm not sure, Judge.
>
> THE COURT: I'll give you ten minutes, is that sufficient?

(continued)

971.08, STATS., requires the court to personally address Strutz and determine that the plea is made voluntarily and with understanding of the nature of the charges. In determining Strutz's understanding of the nature of the charge, ***Bangert*** mandates that the court may use any of the following: (1) summarize the crime's

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> MR. VETERNICK: I'll try.
> ….
>
> THE COURT: I believe, Mr. Strutz, you had a question of your attorney. You discussed, I believe, that one element; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you satisfied now that you understand?
>
> THE DEFENDANT: I understand with some—
>
> THE COURT: Explanation.
>
> THE DEFENDANT: —explanation from my lawyer.
> ….
>
> THE COURT: Now, beyond what the plea agreement was, has anyone told you what the court will likely do?
>
> THE DEFENDANT: No. Likely do?
>
> THE COURT: Yes, like do, what will I likely do?
>
> THE DEFENDANT: I can't answer—I don't know.
>
> MR. VETERNICK: Can I have a minute? (Discussion between Mr. Veternick and the defendant off the record.)
>
> THE DEFENDANT: I know some of the possible things that you're going to do.
> ….
>
> THE COURT: Now, can you tell me, in your own words, what you did that resulted in the charges that you have just pled to?
>
> THE DEFENDANT: Yeah, I can tell you. I—I had a seizure—Well, first of all, I had a seizure before I—had a seizure before this date, before the date of the accident, and I wasn't supposed to be driving then, and I drove, and when I drove, the date of the accident that I drove, I had a seizure, and I caused the deaths of three people.

elements by reading from jury instructions or statutes; (2) request whether defense counsel explained to Strutz the nature of the charges and summarized the extent of the explanation; or (3) refer to the record or other evidence for the defendant's knowledge of the charges. *See* ***id***. at 268, 389 N.W.2d at 23. The operative time period for determining Strutz's understanding of the nature of the charge was when he entered his plea. *See* ***id***. at 269, 389 N.W.2d at 24.

The record reveals that the circuit court followed the requirements of § 971.08, STATS., and ***Bangert***. The court was initially informed that Strutz had reviewed the amended information and jury instructions with his attorney. The court confirmed that Struck and his counsel had reviewed the plea questionnaire and waiver of rights form and that Struck understood everything on the form.[3] The court elicited Strutz's personal history and confirmed that despite his medications and memory difficulties, Strutz believed he understood the proceedings. The court assured itself that Strutz was making his pleas freely and voluntarily and that he understood the elements of the offenses. It informed Strutz of each charge's individual elements and asked him whether he understood them. Each time, Strutz responded in the affirmative. Strutz was also able to tell the court what he did that resulted in the charges against him. Finally, the court verified with defense counsel that Strutz understood the rights he was waiving, the elements of the charges and that the plea was freely and voluntarily given.

At times, Strutz seemed to be unclear about certain aspects of the case, but he nevertheless readily affirmed that he understood those matters after a

[3] The form covered Strutz's personal history, the rights he was giving up and the voluntariness of his plea. Both he and his attorney signed the form.

short break with his attorney or the court's further explanation. We conclude that Strutz fails to demonstrate any deficiency regarding plea-taking procedures.

Next, Strutz contends that he presented a fair and just reason for withdrawing his plea. He claims his cognitive disability is so severe that he could not understand either the pleas or the plea process. He further asserts that the trial court failed to engage in a reasoned process applying appropriate factors in making its decision. He complains that the court confined its consideration to the number of appearances Strutz made before the plea hearing. We are unpersuaded.

A defendant seeking to withdraw a guilty or no contest plea before sentencing must show, by a preponderance of the evidence, that a fair and just reason warrants his plea withdrawal. ***State v Canedy***, 161 Wis.2d 565, 583-84, 469 N.W. 2d 163, 170-71 (1991). Whether a defendant has shown a fair and just reason to withdraw the plea is within the trial court's discretion. ***Id***. at 579, 469 N.W.2d at 169. We will affirm the trial court's discretionary decision if it employed proper legal standards and a reasoned process dependent on facts of record. ***Id***. at 579-80, 469 N.W.2d at 169.

The withdrawal of a guilty plea before sentencing should be freely allowed whenever the court finds any fair and just reason for withdrawal. ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). Freely, however, does not mean automatically. ***Id***. A fair reason is some adequate reason for the defendant's change of heart other than the desire to have a trial. ***Id***. at 861-62, 532 N.W.2d at 117. If the circuit court does not believe the asserted reasons for the plea's withdrawal, there is no fair or just reason to allow withdrawal. ***Id***. at 863, 532 N.W.2d at 118. The existence of a disability alone does not invalidate a plea;

the disability must affect the defendant's understanding of the plea process. *See* ***State v. Salentine***, 206 Wis.2d 419, 431, 557 N.W.2d 439, 443 (Ct. App. 1996).

As we previously noted, the plea hearing colloquy reflects that Strutz understood the offenses' elements. Nonetheless, Strutz maintains that he was medically unable to understand the elements or plea proceedings. He relies primarily on the medical evidence he introduced at the hearing to prove he needed repetition to remember and understand things. After examining the record, the trial court concluded that Strutz would have been repeatedly exposed to the concepts the court discussed with him at the plea hearing and found that Strutz understood the plea proceedings and elements of the offenses.[4] The court indicated that it did not believe Strutz's claim that he did not understand the elements. After identifying several instances in which Strutz misrepresented his understanding or memory, the court concluded that this was a common thread and determined Strutz's credibility was lacking.

Our supreme court has held that "if the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea." ***Garcia***, 192 Wis.2d at 861, 532 N.W.2d at 118. The trial court's credibility assessments will not be overturned unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975). Based on the record, we see no

[4] In addressing Strutz's contention regarding his need for repetition, the court reviewed: (1) the case's procedural and plea negotiation history, concluding Strutz would have discussed the offenses' elements with counsel repeatedly; (2) the trial's importance to both Strutz and his family; (3) the plea hearing record; and (4) the relative similarity of criminal negligence and criminal recklessness concepts.

reason to overturn the court's credibility assessment and therefore no fair and just reason exists for Strutz to withdraw his plea.

By the Court.—Judgment affirmed.

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