COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2163-CR **Cir. Ct. No. 2013CF1535**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL A. ADAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL O. BOHREN and MICHAEL P. MAXWELL, Judges. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Paul A. Adams pleaded no contest to seventh-offense operating a motor vehicle while intoxicated (OWI) in hopes that his sentence would be ordered concurrent to the sentence he was serving upon

revocation of his extended supervision from his sixth OWI conviction. When the court imposed a consecutive sentence, Adams filed a ***Bangert*** and ***Bentley*** motion to withdraw his plea.[1] He alleged that his plea was not knowingly, voluntarily, and intelligently entered because the court did not advise him, or ascertain his understanding, of both elements of the offense and because his counsel ineffectively failed to do likewise. The court denied the motion after a hearing.[2] We affirm the judgment of conviction and the order denying Adams' postconviction motion.

¶2 When a guilty or no-contest plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw it as a matter of right. *See* ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact." ***Id.*** We accept the court's findings of historical and evidentiary facts unless they are clearly erroneous but determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. ***Id.***

¶3 Adams first contends he did not understand the nature of the OWI charge. He argues that the court advised him of the elements of operating with a prohibited alcohol concentration (PAC) but failed to advise him of the elements of the OWI offense or to ascertain his understanding of them. He asserts that, after reading the charge to him, the court asked only if he understood that that was the charge against him.

[1] *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996)

[2] The Honorable Michael O. Bohren presided over the plea hearing and sentencing. The Honorable Michael P. Maxwell presided over the postconviction motion hearing.

¶4 A properly conducted plea colloquy assures that the defendant understands the nature of the charges. *See* ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986). The term "nature of the charge" refers to the elements of the offense in relation to the facts associated with that charge. ***State v. Robles***, 2013 WI App 76, ¶10, 348 Wis. 2d 325, 833 N.W.2d 184.

¶5 A defendant may move to withdraw his or her plea if the court does not undertake the procedure set out in WIS. STAT. § 971.08 or fulfill other mandatory duties at the plea hearing. ***Bangert***, 131 Wis. 2d at 274. He or she bears the initial burden to make a prima facie showing that the plea was accepted without the circuit court's conformance with its duties and must allege that he or she in fact did not know or understand information that should have been provided at the plea hearing. ***Id.*** More particularly, the defendant must state *what* he or she did not understand and connect that lack of understanding to the deficiencies. ***Brown***, 293 Wis. 2d 594, ¶67. If those showings are made, the burden shifts to the State to show by clear and convincing evidence that, despite the inadequacy of the record at the time the plea was accepted, the defendant's plea nonetheless was knowingly, intelligently, and voluntarily entered. ***Bangert***, 131 Wis. 2d at 274.

¶6 Operating while intoxicated has two elements: the defendant (1) drove or operated a motor vehicle on a highway (2) while under the influence of an intoxicant. WIS. JI-CRIMINAL 2663 (2006). Under questioning by the court at the plea hearing, Adams confirmed that: he understood that the charge was "operat[ing] a motor vehicle while under the influence of an intoxicant"; an analysis of his blood showed an alcohol concentration of .179 and the presence of THC and a prescription anti-anxiety drug at the time of operation; and he understood that at trial the State would have to prove beyond a reasonable doubt that he operated the motor vehicle, had prior convictions, and had intoxicants in

his body. He also confirmed that he read and understood the entire plea questionnaire/waiver-of-rights form and read the attached elements form, the OWI part of which was bracketed and marked with an asterisk, and read and understood the contents of the amended complaint.

¶7 Adams' counsel, Peter Heflin, told the court that he "pointed [Adams] to specific sections [of the plea questionnaire] regarding the elements, asked him if he understood that. He did…. Asked him if he had any questions about what he read. Indicated he did not have any questions." Further, as Adams had been charged with OWI on six prior occasions and did not recall having gone to trial on any of them, Heflin believed Adams likely had been advised of the elements at least once. The plea questionnaire from Adams' sixth OWI, introduced by the State, supports that belief, as Adams had initialed the OWI elements. Further, Adams himself told the court at the plea hearing:

> [U]nfortunately this is not my first time going through these so I've read [the plea questionnaire and elements form] and prior and I do know what they constitute and the reading that I did with [counsel] today … was sufficient to recollect anything that I might have forgotten in the past.

Adams assured the court that he had had sufficient time to meet with Heflin, was satisfied with his representation, and wished to go forward with the plea taking.

¶8 The court found Adams' answers to be "articulate, well-focused, careful … [and] deliberate," demonstrating an "acknowledgement … that you understand what is happening in the case." It concluded that his plea was knowing, intelligent, and voluntary. The court's findings are not clearly erroneous.

¶9 "The ultimate issue to be decided at the [***Bangert***] hearing is whether the defendant's plea was knowing, intelligent, and voluntary, not whether the circuit court erred." ***Brown***, 293 Wis. 2d 594, ¶63. The purpose of the hearing, therefore, was to evaluate the effect of the claimed error on Adams' plea so that the court could determine whether it must accept the withdrawal of his plea. *See* ***id.***, ¶65.

¶10 Adams' asserted lack of understanding of the nature of the offense based on the court's alleged omission does not withstand scrutiny. He fails to tell us what it is, after six prior OWIs, he did not understand about the nature of the offense of operating while under the influence of an intoxicant.[3] *See* ***Brown***, 293 Wis. 2d 594, ¶67. As noted, OWI has but two elements. The court may have advised him of the elements of PAC, but it also relied on the plea questionnaire and an accurate elements sheet, which Adams testified he read and understood. The complaint, which Adams also testified he read and understood, likewise recites the elements, and Adams told Heflin he understood the elements.

¶11 Adams' second effort at plea withdrawal rests on his claim that Heflin's alleged failure to inform him of the nature of the case constituted ineffective assistance of counsel. "A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is met if the defendant was denied the effective assistance of counsel. ***Id.***

[3] Adams abandons the argument made below that he would not have pled had he known that his blood alcohol result was inadmissible without expert testimony, as his blood was drawn over four hours after the "event to be proved." *See* WIS. STAT. § 885.235(1g), (3).

¶12 ***Strickland v. Washington***, 466 U.S. 668 (1984), governs claims of ineffective assistance of counsel. To prevail, a defendant must show both that counsel's performance was deficient and that it resulted in prejudice. *See* ***id.*** at 687. Proving deficient performance requires a showing that specific acts or omissions of counsel were "outside the wide range of professionally competent assistance." ***Id.*** at 690. Proving prejudice in the context of a postconviction motion to withdraw a plea based upon ineffective assistance of counsel requires "alleg[ing] facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***Bentley***, 201 Wis. 2d at 312 (citation omitted).

¶13 The postconviction court found that Heflin reviewed the elements of the offense with Adams, that Heflin was satisfied that Adams understood them, the maximum possible penalties, and the rights he was waiving, and that Adams never indicated to Heflin that he did not understand the proceedings, possible defenses, or his options. Based on the prior court's and Heflin's explanations to Adams, Adams' own opportunity to read through the elements, and his familiarity with plea questionnaires from his other OWI cases, the court found that Adams' claim that he did not understand the elements was not credible. The court's findings are not clearly erroneous. We are satisfied that Heflin did not perform deficiently. We therefore need not address prejudice. *See* ***Strickland***, 466 U.S. at 697 (inadequate showing on one prong relieves court of addressing the other).

By the Court.—Judgment and order affirmed.

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