COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1525

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAROLD W. ZASTROW

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

BROWN, P.J. Harold W. Zastrow brings a host of challenges to his no contest plea in an effort to convince this court that the plea procedure was error. After consideration of each issue, we affirm.

¶1 Zastrow was the subject of a harassment injunction, pursuant to § 813.125, STATS., ordering him to cease and desist placing telephone calls to his

former wife, Debra L., either at her residence or at her place of employment. The injunction was in effect until September 2, 2000. Some time prior to December 14, 1998, Zastrow was charged with a misdemeanor. He was released upon condition that he not have contact, directly or indirectly, with Debra L. On December 28, 1998, the State filed a nine-page complaint alleging twenty-five misdemeanor violations. Nineteen counts alleged a violation of the harassment injunction and six alleged a violation of the bond condition that he not contact Debra L. He pled no contest to all of the counts and was sentenced to a total of 27 months in jail with work release privileges. He brought a motion to withdraw his pleas, which was denied. He appeals the denial. Further facts will be mentioned when necessary.

¶2 We will treat the issues raised by Zastrow seriatim.

1. The claim that Zastrow did not understand the charges against him.

¶3 Zastrow contends that the trial court failed to comply with the mandate of § 971.08(1)(a), STATS. This section reads as follows:

> **(1)** Before the court accepts a plea of guilty or no contest it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted[.]

Zastrow claims that the elements of the charges were never explained to him.

¶4 Before answering, we want to underscore that in reviewing his claim, we are not confined to looking at only the plea hearing record. Rather, we may look at the "totality of the circumstances" in deciding whether Zastrow understood the elements of the charges against him. *See* ***State v. Bangert***, 131 Wis.2d 246, 258, 389 N.W.2d 12, 19 (1986). This means that in Zastrow's case,

we can look at the documentary record leading up to the plea hearing, the plea hearing itself, the sentencing and the postconviction proceeding.

¶5 Under the procedure the supreme court established in ***Bangert***, appellate courts employ a two-step process to determine whether a defendant voluntarily and intelligently entered a plea of no contest. This test was reiterated in ***State v. Van Camp***, 213 Wis.2d 131, 140-41, 569 N.W.2d 577, 582-83 (1997) (citations omitted; footnote omitted), as follows:

> We must first determine (1) whether the defendant has made a prima facie showing that his plea was accepted without the trial court's conformance with Wis. Stat. § 971.08, and other mandatory duties imposed by this court, and (2) whether he has properly alleged that he in fact did not know or understand the information which should have been provided at the plea hearing. If the defendant meets this initial burden, 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 at the time the court accepts the plea, despite the inadequacy of the record.

Having set forth the law we use as our guide in deciding these kinds of issues, we now return to Zastrow's first claim that the trial court failed to apprise him of the elements of the charges against him. Zastrow contends that although the trial court "attempted to explain" the elements of the charge of violating a harassment injunction, "the trial court completely abandoned any attempt to explain the elements of the offense and similarly [failed to address] the issue of the six counts of bail jumping."

¶6 Our reading of the record does not bear this out. We preliminarily observe that the trial court did not use the magic word "elements" in determining whether Zastrow understood the charges. But WIS J I—CRIMINAL SM-32 suggests that one way to gain an understanding of the defendant's knowledge is to

summarize the elements of the crime charged, relating them to the facts of the case. Moreover, there is no single, set method for establishing that the defendant understands the crime charged. *See* ***Martinkoski v. State***, 51 Wis.2d 237, 245, 186 N.W.2d 302, 306 (1971).

¶7 During the plea hearing, the trial court explained to Zastrow that the complaint consisted of two sets of crimes charged: those charges that he violated the harassment injunction issued against him and those charges that he violated the conditions of his bond. The trial court had given Zastrow a copy of the complaint and had adjourned the case so that Zastrow could review it. When the case was reconvened and the trial court heard Zastrow's pleas of no contest to all the charges, the trial court went through the elements of the charges. The trial court explained to Zastrow that counts one through nineteen all alleged separate violations of the harassment injunction. The trial court then asked, "You understand that's what you would be acknowledging then, that you did intentionally violate a harassment injunction that was legally entered?" Zastrow answered, "Pleading no contest." This colloquy adequately describes the elements of a harassment injunction violation: that a legal injunction existed against him and that he intentionally violated it. The trial court then explained that counts twenty through twenty-five dealt with Zastrow having been released from custody on bond and intentionally failing to comply with the terms of that bond. These are the elements of bail jumping. To that explanation, Zastrow said, "Yes, I understand that." We hold that Zastrow has not shown how the trial court failed to explain the elements.

¶8 Zastrow seems to argue that because he told the trial court during the hearing that he thought he was having a heart attack and that he just wanted to get the hearing over with so that he could seek medical attention, he did not fully

understand the nature of the charges. First, it should be stated that the trial court was not unconcerned about Zastrow's perceived medical problem. The trial court offered to adjourn the hearing to another date so that Zastrow could receive prompt medical attention. But Zastrow adamantly refused. He wanted to get it over with. There is nothing in the record to indicate that Zastrow did not understand when the trial court went through the elements. He said in response to the harassment elements that he wanted to "plead no contest" and stated that he understood the charges pertaining to the violations of the bond condition. We reject his claim.

2. The claim that the trial court failed to establish a factual basis for the pleas.

¶9 Wisconsin law requires that the court make a record showing that there is a factual basis for the defendant's plea. *See* § 971.08(1)(b), STATS. The precise method by which this duty is met has been left to the discretion of the trial courts. *See* ***Edwards v. State***, 51 Wis.2d 231, 236, 186 N.W.2d 193, 195 (1971). The required information may be established in a variety of ways. One method is by reference to the criminal complaint. *See* WIS J I—CRIMINAL SM-32 at 9.

¶10 Zastrow argues that the plea hearing record fails to establish a factual basis. This claim is without merit. At the start of the plea hearing, the trial court asked Zastrow if he had received a copy of the criminal complaint. Zastrow said that he had received it "[j]ust now." The trial court then recessed the case so that Zastrow could read the complaint. When the trial court went back on the record, the court asked Zastrow if he had read the complaint. Zastrow said he had read it. Next, the court went through the elements as indicated in our discussion above. After the elements had been explained to Zastrow, he was asked if the information was accurate. Zastrow said, "No. I can't fight 'em." Not satisfied

with this answer, the trial court told Zastrow that he "need[ed] to have a factual basis." That is when Zastrow said he thought he was having a heart attack and that is also when the trial court offered to adjourn the case, an offer which Zastrow refused. The court then reiterated that if it was going to accept Zastrow's plea, there needed to be a factual basis for the plea. Zastrow kept saying he was guilty. The trial court kept asking if Zastrow accepted the factual allegations in the complaint. Finally, Zastrow said, "I'm guilty. You asked me if these were factual. I'm saying they are factual. I want it over with." The trial court still was not satisfied and offered to adjourn the case. The trial court said that it needed to establish a factual basis. Then Zastrow said, "Okay. Yes. I committed these offenses." The trial court then asked, "And what you're saying what you committed is what is being said in the criminal complaint?" Zastrow answered, "Yes." The trial court asked, "So, the narrative portion where it goes through specific instances of what happened and what conversations were involved?" Zastrow answered, "Yes."

¶11 In view of this colloquy and the answers to the last three questions, it is obvious to this court that Zastrow knew exactly what the trial court wanted from him: an admission that the facts within the four corners of the complaint were true. After the initial sparring, Zastrow knew that the only way he was going to be allowed to plead no contest was if he admitted the truth of the factual allegations in the complaint. No one badgered him into admitting these facts. To the contrary, the trial court offered him an adjournment more than once. The record is clear. A factual basis was established by reference to the complaint—a factual basis that was admitted as true by Zastrow. His claim on this score fails.

3. Whether the trial court failed to properly obtain a waiver of Zastrow's constitutional rights prior to accepting his no contest plea.

¶12 The essence of a valid plea is that the defendant knowingly and voluntarily waives trial-related constitutional rights by pleading no contest or guilty. *See* ***State v. Bartelt***, 112 Wis.2d 467, 474-75, 334 N.W.2d 91, 94 (1983). WISCONSIN J I—CRIMINAL SM-32 details the constitutional rights the defendant must personally waive. They are: the right to have the State prove that the defendant committed each element of the crime, the right to trial by jury, the right to make the State convince each member of a jury beyond a reasonable doubt that the defendant committed the crime, the right not to incriminate oneself, the right to confront the accuser, the right to face witnesses against the defendant under oath and to cross-examine them, and the right to present witnesses. *See* WIS J I—CRIMINAL SM-32 at 6-7.

¶13 Prior to Zastrow's plea, it is undisputed that he was in the courtroom when the trial court called the case of State of Wisconsin v. David M. Bradford. At the outset of Bradford's plea hearing, the trial court said, "I would ask all persons who are here on any criminal case to listen closely as I go over the constitutional rights with Mr. Bradford here." The trial court then went over all the constitutional rights listed above. At the beginning of Zastrow's plea hearing, the trial court asked, "Mr. Zastrow, did you hear the constitutional rights that I gave at the beginning of this?" Zastrow replied, "Yes, I did." The trial court asked, "Do you understand those rights?" Zastrow answered, "Yes, I do." Later, Zastrow was asked if he understood that by entering his plea of no contest to the charges he would be giving up his constitutional rights. He answered, "Yes."

¶14 Zastrow now claims that because the trial court did not conduct a personal and individual colloquy with him, asking the same questions of him as

the trial court did of Bradford and eliciting individualized responses to those questions from him, there was no effective waiver of constitutional rights. He cites ***State v. Baker***, 169 Wis.2d 49, 74, 485 N.W.2d 237, 247 (1992), for the proposition that the plea hearing should demonstrate a *personal* voluntary waiver of the defendant's constitutional rights. He claims that the procedure used by the trial court in this instance does not pass muster as a personal voluntary waiver. He complains that there is no reference in the record to the amount of time that elapsed between the appearance of Bradford and Zastrow's plea hearing. He also contends that this is especially troubling in light of the fact that the trial court did not "determine [Zastrow's] education and general comprehension, particularly in light of [his] stated health problems."

¶15 In ***State v. Moederndorfer***, 141 Wis.2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987), we rejected the idea that conducting a personal colloquy by verbally following the provisions of WIS J I—CRIMINAL SM-32 was mandatory. In that case, the Waukesha circuit courts had promulgated the use of a "waiver of rights" form largely in lieu of a personal colloquy. We sanctioned its use. We wrote:

> The trial court may instead refer to some portion of the record or some communication between defense counsel and defendant. Any one of these alternatives is proper so long as the alternative used exhibits knowledge of the constitutional rights waived.

Moederndorfer, 141 Wis.2d at 827, 416 N.W.2d at 629.

¶16 In upholding the use of forms, we rejected the notion that there is something inherently wrong about using a form—that its employment undermines the trial court's ability to accurately assess the defendant's understanding of the rights being waived. *See* ***id***. We said, "People can learn as much from reading as

listening." ***Id***. at 828, 416 N.W.2d at 630. We reasoned that a trial court may accurately assess a defendant's understanding by making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, and had read and understood each paragraph. We held that the trial court had made such a record in that case. *See* ***id***.

¶17 ***Moederndorfer*** is instructive on how to decide the issue here. Just as people can learn as much by reading as by listening, so too can a person learn by listening to questions asked of another defendant in a courtroom. Certainly, there may be problems if an upcoming defendant in the audience cannot hear the questions or cannot understand them. And certainly, if the upcoming defendant is not even in the courtroom, the procedure used by the trial court here would be of no use to that particular defendant. The key is to make a record.

¶18 Here, the trial court made such a record. The trial court asked Zastrow if he had heard the questions regarding the waiving of constitutional rights as they had been presented to Bradford. Zastrow said that he had heard them. So, there is no question that he was able to hear them. The trial court asked if Zastrow understood the questions. Zastrow answered in the affirmative. So, there is no question that he understood them. He said he did. The trial court had the right to accept that answer as an honest and accurate one. Zastrow was asked if he understood that by entering his plea of no contest he would be waiving those constitutional rights. Zastrow replied that he understood that. He then pled no contest. The record was made. Zastrow's claim fails.

4. Whether the trial court failed to fulfill its "other duties" prior to accepting Zastrow's no contest plea.

¶19 Zastrow claims that there are other duties imposed upon a trial court before accepting a plea of no contest, all of which relate to his right to be represented by counsel. The following quote is from his brief:

> These duties include a determination as to whether any promises or threats have been made to a defendant in connection with his appearance, his refusal of counsel and his proposed plea of guilty and to inform the defendant of the possibility that a lawyer would discover defenses or possible mitigating circumstances that would not be apparent to a layman. ***Bangert***, 161 [sic] Wis. 2d at 261-262. In addition, the trial court must make sure that the defendant understands that if he is indigent, counsel will be provided to him at no expense. ***Bangert***, at 262 (Citations omitted).

¶20 Zastrow then observes that the trial court never determined whether any promises or threats had been made to him in connection with his refusal of counsel or whether he understood that a lawyer could possibly discover defenses or mitigating circumstances that would not be apparent to a nonlawyer. Zastrow allows that these questions were asked of Bradford, but contends that they "clearly cannot be addressed adequately with the question posed by the trial court in his case 'do you understand these rights?'" Zastrow admits that during the course of his plea, the trial court asked him if he wanted to talk to a lawyer, but he responded that he did not want to talk to an attorney. Zastrow cites law that tells us how courts will indulge in every reasonable presumption against waiver of counsel and argues that this record is inadequate.

¶21 As we said at the outset of this opinion, we look not only to the plea hearing transcript, but to the total record to determine whether manifest injustice has occurred. After review of the total record, we reject Zastrow's claim. First, at the sentencing hearing, the court undertook extensive colloquy about

representation by an attorney. The court told Zastrow that because sentencing was a very important part of the case, he had the right to be represented by an attorney. If he could not afford one, a lawyer could be provided at public expense. The court asked Zastrow if he wanted a lawyer. He said, "No." He was asked if anyone had made any threat or promise to him to dissuade him from asking for a lawyer. Zastrow said, "No." The court informed Zastrow that a lawyer could help in regard to discussing the appropriate penalty and the factors that go into sentencing. Zastrow indicated that he understood that. Zastrow was then questioned about his educational background.

¶22 Then, Zastrow mentioned that he was sitting in jail because of a high cash bond and wondered aloud if hiring a lawyer would just delay things. The trial court reiterated that Zastrow had a right to a lawyer and that the proceedings would be adjourned if Zastrow wanted a lawyer, but that the bond would continue. Zastrow again said that he did not want a lawyer. The trial court then held that Zastrow had knowingly, voluntarily and intelligently waived his right to counsel. This colloquy alone passes muster.

¶23 If that were not enough, the State has drawn our attention to the affidavit that Zastrow filed in connection with the motion to withdraw his plea. That affidavit says in part that he had always been able to address Debra L.'s allegations in the past because of representation by counsel. This affidavit shows that Zastrow knew not only that he had a right to obtain an attorney, but that he also knew that an attorney might be able to discover defenses and mitigating circumstances. Zastrow' s last claim fails.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.