COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3237-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STACY L. BLUNT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and MAXINE A. WHITE, Judges. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Stacy L. Blunt appeals from a judgment entered after he pled guilty to one count of armed robbery, party to a crime, while concealing identity, contrary to §§ 943.32(1)(a)&(2), 939.05 and 939.641, STATS. He also appeals from an order denying his postconviction motion. He claims the

trial court erred in denying his motion to withdraw his guilty plea without conducting an evidentiary hearing. Because Blunt made a prima facie showing that the plea colloquy violated § 971.08(a), STATS., and because he alleged that he did not understand the rights that should have been provided at the plea hearing, we reverse and remand with directions to the trial court to conduct an evidentiary hearing.

I. BACKGROUND

In August 1995, Blunt was charged with armed robbery, party to a crime, while concealing identity. On January 8, 1996, he pled guilty.[1] He was sentenced to thirty-eight years in prison.

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[1] The Hon. Jeffrey A. Wagner conducted the plea hearing. The colloquy that occurred at the hearing provides:

> THE COURT: Is it my understanding the Defendant's entering a plea of guilty to the charge of armed robbery, ah, with the concealing identity?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: And you understand, sir, what you're charged with, the armed robbery and the concealing identity, the penalty enhancer, as party to a crime?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you've gone over the elements with your lawyer; is that right? As to the offense?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And by pleading guilty to that offense, you understand the penalties the Court can impose, up to 40 years, plus the five years on the concealing identity?
>
> THE DEFENDANT: Yes, sir.
>
> Yes, sir.

(continued)

THE COURT: You understand by pleading guilty to the offense, as party to a crime, that you're going to be waiving your rights to a trial by jury, and all twelve jurors must agree unanimously as to a verdict.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The State would have to prove you guilty beyond a reasonable doubt as to each and every single element of the offense.

Do you understand that, also?

THE DEFENDANT: Yes, sir.

THE COURT: You'll be waiving any possible defenses that you may have to the offense charged in the Criminal Complaint.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Be waiving your right to cross-examine the State's witnesses and call witnesses on your own behalf.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You've signed this Guilty Plea Questionnaire and Waiver of Rights Form; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: Discussed that with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Anything that you do not understand by pleading guilty to the charge of armed robbery, concealing identity, party to a crime?

THE DEFENDANT: Nah-nah.

THE COURT: Discussed everything with your lawyer, right?

THE DEFENDANT: Right.

(continued)

Blunt filed a postconviction motion seeking to withdraw his guilty plea. In the motion, he alleged that he did not understand all the elements of the crime and all the constitutional rights he was waiving when he pled guilty. He alleged that at the time of the plea hearing, he was hearing voices which told him to hurt himself. The trial court denied the motion without a hearing.[2] Blunt now appeals.

II. DISCUSSION

Blunt asserts that his guilty plea was unknowingly, involuntarily and unintelligently entered because he did not know the nature of the charge against him and was not fully informed of the constitutional rights he was waiving by pleading guilty. Based on these allegations, he contends the trial court erred in denying his postconviction motion seeking plea withdrawal when it denied the motion without holding a hearing. The State admits in its brief to this court that a review of the plea colloquy and the guilty plea questionnaire confirms Blunt's allegation that "he was not advised of the elements of armed robbery, masked, party to a crime in the colloquy or the questionnaire, nor did the court determine

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> THE COURT: And, counsel, you're satisfied the Defendant's intelligently, voluntarily and knowingly waiving those constitutional rights?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: What's your plea, sir, to the charge -- to the armed robbery, party to a crime, with the enhancer of concealing identity?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: On that plea then, the Court will make a finding of guilt.

[2] The Hon. Maxine A. White decided the postconviction motion.

whether trial counsel had advised Blunt of the elements." The State contends, however, that the trial court did not err in denying Blunt's motion without a hearing because Blunt's postconviction motion provides merely conclusory allegations, rather than specific facts, which if true, would entitle Blunt to relief.[3] Therefore, the State claims, under ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996), the trial court acted within its discretion to deny Blunt's motion without a hearing. *See* ***id.*** at 310-11, 548 N.W.2d at 53.

In response, Blunt argues that ***Bentley*** does not apply to the instant case because ***Bentley*** involved a motion to withdraw a plea based on ineffective assistance of counsel. Blunt contends that the instant case is governed by ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

We conclude that ***Bangert*** controls this case because it presents the question of whether the plea colloquy was proper and does not involve an allegation of ineffective assistance of counsel.[4] Under a ***Bangert*** analysis, whenever the § 971.08(1)(a), STATS.,[5] or other court-mandated duties are not

[3] At oral argument, however, the State retreated from that position and conceded the issue.

[4] We invite our Supreme Court to examine the issue of the interrelationship between ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1995) and ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). Although we feel bound to apply the ***Bangert*** analysis here, these cases create confusion in this area of the law. ***Bangert*** dictates the proper procedures for review of a plea hearing. ***Bentley***, although in the context of an ineffective assistance claim, sets forth the proper standards when addressing the trial court's denial of a postconviction hearing. The case before us does not involve an ineffective assistance claim, but it does involve an allegation that the trial court incorrectly refused to conduct a postconviction motion hearing.

[5] Section 971.08(1)(a), STATS., provides:

> 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.

fulfilled at the plea hearing, a defendant may move to withdraw his plea. *See* ***id.*** at 274, 389 N.W.2d at 26. Blunt must first "make a prima facie showing that the court violated its mandatory statutory duties and allege that he … in fact did not know of the information that the court was statutorily required to provide." ***State v. Kywanda F.***, 200 Wis.2d 26, 38, 546 N.W.2d 440, 446 (1996). If Blunt makes such a showing, the burden then shifts to the State "to demonstrate by clear and convincing evidence that the [defendant] knew of the statutory right and therefore was not prejudiced." ***Id.***

Whether Blunt has made a prima facie showing that the trial court failed to advise him of his rights is a question of law that we review independently. *See* ***id.*** To meet this initial burden, Blunt must (1) make a prima facie showing that his plea was accepted without the trial court's conformance with § 971.08, STATS., or other court-imposed mandatory duties, and (2) allege that he in fact did not know or understand the information which should have been provided at the plea hearing. ***State v. Van Camp***, Nos. 96-0600 & 96-1509, slip op. at 7 (Wis. Oct. 23, 1997).

Both sides agree that the plea colloquy was inadequate. The elements of the crime were not specifically stated by any of the three methods mandated by ***Bangert***, and the plea colloquy demonstrates that Blunt was not advised of all of the constitutional rights he was waiving by pleading guilty. In Blunt's postconviction motion, he alleged that the trial court failed to advise him of the elements of the crime of armed robbery. In fact, the State conceded during oral argument that neither the plea colloquy nor the waiver of rights form even mentions the party to a crime element of the charge. Blunt also alleged that the trial court never asked him if he understood that his plea waived all of his constitutional rights, specifically his right against self-incrimination. In addition,

the motion papers allege that Blunt did not know he would not have to testify against himself. We conclude that Blunt has made a prima facie showing.

As a result, the burden shifts to the State to prove by clear and convincing evidence "by any evidence inside or outside of the record that [Blunt] knew of his right." ***Id.*** Although our review of the record indicates that Blunt made a prima facie showing under ***Bangert***, we also recognize that the trial court did not make such a determination. Therefore, the factual record before us is inadequate, and we cannot make a determination whether Blunt's plea was knowing and voluntary "under the totality of the circumstances." *See* ***Kywanda F.***, 200 Wis.2d at 42, 546 N.W.2d at 448. Therefore, we remand for a hearing to determine whether Blunt's plea was knowingly, voluntarily and intelligently entered. If the trial court determines that Blunt did enter a knowing, voluntary and intelligent plea, the judgment shall be reinstated.

By the Court.—Judgment and order reversed and cause remanded with directions.

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