COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3193-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Larry Jones appeals his judgment of conviction for misdemeanor battery, contrary to WIS. STAT. § 940.19(1), and an order denying his postconviction motion. Jones argues that: (1) the circuit court failed to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

comply with WIS. STAT. § 971.08 by conducting an inadequate plea colloquy; (2) he should have been allowed to withdraw his plea prior to sentencing because the circuit court rejected the plea agreement; (3) the State breached the terms of the plea agreement; and (4) he was denied effective assistance of counsel. We disagree and affirm the conviction.

BACKGROUND

¶2 Jones was charged with misdemeanor battery. He appeared with his attorney at the plea hearing after negotiating a plea agreement with the State. Jones signed a plea questionnaire, which stated that in return for a plea of no contest, the State would request that the circuit court defer "entry of the conviction" for eighteen months. If Jones would stay out of trouble, the charge would be dismissed.

¶3 The circuit court conducted a plea colloquy. At the beginning of the colloquy, Jones pled no contest. The court then continued and asked Jones about his education and whether he was willing to give up the constitutional rights listed in the plea questionnaire. Jones said that he was.

¶4 The circuit court asked Jones about his understanding of the agreement. Jones stated that he had to take an anger management class, be on probation for a year and a half, and if there were no incidents, the charge would be dismissed. The court then found that Jones' plea was knowingly, freely, voluntarily, and understandingly made. As a factual basis for the plea, the court relied on the probable cause section of the complaint.

¶5 Before accepting the plea, the State informed the circuit court that the plea agreement called for the court to defer acceptance of the plea for eighteen

months. The court then continued the colloquy and asked Jones if he understood that if there was a trial, the State would have to prove all the elements of battery. The court then stated the elements of battery for Jones. The court also asked Jones if he understood that it was not bound by the terms of the plea agreement. Jones said he understood.

¶6 The circuit court rejected the plea agreement and accepted Jones' plea. Jones requested that he be allowed to withdraw his plea. The court denied the request and immediately proceeded to sentencing. It asked the State for a sentence recommendation. The State requested that Jones be placed on probation for eighteen months.

¶7 Defense counsel objected to the circuit court proceeding with the sentencing. However, counsel agreed that probation was appropriate. The court sentenced Jones to nine months in jail, stayed the sentence, and placed him on probation for eighteen months.

¶8 Jones moved for postconviction relief. The circuit court denied the motion. This appeal followed.

STANDARD OF REVIEW

¶9 "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A plea withdrawal is committed to the trial court's discretion. ***Id.*** A reviewing court may reverse the trial court only if it has failed to properly exercise its discretion, which includes an erroneous application of the law. ***Id.***

DISCUSSION

I. Plea Colloquy

¶10 Jones argues that he should have been allowed to withdraw his plea because the circuit court did not comply with the requirements of WIS. STAT. § 971.08.[2] Jones contends that his plea was not knowing and voluntary and that the court erroneously relied on the complaint for a factual basis for the plea. We disagree.

A. Knowing and Voluntary Plea

¶11 In order to safeguard a defendant's constitutional rights, WIS. STAT. § 971.08(1) requires the circuit court at a plea hearing to undertake a personal colloquy with the defendant to assure that the plea is voluntarily and knowingly made. ***State v. Bangert***, 131 Wis. 2d 246, 269-72, 389 N.W.2d 12 (1986). This function can be performed by a colloquy between the judge and the defendant, or by referring to some portion of the record or communication between the defendant and his or her lawyer, which exhibits the defendant's knowledge, among other things, of the rights he or she relinquishes. ***Id.*** at 274-75.

¶12 Whenever WIS. STAT. § 971.08(1) is not satisfied at a plea hearing, a defendant may move to withdraw the plea. ***Id.*** at 274. The defendant must make

[2] WISCONSIN STAT. § 971.08(1)(a) and (b) reads as follows:

> (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.

a prima facie showing that the circuit court violated its mandatory statutory duties, and allege that he or she did not know or understand the information that the court failed to provide. ***Id.*** Once the defendant makes this showing, the burden shifts to the State to demonstrate by clear and convincing evidence that the defendant's plea was knowingly and voluntarily made. ***Id.***

¶13 Whether a plea was knowingly and voluntarily made is a question of constitutional fact subject to independent review. ***Id.*** at 283. The circuit court's findings of evidentiary facts, however, will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. ***Id.*** at 283-284.

¶14 Jones fails to satisfy the first of the two threshold requirements. The record establishes that the circuit court conducted a plea colloquy that satisfied the requirements of WIS. STAT. § 971.08. Here, the court personally addressed Jones regarding the nature of the charges and the potential punishment. It implicitly referred to the plea questionnaire by acknowledging Jones' understanding of the rights he had given up. The court then asked Jones whether he was willing to give up those rights.

¶15 The court asked Jones his understanding of the plea agreement. The court went through each of the elements of battery with Jones and asked him whether he understood that the State would have to prove each element beyond a reasonable doubt. The court also asked Jones whether he understood that the court was not bound to accept the terms of the agreement. We are satisfied that the plea colloquy complied with WIS. STAT. § 971.08(1).

¶16 The record supports the circuit court's determination that Jones entered a knowing and voluntary plea. The circuit court generally set forth the

elements of the crime, addressed Jones personally and determined that the plea was voluntary with an understanding of the nature of the charge. In addition, the circuit court referred to and questioned Jones about the plea questionnaire he signed and asked him if he was willing to give up those rights.

¶17 Jones argues that the circuit court erred by asking for Jones' plea at the beginning of the colloquy and that it did not follow the proper order of questioning found in ***State v. Comstock***, 168 Wis. 2d 915, 928-29, 485 N.W.2d 354 (1992).

¶18 Despite Jones' assertions, the order of the plea colloquy was never at issue in ***Comstock***, nor did it discuss the proper order of the colloquy. *See* ***id.*** at 920. The generally accepted procedure for conducting a plea colloquy is found in WIS JI—CRIMINAL SM-32. Jury instruction SM-32 begins with a direct request to the defendant for a plea. Jones cites no authority for the proposition that a plea colloquy cannot begin with the court taking the defendant's plea.

B. Factual Basis

¶19 Next, Jones argues that the circuit court erroneously concluded that a factual basis for the plea existed in the probable cause section of the complaint. Jones contends that the complaint contains a defense to the charge of battery and that he has consistently denied that he ever committed battery. In addition, he contends that he never stipulated to the facts found in the complaint. As a result, Jones argues the circuit court improperly used the complaint as a factual basis. We disagree.

¶20 In accepting a no contest plea, the trial court must ascertain that a factual basis exists to support the plea. ***Bangert***, 131 Wis. 2d at 262. Failure to

ascertain that "the defendant in fact committed the crime charged" is an erroneous exercise of discretion and constitutes a "manifest injustice," which is grounds for the withdrawal of a plea. ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). The precise method by which this duty is met has been left to the discretion of the circuit court. ***Edwards v. State***, 51 Wis. 2d 231, 236, 186 N.W.2d 193 (1971). However, "[i]f the facts as set forth in the complaint meet the elements of the crime charged, they may form the factual basis for a plea." ***State v. Black***, 2001 WI 31, ¶14. In addition, it is not necessary for a defendant to stipulate to the complaint before it can be used to form a factual basis. *See* ***State v. Garcia***, 192 Wis. 2d 845, 857-58, 532 N.W.2d 111 (1995).

¶21 A factual basis for a plea exists if an inculpatory inference can be drawn from the complaint even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one. ***Black***, 2001 WI at ¶16. "This is the essence of what a defendant waives when he or she enters a guilty or no contest plea." ***Id.*** It makes no difference if a complaint contains information suggesting self-defense. If the complaint contains inculpatory material, it can be used to form a factual basis for the plea.

¶22 Here, the circuit court properly utilized the complaint as a factual basis for the plea, and satisfied itself that Jones in fact committed the crime charged. The complaint alleged that Jones had punched his girlfriend in the mouth causing swelling, soreness, and a loosening of her front teeth. It also alleged that Jones swung her around and slammed her into the wall causing bruises on her chest. Therefore, we conclude that a factual basis existed for each element of battery.

II. Withdrawal of Plea Prior to Sentencing

¶23 Jones argues that he should have been allowed to withdraw his plea before sentencing because the circuit court rejected the plea agreement. Jones contends that he is innocent of battery and that he agreed to the plea bargain only to put the matter behind him. We conclude the trial court acted properly.

¶24 "A circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal." ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). "But freely does not mean automatically." ***Id.*** (citation omitted). A fair and just reason is "some adequate reason for defendant's change of heart … other than the desire to have a trial." ***Id.*** at 861-62 (citation omitted). "The burden is on the defendant to prove a fair and just reason for withdrawal of the plea by a preponderance of the evidence." ***Id.*** at 862. An assertion of innocence and a prompt motion to withdraw are not in themselves fair and just reasons for a plea withdrawal, but are factors that bear on whether the defendant's proffered reason is credible. ***State v. Shimek***, 230 Wis. 2d 730, 740 n.2, 601 N.W.2d 865 (Ct. App. 1999).

¶25 Jones made no assertion of his innocence until the circuit court rejected the plea agreement. It was at this point that Jones moved to withdraw his plea and asserted his innocence. Jones failed to provide a reason for his change of heart other than he now desired to have a trial. The circuit court properly denied this motion, noting that Jones had the opportunity to go to trial but had opted to plead instead. Jones cannot be permitted to test the waters with a no contest plea and then immediately back out when the circuit court chooses not to accept the plea agreement.

III. Breach of the Plea Agreement

¶26 Jones argues that he should be allowed to withdraw his plea because the State breached a material term of the plea agreement. Jones contends that he believed the State would recommend a deferred prosecution rather than a deferred acceptance of the plea. We disagree.

¶27 "It is the trial court's responsibility to weigh the evidence and to determine credibility, and its findings in these areas will not be disturbed on appeal unless they are clearly erroneous." ***Johnson v. Miller***, 157 Wis. 2d 482, 487, 459 N.W.2d 886 (Ct. App. 1990). However, whether the State violated the spirit of the plea agreement is a question of law which we review independently. ***State v. Ferguson***, 166 Wis. 2d 317, 320-21, 479 N.W.2d 241 (Ct. App. 1991).

¶28 The court found that there was no breach of the plea agreement because the State recommended exactly what Jones had agreed to. The record establishes that the plea agreement was specifically recited by the State at the plea hearing. The State stated that if Jones failed to live up to his end of the agreement, he would be brought back before the court for sentencing. Jones' attorney testified at the postconviction hearing that he wrote on the back of the plea questionnaire the terms of the plea bargain.[3] The questionnaire stated that the State would recommend to the court that it defer entry of conviction.

[3] We note that the State's brief refers to the plea questionnaire by stating that it "clearly spells out that the plea agreement called for a deferred guilty plea rather than a deferred prosecution agreement." We conclude that the State simply misquoted the plea questionnaire. The plea questionnaire clearly states that Jones will "plead no contest" and that the State will recommend a deferred "entry of conviction for one and a half years."

¶29 Jones is unable to point to any evidence that establishes the existence of a deferred prosecution agreement with the State other than his own testimony. Jones testified at length at the postconviction hearing. He stated that he lacked an understanding of the plea questionnaire and that he was unable to read because he did not have his glasses. He also stated that his attorney did not spend enough time with him prior to the plea hearing. Based upon this, it was his understanding that the plea agreement was a deferred prosecution rather than a deferred acceptance of guilty plea.

¶30 However, Jones was cross-examined at the postconviction hearing. When asked about his understanding of the consequences of violating the agreement, Jones stated that it was his understanding he would be brought before the court for sentencing. This is what is contemplated by a deferred acceptance of a plea agreement.

¶31 In addition, Jones' attorney stated that he had reached the plea agreement with the State and wrote the terms in the plea questionnaire. He stated that he had reached the agreement with Jones' input and that he had discussed these terms several times before the plea hearing.

¶32 Once the trial court rejected the plea agreement, the circumstances changed. The State recommended a sentence that was the same time period as the original deferred plea agreement. As a result, we conclude that State did not breach the plea agreement.

IV. Ineffective Assistance of Counsel

¶33 Jones argues that he should have been allowed to withdraw his plea because his attorney failed to object to the State's breach of the plea agreement and failed to stop Jones from entering a plea. We disagree.

¶34 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing both that counsel's performance was deficient and that the deficient performance produced prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If this court concludes that the defendant has failed to establish that counsel was deficient, we need not address whether the defendant was prejudiced by counsel's actions. ***Id.*** at 697.

¶35 To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. We conclude that Jones has failed to identify any specific acts or omissions. Because there was no breach of the plea agreement, it was not deficient performance for Jones' attorney to not object to the entire plea agreement. The plea agreement articulated to the court was what the parties had agreed to. In addition, it was not deficient performance for Jones' attorney to not stop him from entering a plea. The terms of the plea agreement required Jones to enter a plea. Therefore, we reject Jones' arguments.

By the Court.—Judgment and order affirmed.

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