COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1391-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM E. HALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

¶1 SNYDER, J.[1] William E. Hall appeals from a conviction for violating WIS. STAT. § 346.63(1)(a), operating a motor vehicle while under the influence of an intoxicant (OMVWI), third offense. Hall argues that his plea to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the OMVWI second offense was constitutionally defective and therefore not valid for purposes of sentence enhancement under § 346.65(2)(b). He contends that his motion to collaterally attack the prior conviction was wrongly denied. We are not persuaded and affirm the judgment of conviction and the order.

FACTS

¶2 On July 2, 1999, Hall was charged with operating a motor vehicle while under the influence of an intoxicant and with having a prohibited blood alcohol concentration for the third time contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(c). His two prior offenses occurred on August 19, 1990, and November 30, 1996; Hall had been convicted of the November 30, 1996 offense on March 9, 1998.

¶3 On October 20, 1999, Hall filed a motion to preclude consideration of the March 9, 1998 conviction. He alleged that the plea colloquy from the March 9, 1998 conviction was constitutionally defective because the court failed to adequately ascertain if he had an understanding of the elements of the offense. A hearing on this motion was held on November 15, 1999. The trial court denied the motion, and Hall appeals this order and the judgment of conviction.

DISCUSSION

¶4 This appeal involves the application of constitutional standards to undisputed facts, a question of law which we review de novo. *See* ***State v. Foust***, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997).

¶5 Hall argues that he should have been allowed to collaterally attack his prior conviction because the plea was constitutionally defective. He cites to ***Foust*** and ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), in support of

his arguments. Hall contends that he has adequately demonstrated that he did not understand the nature or the elements of the offense in his prior plea.

¶6 The State counters that ***Foust*** improperly extended the holding of ***Baker*** because the purpose of the OWI laws is to set forth a progressive system of penalty classification, and the legislature intended a classification system based upon prior conduct, not prior conviction. However, as the trial court correctly noted, these arguments were considered and rejected by the ***Foust*** court. This court has no authority to overrule or modify language from a previously published court of appeals decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Furthermore, the State has not cited any binding, relevant authority convincing us that ***Foust*** was improper.

¶7 The State also argues that ***Foust*** is in direct conflict with ***State v. Alexander***, 214 Wis. 2d 628, 644, 571 N.W.2d 662 (1997). This argument is also without merit. The issue in ***Alexander*** was whether the trial court erred in submitting evidence of two or more convictions to the jury when the defendant stipulated to their existence, an issue completely unrelated to the one at hand. *See* ***id.*** at 634. ***Alexander*** does not implicate the holding in ***Foust*** and does not persuade us that ***Foust***'s holding was improper.

¶8 The State further argues that Hall has not adequately demonstrated that his previous plea was constitutionally defective. With this argument, we agree.

¶9 A plea's constitutional validity must be considered in terms of whether it was entered knowingly, voluntarily and intelligently. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). WISCONSIN STAT. § 971.08(1) reads:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall:
>
> (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;
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

Although § 971.08 is not a constitutional obligation, the statute is intended to help the trial court make the constitutionally required determination that a defendant's plea is voluntary. *See* ***Bangert***, 131 Wis. 2d at 261.

¶10 A valid, voluntary plea must be based on "an intentional relinquishment or abandonment of a known right or privilege." ***Id.*** at 265 (citations omitted). A plea may be involuntary if either the defendant does not have a thorough understanding of the charge or if he or she does not understand the nature of the rights he or she is waiving. *See* ***id.*** at 265-66. In addition, "[a]n understanding of the nature of the charge must include an awareness of the essential elements of the crime." ***Id.*** at 267. Although the trial court must "address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge," WIS. STAT. § 971.08(1)(a) does not prescribe precisely how that determination should be made. *See* ***Bangert***, 131 Wis. 2d at 266 (citation omitted).

¶11 To ensure that the defendant understands the nature of the charge, the trial court may review the elements of the crime by reading from the applicable jury instructions or from the appropriate statute. *See* ***id.*** at 268. The trial judge may ask the defendant's counsel whether the nature of the charge was explained to the defendant and ask counsel to summarize the explanation, including a reiteration of the elements. *See* ***id***. The trial judge may explicitly refer to the

record or other evidence of the defendant's knowledge of the nature of the charge established prior to the plea hearing. *See* ***id***. The trial judge may also specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant had notice of the nature of the charge. *See* ***id.*** While all of these suggestions satisfy the dictates of WIS. STAT. § 971.08, this list is not a complete inventory of all the methods available to a trial judge to satisfy his or her statutory obligation to personally determine the defendant's understanding. *See* ***id***.

¶12 To demonstrate a constitutionally defective plea, the initial burden lies with the defendant to establish a prima facie showing that the plea was accepted without the trial court's compliance with WIS. STAT. § 971.08 or other mandatory procedures. *See* ***Bangert***, 131 Wis. 2d at 274. When the defendant has adequately established a prima facie violation of § 971.08(1)(a) or other mandatory duties, and alleges that he or she did not know or understand the information that should have been provided at the plea hearing, the burden then shifts to the State to demonstrate by clear and convincing evidence that the plea was knowingly, voluntarily and intelligently entered. *See* ***Bangert***, 131 Wis. 2d at 274. The State can then utilize any evidence in the record that verifies that the plea was knowingly and voluntarily made. *See* ***id.*** at 274-75.

¶13 In the case at hand, the trial court held that the previous plea colloquy met the minimal constitutional requirements. We agree. At the previous plea hearing held on March 9, 1998, before Judge Joseph D. McCormack, the following exchange occurred between the prosecutor, the trial court and Hall:

> DA: Judge, it's my understanding that the defendant will be entering a plea of either guilty or no contest to Count 1, operating under the influence of an intoxicant, third time within a ten-year period. If the Court accepts that plea, the

State will recommend 30 days incarceration in the county jail and 24 months revocation of his operating privileges and an order for assessment. We're also moving to dismiss Count 2, the BAC, with a reported value of .08.

COURT: Is that your understanding, sir?

HALL: Yes, sir.

….

COURT: How do you plead to the charge of operating a motor vehicle while under the influence on November 30th of 1996 in the City of Cedarburg?

HALL: No contest.

COURT: Do you understand that by entering that plea you waive, that is you give up, your right to require the State to prove by evidence beyond a reasonable doubt to a jury of 12, all 12 agreeing that you were in fact operating a motor vehicle and that you were under the influence of an intoxicant as that term is legally defined?

HALL: Yes, sir.

COURT: You've filled out this plea questionnaire form?

HALL: Yes, sir.

COURT: Is there anything on here you don't understand, anything you want me to explain to you?

HALL: No, sir.

COURT: Anybody threaten you or offer you anything in order to get you to sign the form or enter the plea you just entered?

HALL: No, sir.

COURT: I'll accept the defendant's plea to Count No. 1 in Case No. 97-CT-37, deem the complaint to contain a sufficient factual basis to find the defendant guilty, and I do so find him guilty of the offense as set forth therein. Order Count 2 dismissed. Find the defendant to have violated third offense within a ten-year period. Order a fine of $600 plus costs, plus penalty assessment; order him sentenced to county jail for 30 days; order his license revoked for 24

> months; order him to assessment and order interlock for the period of revocation.

The colloquy meets the requirements of WIS. STAT. § 971.08 and ***Bangert***. The trial court addressed Hall personally and asked him if he understood that the State would have to prove to twelve jurors beyond a reasonable doubt that Hall was in fact operating a motor vehicle and under the influence of an intoxicant, as that term is legally defined. The trial court asked Hall if he agreed to the plea bargain as set forth by the prosecutor. The trial court determined that Hall's plea was voluntary when Hall informed the court that no one threatened him or offered him anything to induce a plea agreement.

¶14 In addition, the trial court specifically referred to the plea questionnaire completed and signed by Hall. While the plea questionnaire does not set forth the elements of the charged offense, the form does indicate that Hall was an employed 58-year-old man with a high school diploma. According to the plea questionnaire, Hall could read, write and understand the English language, had read the charges in the case, had not taken any medication, drugs or alcohol in the previous twenty-four hours, and had never received treatment for mental or emotional problems. Hall initialed each box listing his constitutional rights, indicating that he understood them and gave them up of his own free will. He also initialed the box enumerating his postconviction rights. The plea questionnaire was signed by Hall and dated March 9, 1998.

¶15 The trial court questioned Hall about the plea questionnaire and specifically asked him if there was anything on the form that he did not understand or that needed explaining. Hall responded negatively.

¶16 The transcript thus indicates that while this colloquy is certainly not an exemplary one, the trial court generally set forth the elements of the charge,

addressed Hall personally and determined that his plea was voluntary with an understanding of the nature of the charge, as required by WIS. STAT. § 971.08. In addition, the trial court specifically referred to and questioned Hall about the plea questionnaire that he completed and signed.

CONCLUSION

¶17 Hall has not met his prima facie burden that his previous plea was constitutionally defective. His motion to collaterally attack the prior conviction was properly denied and we affirm the judgment of conviction and the order.

By the Court.—Judgment and order affirmed.

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