COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3319

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD DEBAERE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Donald DeBaere appeals from a judgment of conviction and an order denying his postconviction motion to withdraw his guilty pleas. The issue on review is whether the trial court erred in denying DeBaere's motion to withdraw his guilty pleas. DeBaere contends that he did not understand

that he was permanently waiving certain constitutional rights when he entered his guilty pleas and that he did not understand the terms and conditions of his plea agreement. DeBaere further claims that the trial court erred in finding he received effective assistance of counsel. We affirm.

¶2 DeBaere was charged with two counts of first-degree sexual assault of his nine-year-old daughter. On March 17, 1999, at a change of plea hearing held after several months of plea negotiations, DeBaere and the State reached a plea agreement. The State summarized the terms of the plea agreement for the court. The State advised the court that DeBaere would plead guilty or no contest to two counts of incest, amended down from the initial charges of first-degree sexual abuse of a child. This plea agreement reduced DeBaere's possible prison sentence from eighty years to twenty years. The State would recommend a term of incarceration with a consecutive term of probation. And, the State advised the court: "[U]pon [a presentence] evaluation from a qualified psychologist or therapist ... we may have discussions regarding further amendments once that evaluation comes in." The court asked DeBaere directly if the prosecutor's description of the plea agreement was consistent with DeBaere's understanding and DeBaere responded that it was. The court then engaged DeBaere in a thorough colloquy, outlining the elements of the charges and the rights he would waive by entering the pleas. The court accepted DeBaere's guilty pleas and adjudged him guilty of two counts of incest in violation of WIS. STAT. § 944.06 (1997-98).[1]

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 At the sentencing hearing held on May 10, 1999, DeBaere moved to withdraw his pleas, claiming that he was innocent and that he did not understand the consequences of his guilty pleas when he entered them.[2] DeBaere obtained new counsel and the court held an evidentiary hearing on DeBaere's motion to withdraw his pleas.

¶4 Testimony elicited at the subsequent evidentiary hearing clarifies the details of the plea agreement that DeBaere later claimed he did not understand. As the final plea agreement was negotiated, the parties agreed that DeBaere would submit to a psychiatric evaluation by a qualified therapist trained to evaluate sexual offenders. If the ensuing report was "favorable" such that DeBaere "admitted responsibility" for his crimes and was deemed "amenable to treatment," the State agreed to consider a further reduction of the charges, and might recommend jail time and probation rather than prison time. DeBaere's counsel testified that there was a further agreement that if the report was not "rock solid" on "accountability" or "treatability," then the State would not object if DeBaere withdrew his pleas.[3] DeBaere completed the evaluation, but denied committing

[2] Nine days after the plea hearing, DeBaere told his lawyer that he thought he could automatically withdraw his pleas within a certain number of days and that he wanted to do so. DeBaere indicated that he wished to withdraw his pleas because he wanted a jury trial and that he had concerns about meeting with the presentencing evaluator. Counsel informed DeBaere that he did not have an automatic right of withdrawal. Anticipating a favorable presentence report, counsel advised DeBaere to continue with the evaluation process and await the results. DeBaere agreed to follow this advice. When DeBaere and his attorney reviewed the unfavorable report, DeBaere again asserted his desire to withdraw his pleas. His attorney presented the motion at the sentencing hearing and withdrew as counsel.

[3] We have reservations about the "contingent" nature of the plea agreement in this case where the ultimate outcome depended upon some future event, albeit one beyond the State's control. We are particularly troubled that counsel did not fully apprise the court of all aspects of the plea agreement. However, DeBaere does not challenge, and accordingly we will not address, the propriety of such a plea agreement.

the crimes. Accordingly, the report found that DeBaere did not take responsibility for his crimes and concluded that he was not amenable to treatment.[4]

¶5 DeBaere moved to withdraw his pleas, claiming that he did not understand the consequences of pleading guilty. He claims he did not understand that he was permanently waiving his right to a jury trial. He further claims that he did not understand that to "accept responsibility" for his crimes so as to obtain a favorable presentence report meant that he was expected to admit guilt to the therapist conducting the evaluation. At the conclusion of the evidentiary hearing, the trial court concluded that DeBaere had not established a fair and just reason to withdraw his pleas. The court denied DeBaere's motion for plea withdrawal and sentenced him to ten years in prison. DeBaere filed a postconviction motion to withdraw his pleas, claiming that they were not entered knowingly, voluntarily or intelligently and alleging that his counsel at the plea stage and subsequent counsel at the hearing on the motion to withdraw both provided him with ineffective assistance. The court denied DeBaere's postconviction motion. DeBaere appeals.

¶6 We first address DeBaere's postconviction argument that his pleas were not entered knowingly, intelligently and voluntarily because resolution of that issue is relevant to his alternate claim that he had a "fair and just reason" to withdraw his pleas. A guilty or no contest plea must be entered knowingly, voluntarily and intelligently. *See* ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969); ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). On appellate review, the issue of whether a plea was knowingly and intelligently entered

[4] DeBaere's plea hearing counsel testified that the report did not satisfy the two prerequisites to the State recommending a downward revision in charges or sentencing, and did not satisfy the conditions that would have permitted DeBaere to move to withdraw his pleas without State objection.

presents a question of constitutional fact. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). We will not upset the trial court's findings of historical or evidentiary facts unless they are clearly erroneous. *See* ***id.*** We review constitutional issues independently of the determinations rendered by the trial court. *See* ***State v. Harvey***, 139 Wis. 2d 353, 382, 407 N.W.2d 235 (1987).

¶7 In ***Bangert***, 131 Wis. 2d at 274, the Wisconsin Supreme Court established a test designed to ascertain whether a defendant lacked an understanding of the charges against him or her, thus rendering his or her plea constitutionally infirm. First, a defendant must show that the trial court failed to comply with the procedural requirements set forth in WIS. STAT. § 971.08.[5] *See* ***Bangert***, 131 Wis. 2d at 274. Then the defendant must properly allege that he or she did not understand or know the information that should have been provided at the plea hearing. *See* ***id.*** Once the defendant makes a prima facie showing that his or her plea was accepted without compliance with the procedures set forth in § 971.08 and has properly alleged that he or she did not understand or know the information that should have been provided at the plea hearing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly, voluntarily and intelligently entered. *See* ***Bangert***, 131 Wis. 2d at 274;

[5] WISCONSIN STAT. § 971.08 represents the statutory codification of the constitutional mandate that a plea be knowing, voluntary and intelligent. It 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.

see also ***State v. Moederndorfer***, 141 Wis. 2d 823, 830, 416 N.W.2d 627 (Ct. App. 1987).

¶8 The record wholly supports the trial court's finding that DeBaere's pleas were entered knowingly, voluntarily and intelligently. The record reflects that the court engaged DeBaere in a thorough and methodical colloquy regarding the plea agreement, the charges and their elements, the possible penalties and the constitutional rights that he would forfeit by entering a guilty or no-contest plea. The record further supports the court's finding that DeBaere's claim of confusion was not credible.

¶9 At the plea hearing, the trial court first advised DeBaere to tell the court if there was anything he did not understand or wanted to discuss with counsel. The court then asked DeBaere directly if he understood the implications of his guilty pleas, including the constitutional rights he was waiving as a result. The court also asked whether he had enough time to discuss the pleas and the elements of the offense with his attorney. DeBaere responded affirmatively to each question. When asked by the court whether he had reviewed and signed the plea questionnaire and waiver of rights form, and whether he understood the contents of the form, DeBaere again responded in the affirmative. The information contained in the questionnaire and waiver of rights form may be used

to demonstrate DeBaere's awareness of the rights he waived by entering the pleas. *See* ***State v. Brandt***, 226 Wis. 2d 610, 621, 594 N.W.2d 759 (1999).[6]

¶10 The court asked whether "the facts in the underlying criminal complaint regarding the charges as now amended, are those facts true?" DeBaere answered "yes." And he responded "yes" when the court asked if he understood he would be giving up a number of constitutional rights by entering a plea:

> The Court: When you enter this plea you give up a number of very important constitutional rights. I'm going to review five of them with you and I'm confident counsel has reviewed it even more, but I'm going to review five with you right now. You give up your right to a trial by jury where the verdict by the 12 jurors must be unanimous. Do you understand that?
>
> Mr. DeBaere: Yes.
>
> The Court: You also give up your right to the help you would receive from your attorney during the jury trial, and of course the reason is there won't be a jury trial. Do you understand that?
>
> Mr. DeBaere: Yes.

¶11 The court proceeded to outline other constitutional rights that DeBaere waived by entering a plea and outlined each of the elements of the crimes, asking each time if DeBaere understood them. Each time DeBaere responded that he understood.

¶12 With respect to DeBaere's understanding of the terms of the plea agreement, the court asked him directly if the prosecutor's description of the plea

[6] Moreover, DeBaere initially testified under oath that he had never before been charged with a crime and that he was wholly unfamiliar with plea negotiations and with the terms of the plea questionnaire and waiver of rights form he signed at the plea hearing. On cross-examination, the prosecutor confronted DeBaere with the fact that he had executed a substantially similar plea questionnaire and waiver of rights form less than two years earlier in connection with a charge for operating while intoxicated, while represented by the same attorney. The trial court found that DeBaere's misrepresentation adversely affected his credibility.

agreement was consistent with DeBaere's understanding of the agreement and DeBaere responded that it was. After the colloquy, the court again asked if the statements of the attorneys accurately reflected all the plea discussions as DeBaere understood them, and DeBaere responded "yes." Finally, before accepting the pleas the court asked, "[I]s there anything more, Mr. DeBaere, that you wish to say regarding the plea you have entered to these two amended charges?" DeBaere responded, "No, your Honor."

¶13 The record supports the court's detailed findings regarding DeBaere's ability to understand the nature and consequences of his pleas. At the time of the plea hearing, DeBaere was a forty-year-old businessman. He had completed high school and had obtained a two-year associate degree in marketing. He owned and operated his own business. The trial court also found that DeBaere's courtroom demeanor did not indicate that he lacked understanding, was especially nervous, or was confused by the proceedings. DeBaere's plea attorney testified that he believed DeBaere understood the plea proceedings. Indeed, DeBaere acknowledges that his counsel "advised him that he must 'accept responsibility' for his conduct in order to receive a 'favorable' report from the therapist." However, DeBaere blames counsel for failing to explicitly tell him that this meant he had to admit to the evaluator that he committed the crime of incest in order to receive a favorable report. The trial court found this claim "specious and contrived." We agree. No person of average intelligence could honestly claim that when told to "accept responsibility" it did not mean to admit the crime.

¶14 In short, the record wholly supports the trial court's finding that DeBaere's pleas satisfied the constitutional requirements for knowing, voluntary and intelligent pleas. The pleas satisfied the requirements of WIS. STAT. § 971.08 and satisfied the requirements set forth in ***Bangert*** for establishing DeBaere's

understanding of the charges against him. We affirm the trial court's finding that the pleas were entered knowingly, voluntarily and intelligently.[7]

¶15 We next address whether the trial court erred in finding that DeBaere failed to demonstrate a "fair and just" reason to withdraw his pleas before sentencing. *See* ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989). The record supports the trial court's finding.

¶16 The decision whether to grant or deny a motion to withdraw a guilty plea before sentencing is addressed to the sound discretion of the trial court. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1988). We will not disturb the trial court's decision unless it exercised that discretion erroneously. *See* ***id.***

¶17 Whether a defendant has asserted a fair and just reason for withdrawal of his or her plea involves the consideration of a number of factors, including the assertion of innocence, hasty entry of the plea, misunderstanding of the plea's consequences, and an expeditious decision to withdraw the plea. *See* ***Shanks***, 152 Wis. 2d at 290. DeBaere claims to have demonstrated each of these factors, and we will address them in turn.

¶18 First, the trial court found that DeBaere's belated claim of innocence was incredible in light of the record evidence, including his guilty pleas and the fact that at the plea hearing he admitted that the details alleged in the criminal

[7] We reject DeBaere's characterization of the issue in this case as whether a defendant who fails to correct a prosecutor's incomplete description of a plea is later foreclosed from complaining that he or she did not understand part of the undisclosed agreement. Rather, the trial court concluded that the record evidence did not support DeBaere's assertion that he did not understand the terms of the plea agreement.

complaint were true. The court also rejected DeBaere's efforts to characterize his plea negotiations as "hasty." Although the exact terms of the plea agreement were finalized the day of the plea hearing, the court noted that DeBaere and his attorney had numerous meetings over the months of plea negotiations. At those meetings they discussed various scenarios, including a possible plea to incest and the penalties and fines associated with those charges.

¶19 The primary basis for DeBaere's motion to withdraw his pleas was his alleged misunderstanding of the consequences of the guilty pleas and the terms of his plea agreement. We have already concluded that the plea colloquy and plea questionnaire more than adequately satisfied the requirements of a knowing, voluntary and intelligent plea. With respect to DeBaere's claims of confusion, we conclude that the record wholly supports the trial court's finding that DeBaere moved to withdraw his pleas because he did not receive the favorable presentence report he wanted. Similarly, the record supports the court's finding that although DeBaere first raised the prospect of withdrawing his guilty pleas nine days after the plea hearing, his motion was linked with the receipt of the unfavorable presentence report.

¶20 Thus, the trial court ultimately concluded that DeBaere had not offered a fair and just reason for withdrawing his pleas. This determination is supported by the record and involved a logical application of the appropriate law to the facts. We see no reason to disturb the trial court's finding.

¶21 We next examine whether the trial court erred in concluding that the State would suffer substantial prejudice if DeBaere were allowed to withdraw his pleas. DeBaere asserts that the trial court erroneously shifted the burden of proof on this element to DeBaere. We disagree. The record does not indicate that the

trial court improperly assigned the burden of proof. Rather, the court denied DeBaere's motion for plea withdrawal, finding that, based on the record evidence, the State would suffer substantial prejudice. In making that determination, the trial court accepted the testimony of the victim's therapist. She testified that the delay in proceedings, coupled with DeBaere's desire to withdraw his guilty pleas, had such an adverse impact upon the victim that she believed that the victim would no longer be able to testify if the pleas were withdrawn and the case proceeded to trial. It was reasonable to consider the impact a plea withdrawal would have on the child victim—the State's key witness. *See* ***State v. Bollig***, 2000 WI 6, ¶46, 232 Wis. 2d 561, 605 N.W.2d 199. The fact that the trial court did not sua sponte identify and reject theoretical alternatives to having the child testify at trial is simply insufficient to warrant disturbing the trial court's exercise of discretion here.[8] We conclude that the trial court did not misuse its discretion in finding that the State would suffer substantial prejudice if DeBaere withdrew his pleas. Accordingly, we affirm the trial court's order denying DeBaere's motion to withdraw his pleas.

¶22 DeBaere's final argument is that he should have been allowed to withdraw his pleas because he received ineffective assistance of counsel both at the time of the plea hearing and by successor counsel at the hearing on the motion to withdraw his pleas. We affirm the trial court's finding that both of DeBaere's attorneys provided him with effective assistance.

¶23 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that he or she was

[8] The trial court noted in its findings that neither attorney presented arguments regarding alternatives to having the child victim testify at trial.

prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶24 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we independently review the two-pronged determination of trial counsel's performance as a question of law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶25 There is a strong presumption that counsel rendered adequate assistance. *See* ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689.

¶26 DeBaere first asserts that he was prejudiced by his plea counsel's failure to tell him that "acceptance of responsibility" for his crimes meant that he was expected to admit guilt to the therapist in order to obtain a favorable presentence report. He also claims that counsel failed to explain what was meant by a "favorable report" such that he thought his assertion of innocence would generate a favorable report. The trial court concluded that the notion that counsel should have had to explicitly tell DeBaere that he would have to admit guilt to the evaluator after DeBaere had entered guilty pleas and admitted the facts underlying

the criminal complaint was nonsensical. Thus, the court found that counsel's performance was not deficient and that, even if it had been, no prejudice inured to DeBaere. We agree. The record also supports the trial court's rejection of DeBaere's effort to blame counsel for his erroneous belief that claiming innocence would garner a favorable presentence report.

¶27 Since we have affirmed the trial court's conclusion that DeBaere's plea counsel was not ineffective, DeBaere's argument that successor counsel at the evidentiary hearing was ineffective for failing to argue ineffective assistance of plea counsel at the evidentiary hearing also fails. We affirm the judgment and the order of the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.