COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1140-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHET WOODWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

SNYDER, P.J. Chet Woodward appeals from a judgment of conviction in which he pled no contest to the charge of operating a motor vehicle with a prohibited alcohol concentration (PAC). He now contends that the trial court erred when it denied his motion to withdraw his no contest plea and that he was denied the effective assistance of counsel because his trial counsel "wrongfully stipulated to a fact about which there was no factual basis." Because we conclude that the trial court properly ascertained at the time Woodward entered

his plea that it was knowing, intelligent and voluntary and did not err in finding that there was a factual basis for the charge, we affirm.

Woodward was charged with one count of operating a motor vehicle while under the influence of an intoxicant (OWI) and the companion charge of operating with a prohibited alcohol concentration. Woodward brought a suppression motion, which was denied.[1] A plea agreement was reached whereby Woodward would plead no contest to the PAC charge and the OWI charge would be dropped. At the plea hearing, the court asked Woodward whether his attorney had gone over the guilty plea questionnaire with him and whether it had been explained to him.[2] The trial court also conducted the following colloquy:

> THE COURT: Do you understand by signing this form and giving it to me and pleading no contest, you are telling me that you understand your trial rights, you understand that you are giving your trial rights up, you understand that you are going to be convicted, and you understand that there's a mandatory jail sentence in this case?
>
> [WOODWARD]: Yes, I understand that.
>
> THE COURT: [Defense counsel], do you believe your client has freely, voluntarily entered his plea?

[1] The suppression motion was based on Woodward's claim that he was arrested "without sufficient evidence that [he] was operating a motor vehicle upon a public highway, and without sufficient field test results to warrant continued detention." At the motion hearing, the arresting officer testified that he had observed Woodward's vehicle make a left turn and strike an earthen berm. The officer then activated the lights on his squad; the vehicle continued a short distance further and turned into a driveway. The driver scraped the side of the car as he attempted to pull it into the garage. The officer also testified that the car contained a single occupant, who then exited and walked to the rear of the car. That individual was identified as Woodward.

[2] The plea questionnaire which the trial court had before it was appropriately signed and initialed by Woodward. It also had attached to it WIS J I—CRIMINAL 2660, "Operating a motor vehicle with a prohibited alcohol concentration—criminal offense."

DEFENSE
COUNSEL: I do, Judge.

Following this, defense counsel was asked whether Woodward stipulated to the fact that at the time of the offense he had a prohibited alcohol concentration and that he was operating the motor vehicle. After defense counsel so stipulated, the trial court stated that there was a factual basis for the charge, found Woodward guilty and entered a judgment of conviction.

Woodward brought a motion for postconviction relief, alleging that his no contest plea was not knowing, intelligent and voluntary and that he had received ineffective assistance of counsel. The ineffectiveness claim was predicated on Woodward's belief that trial counsel had stipulated to the fact that he was operating "despite there being no factual basis for such a stipulation." His motion was denied and he now appeals.

The issue of whether Woodward's plea was knowing, intelligent and voluntary requires us to apply a constitutional standard to undisputed facts. Whether a plea was correctly entered is a question of constitutional fact and is examined independently on appeal, while the trial court's findings of historical fact will not be reversed unless contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Kywanda F.,*** 200 Wis.2d 26, 42, 546 N.W.2d 440, 448 (1996). We thus conduct a de novo review of whether the no contest plea satisfies the constitutional requirement that it be made knowingly, intelligently and voluntarily.

Section 971.08(1), STATS., requires that before a court accepts a plea of guilty or no contest, it must:

> (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.

In addition to this, the trial court has the following general duties to undertake before accepting a plea of guilty or no contest: (1) determine the extent of the defendant's education and general comprehension; (2) establish the defendant's understanding of the nature of the crime and the range of punishment it carries; (3) ascertain whether any promises or threats have been made to him; (4) alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances; (5) explain that if the defendant is indigent counsel will be provided at no expense; and (6) personally ascertain whether a factual basis exists to support the plea. *See* ***State v. Bangert,*** 131 Wis.2d 246, 261-62, 389 N.W.2d 12, 21 (1986).

We examine the plea hearing to ascertain whether Woodward's plea satisfied the constitutional standard of being knowing, intelligent and voluntary. Before accepting a plea of guilty or no contest, a trial court has a duty to undertake a colloquy with a defendant to ascertain his or her understanding of the nature of the charge. *See* ***id.*** If a defendant does not evidence his or her understanding of the nature of the charge in some manner, the plea is not voluntary. *See* ***id.*** at 261 n.3, 389 N.W.2d at 20. This necessity is also codified in § 971.08(1)(a), STATS., which requires that the court "[a]ddress the defendant personally and determine that the plea is made … with understanding of the nature of the charge and the potential punishment if convicted." Furthermore, the court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Section 971.08(1)(b).

In the instant case the hearing transcript reveals that the trial court directly questioned Woodward about his education and then referred to a form which had been prepared by defense counsel. The trial court examined the form, a three-page document which outlined the plea agreement and in which Woodward acknowledged that he understood that by pleading no contest he was "admitting that [he] committed all the elements of the crime."[3] The plea agreement then referenced the applicable jury instructions for the crime of operating with a prohibited alcohol concentration, which was attached. Woodward also acknowledged on this form that the factual basis for the plea was established by the criminal complaint. We conclude that the voluntariness of the plea was established.

In order to satisfy plea requirements, a defendant must also indicate his or her knowledge that by pleading guilty or no contest certain constitutional rights are waived. *See* ***Bangert,*** 131 Wis.2d at 262, 389 N.W.2d at 21. According to the plea agreement, defense counsel had reviewed these rights with Woodward and Woodward had individually checked a list of the constitutional rights he was giving up by entering a plea. This document was signed and dated by Woodward.

[3] Woodward also argues that because of a handwritten notation that he made on the plea questionnaire and a statement made at the end of the plea hearing, the trial court should have realized that he was not admitting guilt. The notation that Woodward references follows the typewritten statement, "No threats or promises have been made to me in connection with this case except *that I feel if I go to a jury trial without a witness I may not win my case*." (Italics denotes handwritten notation made by Woodward.) Woodward contends that this notation shows that he did not admit guilt. We are not persuaded that the statement evidences anything more than Woodward's recognition that without a witness he did not have a very strong case.

He also argues that his later statement to the court, "I ain't got the money to go to jury trial, so I might as well plead no contest," also indicates that he was not admitting guilt. Such a conclusion would require us to read more into the statement than is apparent. Woodward had already conceded that he had no witnesses to his claim that he was not driving the car at the time of the stop, and this statement appears to reflect nothing more than his realization of the cost of a jury trial.

The court asked Woodward directly whether the form had been explained to him. He responded affirmatively. In ***State v. Moederndorfer,*** 141 Wis.2d 823, 828, 416 N.W.2d 627, 630 (Ct. App. 1987), this court held that "[a] trial court can accurately assess a defendant's understanding of what he or she has read by making a record that the defendant had sufficient time prior to the hearing to review the form, … to discuss the form with counsel, had read each paragraph, and had understood each one." Our review of the record convinces us that this occurred. Under the requirements outlined in ***Bangert*** and ***Moederndorfer,*** we conclude that through its examination of this document the trial court showed on the record that Woodward "entered his plea voluntarily and knowingly ... with understanding of the rights he was waiving." ***Bangert,*** 131 Wis.2d at 270, 389 N.W.2d at 24 (citation omitted).

Woodward also contends that his trial counsel was ineffective when counsel "wrongfully stipulated" to the operating element, which Woodward argues had no factual basis. He bases this contention on the apparent fact that he consistently maintained his innocence to his attorney, claiming that an individual by the name of "John" was actually driving the car at the time of the stop. However, as defense counsel explained at the postconviction hearing:

> Mr. Woodward and I had a number of conversations about the merits of his defense, and I explained to [him] that absent a key witness by the name of John it would probably be very difficult to sustain his defense of not operating in the face of the officer's testimony … and I asked Mr. Woodward on numerous occasions to try his very best to find this individual because it was key, and I explained to him why it was key…. Mr. Woodward was just not able to produce this individual ….

At no time did Woodward protest his belief in his innocence to the court.[4] No mention of this defense to the charge was ever made other than in attorney/client conversations. In addition, the trial court had conducted a probable cause hearing prior to the plea agreement at which the arresting officer had testified as to the probable cause for the arrest of Woodward. *See supra* note 1. The trial court also had before it Woodward's admission that the factual elements were established by the criminal complaint. There is no basis for Woodward's claim that defense counsel's stipulation to a factual basis for the plea was unsupported.

In sum, we conclude that Woodward's claim that his no contest plea was not knowing, intelligent and voluntary is not supported by the record before us. Additionally, his assertion that his trial counsel was ineffective when counsel stipulated that there was a factual basis for the charged crime is also without foundation.

By the Court.—Judgment affirmed.

[4] In a related claim, Woodward asserts that he should have been counseled to bring an ***Alford*** plea, which would have permitted him to plea without admitting guilt. *See* ***North Carolina v. Alford,*** 400 U.S. 25 (1970). Woodward's protestations of innocence were addressed only to his trial counsel, and in spite of counsel's urging, Woodward was unable to produce any verification of his claimed innocence, even to satisfy his counsel that an ***Alford*** plea would be appropriate. Even if we were to conclude that defense counsel should have explained an ***Alford*** plea to Woodward, we do not see how such a requirement can be imputed to the trial court under these facts.

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