COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1341-CR **Cir. Ct. No. 2011CM654**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN L. GARRETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

¶1 REILLY, J.[1] Justin L. Garrett appeals the denial of his postconviction motion to withdraw his no contest plea and modify his sentence.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Garrett was convicted of fourth-degree sexual assault upon his plea of no contest to that charge. Garrett moved to withdraw his plea after he was sentenced. Garrett argues that his plea was not knowingly, intelligently, and voluntarily made as he did not understand the nature of the offense and the rights he was waiving. Garrett also argues that the imposition of absolute sobriety and potential alcohol and drug treatment was unreasonable, inappropriate, and an erroneous exercise of the circuit court's discretion. We conclude that Garrett's plea was made knowingly, intelligently, and voluntarily, and that Garrett had a sufficient understanding of his crime and the rights he was waiving. We also hold that the conditions placed on Garrett's probation were reasonable, appropriate, and within the circuit court's discretion.

BACKGROUND

¶2 Garrett was charged with fourth-degree sexual assault in violation of WIS. STAT. § 940.225(3m). The State agreed to recommend eighteen months of probation if Garrett entered a no contest plea. Garrett met with his counsel and went through the Plea Questionnaire/Waiver of Rights form ("plea questionnaire"). Garrett placed checkmarks next to all of the constitutional rights he was waiving. Garrett checked the box stating that he had reviewed the attached jury instructions, which included the elements of the crime Garrett was charged with and the definition of those elements. The elements section on the jury instructions was circled. Garrett signed the plea questionnaire and entered a no contest plea to the fourth-degree sexual assault charge.

¶3 Prior to accepting the plea, the court held the following colloquy with Garrett:

> The Court: And you've completed the plea questionnaire and waiver of rights form?
> [Garrett]: Yes.
> The Court: And that is your signature on the back page?
> [Garrett]: Yes.
> The Court: And before you signed this form, did you have an opportunity to read through it?
> [Garrett]: Yes.
> The Court: And do you read and write and understand the English language?
> [Garrett]: Yes.
> The Court: And you also have had an opportunity to go over it with [defense counsel]?
> [Garrett]: Yes.
> The Court: And do you understand the important rights that you're giving up, including the right to have a jury trial?
> [Garrett]: Yes.
> The Court: Do you understand that all 12 jurors would have to agree beyond a reasonable doubt that you committed this offense?
> [Garrett]: Yes.
> The Court: Do you understand that all 12 jurors would have to agree beyond a reasonable doubt that you did have sexual contact with this person referenced by initials PLR without that person's consent?
> [Garrett]: Yes.
> The Court: And [defense counsel] has explained what sexual contact means?
> [Garrett]: Yes.

¶4 The court also inquired of Garrett's counsel during the colloquy:

> The Court: You believe the no contest plea is being entered into freely, voluntarily, and intelligently?
> [Defense Counsel]: Yes, Your Honor.

¶5 The circuit court accepted Garrett's no contest plea. At the sentencing hearing, the court was told of Garrett's prior conviction for possession of THC and drug paraphernalia, and that drinking and marijuana smoking were involved in this incident. Garrett did not contest these statements. The court withheld sentence and placed Garrett on probation for eighteen months. Garrett was ordered, as a condition of probation, not to possess or be under the influence of alcohol or any illegal controlled substances and to follow all treatment recommendations made by his parole agent, including alcohol and drug treatment, if deemed appropriate. Garrett thereafter filed his motion to withdraw his plea and modify his sentence.

¶6 The circuit court held a hearing and concluded that the plea colloquy, along with the information provided in the plea questionnaire and attached jury instructions, was sufficient to prove that Garrett entered into his no contest plea knowingly, intelligently, and voluntarily. As to the motion to modify sentence, the court concluded that Garrett's prior drug-related conviction and the indication of alcohol and illegal drug involvement in this present incident necessitated his probation conditions. Garrett appeals.

PLEA WITHDRAWAL

¶7 A defendant who seeks to withdraw a no contest plea after sentencing carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). One situation where plea withdrawal is necessary to correct a manifest injustice is when a plea is not entered into voluntarily, knowingly, and intelligently. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. Whether Garrett's plea was voluntarily, knowingly, and intelligently entered is a question of constitutional fact. ***Id.***, ¶16. We review constitutional questions independent of the conclusion of the lower court. ***Id.***

¶8 To determine whether a defendant voluntarily, knowingly, and intelligently entered a plea of no contest, we must first determine: (1) whether the defendant made a prima facie showing that his plea was accepted without the circuit court's conformance with WIS. STAT. § 971.08[2] or the procedures set forth in ***Bangert***, and (2) whether the defendant in fact did not know or understand the information that should have been provided at the plea hearing. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). If the defendant meets this burden,

[2] WISCONSIN STAT. § 971.08 states in relevant part:

> **(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.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

then the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered. ***Id.***

¶9 "A circuit court has significant discretion in how it conducts a plea hearing." ***State v. Brandt***, 226 Wis. 2d 610, 621, 594 N.W.2d 759 (1999). A circuit court may incorporate into the plea colloquy the information contained in the plea questionnaire and may also rely substantially on that questionnaire to establish the defendant's understanding of the crime. ***Id.*** Moreover, completing and signing a plea questionnaire that contains a specific reference to the elements of the offense being charged is sufficient to establish a defendant's awareness of the nature of his offense. *See* ***State v. Bollig***, 2000 WI 6, ¶¶54-55, 232 Wis. 2d 561, 605 N.W.2d 199.

¶10 Garrett argues that he did not understand the meaning of the specific elements of the charge of fourth-degree sexual assault: sexual contact and consent. Garrett, however, does not contest that he, with the assistance of his counsel, discussed and completed all of the sections of the plea questionnaire and reviewed the attached jury instructions, which contained specific references to, and definitions of, sexual contact and consent. The elements section attached to the plea questionnaire was encircled, showing that special emphasis was placed on the elements Garrett claims he did not understand. Garrett expressed no uncertainty at the plea hearing nor questioned the meaning of any of the elements at his plea hearing.

¶11 Garrett argues that the court did not establish that he understood that he had a constitutional right to confront his accuser. Wisconsin law does not require a waiver of each individual right. ***Bangert***, 131 Wis. 2d at 270. The circuit court asked specific questions about Garrett's understanding of his waiver

of his right to a jury trial. Garrett affirmatively answered all of the relevant questions about his constitutional rights. Garrett placed checkmarks in each box on the plea questionnaire next to each explicit description of each constitutional right that he was waiving, including the right to confront his accuser. The court confirmed with Garrett's counsel that Garrett knew the constitutional rights he was giving up and that he understood the meaning of sexual contact and consent. We conclude that Garrett has failed to establish a prima facie case that his plea was not voluntary, knowing, and intelligent.

PROBATIONARY CONDITIONS

¶12 Appellate review of a circuit court's sentencing decision is limited to determining if the court's discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Circuit courts are granted broad discretion in determining conditions of probation, ***State v. Miller***, 2005 WI App 114, ¶11, 283 Wis. 2d 465, 701 N.W.2d 47, and only when discretion is exercised on the basis of clearly irrelevant or improper factors is there an erroneous exercise of discretion, ***Gallion***, 270 Wis. 2d 535, ¶17. We follow a consistent and strong policy against interference with the discretion of the circuit court in passing sentence. ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

¶13 Circuit courts may impose any conditions of probation that appear to be reasonable and appropriate. WIS. STAT. § 973.09(1)(a). We review conditions of probation to determine whether they serve the dual objectives of probation, namely, the rehabilitation of the offender and the protection of the state and community interest. ***State v. Miller***, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993). Conditions of probation need not be related to the actual offense for

which a defendant is convicted; conditions imposed to rehabilitate a defendant for past conduct are reasonable and appropriate if the past conduct is rationally related to the defendant's need for rehabilitation. *See* ***id.*** at 210. A condition is reasonably related to the goal of rehabilitation if it helps the convicted individual conform his or her conduct to the law. ***State v. Oakley***, 2001 WI 103, ¶21, 245 Wis. 2d 447, 629 N.W.2d 200.

¶14 The circuit court had sufficient grounds to set probation conditions of absolute sobriety and potential alcohol and drug treatment. Garrett had a history of using drugs, as evidenced by his prior conviction for possession of THC and drug paraphernalia, and there were unrefuted allegations that drugs and alcohol were involved in Garrett's crime. The court properly took these factors into account when setting Garrett's probationary conditions. The probationary conditions imposed by the circuit court were reasonable and appropriate.

¶15 Garrett argues that the State's assertion at Garrett's plea and sentencing hearing that drugs and alcohol were involved in this incident constitutes a new factor and, as such, warrants modification to remove the conditions placed on Garrett's probation. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). As the information Garrett complains of was provided to the court at the time of the original sentencing, it is not a "new factor." At Garrett's plea and sentencing hearing, upon hearing the mention of alcohol and drugs being involved in this incident, neither Garrett nor his counsel took any action to express a denial of, or a disagreement with, the information.

CONCLUSION

¶16 As Garrett's no contest plea was entered voluntarily, knowingly, and intelligently, and as the court did not erroneously exercise its discretion in setting the conditions of his probation, we affirm.

By the Court.—Judgment and order affirmed.

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