COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2459-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. LUEDKE,

DEFENDANT-APPELLANT.

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

Before Dykman, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Daniel Luedke appeals from a judgment convicting him of two counts of felony impersonating a peace officer and from an order denying his motion for postconviction relief. Luedke argues that his guilty plea

was not knowingly, intelligently, and voluntarily entered. We reverse the order denying postconviction relief and remand for further proceedings.

¶2 Luedke was charged with two counts of impersonating a peace officer, as a felony, for allegedly making about ten telephone calls to various police departments, identifying himself as a law enforcement officer, and describing a situation where police help was required. Luedke entered a guilty plea and was sentenced to five years in prison on count one and a consecutive three-year term of probation on count two. Shortly thereafter, Luedke moved to withdraw his plea on the grounds that it was not knowingly, intelligently, and voluntarily entered. The trial court denied the motion.

¶3 To determine whether a plea was knowingly, intelligently, and voluntarily entered, we first "review the plea hearing transcript to determine whether the defendant has made a prima facie showing that the trial court did not comply with the procedures required by § 971.08, Stats." ***State v. McKee***, 212 Wis. 2d 488, 490-91, 569 N.W.2d 93 (Ct. App. 1997). WISCONSIN STAT. § 971.08(1)(a) (1999-2000)[1] requires that the trial court "[a]ddress 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." To determine a defendant's understanding of the nature of the charge, "[t]he court must establish that the defendant has 'an awareness of the essential elements of the crime.'" ***McKee***, 212 Wis. 2d at 491.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The trial court may establish the defendant's awareness of the essential elements of the crime in several ways. The trial court may do so:

> (1) by personally summarizing the elements for the defendant; (2) by asking defense counsel whether he or she explained the elements to the defendant, and then asking the lawyer to reiterate what was explained to the defendant; or (3) by expressly referring to the record or other evidence of the defendant's knowledge of the nature of the charge established prior to the plea hearing.

Id. at 492. We have explained that "[t]his list is not 'exhaustive,' but rather indicates that the method chosen by the trial court must do more than 'merely … perfunctorily question the defendant about his understanding of the charge' [and] record 'a perfunctory affirmative response by the defendant.'" ***Id.***

¶5 Luedke contends that his plea was not knowingly, intelligently, and voluntarily entered because he did not understand the elements of the crime to which he pleaded guilty. The crime of impersonating a peace officer may be a misdemeanor or a felony, depending on the circumstances. WISCONSIN. STAT. § 946.70 (emphasis added) provides:

> **Impersonating peace officers.** (1) Except as provided in sub. (2), whoever impersonates a peace officer with intent to mislead others into believing that the person is actually a peace officer is guilty of a Class A misdemeanor.
>
> (2) Any person violating sub. (1) *with the intent to commit or aid or abet the commission of a crime* other than the crime under this section is guilty of a Class D felony.

¶6 The trial court conducted the following colloquy with Luedke concerning the plea:

> THE COURT: Then you understand what you're charged with, sir, as to Counts 1 and 2, impersonating a police officer—

THE DEFENDANT: Yes

THE COURT: —or peace officer?

You've read the Complaint or had it read to yourself?

THE DEFENDANT: Mm-hmm.

Yes.

THE COURT: And you understand the penalty the Court can impose, up to five years on each count?

THE DEFENDANT: Yes.

THE COURT: And by pleading guilty to each count, you're going to be waiving your rights to trial by jury, and all – all 12 jurors must agree unanimously as to a verdict as to each count.

Do you understand that?

THE DEFENDANT: Yes.

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, I do.

THE COURT: Have you gone over the elements of the offense with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Do you understand them?

THE DEFENDANT: Yes, I do.

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

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

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

THE DEFENDANT: Yes.

THE COURT: Be waiving your right to – to remain silent.

Do you understand this?

THE DEFENDANT: Yes, I do.

> THE COURT: So you signed this Guilty Plea Questionnaire and Waiver of Rights Form; is that right?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Discussed it with your lawyer?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And, ah, you understand the Court's not bound by any negotiations or plea bargains?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Nobody's made any promises or threats to you to plead guilty to the offenses?
>
> THE DEFENDANT: That's correct.
>
> THE COURT: And you're doing so voluntarily and knowingly; is that correct?
>
> THE DEFENDANT: Yes
>
> THE COURT: Counsel, you believe that he's voluntarily, knowingly and intelligently waiving those constitutional rights?
>
> MR. KULKOSKI: Yes, Your Honor.

¶7 We conclude that the trial court did not adequately establish that Luedke had an awareness of the essential elements of the crime, particularly because it is difficult for a layperson to understand the distinction between *misdemeanor* impersonating a peace officer and *felony* impersonating a peace officer, which requires that the State also prove the elements of an underlying crime. The trial court did not summarize the elements of felony impersonating an officer for Luedke or ask defense counsel whether he had explained the elements to Luedke. The trial court did not discuss any underlying crimes with Luedke and did not refer to the record to show that Luedke knew the elements of the crime. The plea questionnaire did not list the elements of the crime. As we have previously explained, "the trial court must do more than 'merely … perfunctorily question the defendant about his understanding of the charge' [and] record 'a perfunctory affirmative response by the defendant.'" ***McKee***, 212 Wis. 2d at 492. That is exactly what happened here.

¶8 The State contends that, if Luedke has made a prima facie case that the plea was not knowingly entered, we should review the preliminary hearing transcript because it establishes that Luedke understood the nature of the crime. *See* ***State v. Bollig***, 2000 WI 6, ¶49, 232 Wis. 2d 561, 605 N.W.2d 199 (if the defendant makes a prima facie showing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered). Although the State may utilize the entire record to demonstrate a defendant's knowledge of the nature of a crime, *see* ***id.*** at ¶53, we conclude that this case should be remanded for a hearing before the trial court to determine whether the State can meet its burden. *See* ***State v. Hansen***, 168 Wis. 2d 749, 756, 485 N.W.2d 74 (Ct. App. 1992). In ***Hansen***, like this case, the State argued that it could meet the shifted burden of proof based on the appellate record. *See* ***id.*** We concluded that the trial court was better situated to make this determination. ***Id.*** Therefore, we reverse the judgment of conviction and postconviction order and remand for the trial court to determine whether the State can prove by clear and convincing evidence that Luedke understood the elements of the offense to which he pleaded guilty.

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

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