COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0598-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK A. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: JOSEPH A. McDONALD, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Patrick Peterson appeals from a judgment of conviction for first-degree intentional homicide and hiding a corpse, and from an order denying postconviction relief. Peterson asserts that he should be allowed to withdraw his guilty plea to the homicide charge because he did not know that the circuit court had the authority to establish his parole eligibility date or to deny him

parole.[1] We conclude that although the circuit court did not specifically provide Peterson with parole eligibility information at the plea hearing, its finding that Peterson knew the potential punishment is not clearly erroneous and there is sufficient clear and convincing evidence that Peterson entered his plea knowingly, voluntarily and intelligently. We affirm the judgment and order.

BACKGROUND

¶2 Peterson was charged with first-degree intentional homicide and hiding a corpse in connection with the death of his father. Pursuant to a November 1999 plea agreement, Peterson entered a plea of guilty to amended charges including party to the crime of conspiracy to commit first-degree intentional homicide, with a criminal gang enhancer, and one count of hiding a corpse. This lowered Peterson's maximum potential sentence from life imprisonment to a total of fifty years. As part of the plea agreement, Peterson was required to testify against his co-defendants. At a November 12 plea hearing, the circuit court accepted Peterson's pleas and found him guilty.

¶3 Several days later, the State moved to terminate the plea agreement on grounds that Peterson had changed his story and could no longer be an effective witness against his co-defendants. The circuit court granted the State's motion, and the original charges were reinstated.

[1] It is unclear whether Peterson also seeks to withdraw his plea to hiding a corpse. His postconviction motion and notice of appeal indicate that he is appealing the entire final judgment, but his brief indicates that he seeks to withdraw only his plea to the homicide charge. Also, Peterson, at the postconviction motion hearing, argued that he should be allowed to withdraw his plea to count 1, the homicide charge. Because Peterson's sole basis for appeal is his lack of knowledge about the penalties for the homicide charge, an argument we reject, we need not determine whether Peterson also seeks to withdraw his plea to hiding a corpse. The circuit court's order and the judgment are affirmed in their entirety.

¶4 Peterson and the State entered into another plea agreement in December 1999. Peterson pled guilty to one count of first-degree intentional homicide and one count of hiding a corpse, both as party to a crime. Under the plea agreement, the parties agreed to jointly recommend on the homicide count a sentence of life imprisonment with parole eligibility after twenty-seven years. The circuit court accepted Peterson's guilty pleas and found him guilty of both counts.

¶5 On March 2, 2000, the circuit court followed the parties' joint recommendation and sentenced Peterson to life imprisonment with the possibility of parole after twenty-seven years on the homicide count.[2] Peterson filed a notice of intent to pursue postconviction relief.

¶6 On October 26, Peterson filed a postconviction motion to withdraw his guilty plea. He claimed that he did not knowingly and intelligently enter his plea because he did not know the maximum parole eligibility date or that the court could set a parole eligibility date greater than that recommended by counsel. Peterson's motion relied in large part on ***State v. Byrge***, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477, which was decided on July 13, 2000.

¶7 ***Byrge*** held that, in the narrow circumstance in which a circuit court has authority under WIS. STAT. § 973.014(2)[3] to fix a defendant's parole eligibility date, the court is obligated to provide the defendant with parole eligibility information before accepting a plea. *See* ***Byrge***, 2000 WI 101 at ¶68. If the court does not provide this information and the defendant alleges that the plea was not

[2] Peterson also received an additional five years in prison on the count of hiding a corpse, to be served concurrently with the homicide count.

[3] All statutory references are to the 1999-2000 version unless indicated otherwise.

knowing, voluntary and intelligent, the defendant has established a prima facie showing that the plea violates WIS. STAT. § 971.08(1)(a).[4] *See* ***Byrge***, 2000 WI 101 at ¶68. The burden then shifts to the State to prove by clear and convincing evidence that the defendant entered the plea knowingly, voluntarily and intelligently, according to the requirements outlined in § 971.08(1)(a). *See* ***Byrge***, 2000 WI 101 at ¶¶68-69.

¶8 At the postconviction hearing, the State argued that even if Peterson had made a prima facie showing that his plea was entered in violation of WIS. STAT. § 971.08(1)(a), there was clear and convincing evidence that Peterson's plea was, in fact, entered knowingly, voluntarily and intelligently.

¶9 The circuit court questioned the applicability of ***Byrge*** given that Peterson, unlike Byrge, pled after negotiating a plea agreement. *See* ***Byrge***, 2000 WI 101 at ¶11. The court also questioned whether ***Byrge*** should be given retroactive effect, citing the concurring opinion in ***Byrge*** that recognized that the majority opinion had chosen not to address whether the decision would be applied retroactively. *See* ***id.*** at ¶81 (Bradley, J., concurring). In any event, the court found that Peterson "knew what the potential punishment was" and concluded that the State had proved by clear and convincing evidence that Peterson entered his

[4] WISCONSIN STAT. § 971.08(1) provides 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.

pleas knowingly, voluntarily and intelligently. The court denied Peterson's motion to withdraw his plea and this appeal followed.

DISCUSSION

¶10 The State concedes that Peterson has made a prima facie showing that his plea was entered in violation of WIS. STAT. § 971.08(1) with respect to parole eligibility information, as required by ***Byrge***. The State does not contest the retroactive applicability of ***Byrge*** to Peterson and does not argue that ***Byrge*** is limited to cases not involving a negotiated plea. For purposes of this opinion, we will therefore assume that ***Byrge*** applies and that the circuit court was required to provide Peterson with parole eligibility information.

¶11 At issue, therefore, is the circuit court's finding that Peterson knew the potential punishment and its conclusion that Peterson's plea was entered knowingly, voluntarily and intelligently. We will not disturb a circuit court's findings of historical facts unless they are clearly erroneous. ***Byrge***, 2001 WI 101 at ¶55. However, whether a plea was entered knowingly, voluntarily and intelligently presents a question of constitutional fact subject to our independent review. *See* ***id.*** Under this standard, an appellate court may look to the entire record in the course of its review. ***Id.***

¶12 Peterson contests the circuit court's finding that he knew the potential punishment and its conclusion that the State failed to meet its burden of proving that his plea was entered knowingly, voluntarily and intelligently. Peterson also asserts that the circuit court erred by refusing to hold an evidentiary hearing on his motion. We conclude that the court was not required to hold an evidentiary hearing, that the court's finding is not clearly erroneous, and that the

State proved by clear and convincing evidence that Peterson entered his plea knowingly, voluntarily, and intelligently.

A. *Byrge* does not require an evidentiary hearing in all cases

¶13 We begin with Peterson's argument that the circuit court erred by refusing to hold an evidentiary hearing on his motion. Peterson sought an evidentiary hearing where he would be the only witness. Indeed, Peterson specifically argued against allowing his former attorneys to testify. It is unclear whether Peterson contends that an evidentiary hearing is always required, or that the lack of an evidentiary hearing made it impossible for the State to carry its burden in this case.[5] In any event, we recognize that an evidentiary hearing is not required in all cases and conclude that the State was able to carry its burden without a hearing.

¶14 First, ***Byrge*** explicitly indicated that in meeting its burden, the State "may rely on any evidence, including testimony from defense counsel, to prove that a defendant possessed the requisite information to make the plea knowing, voluntary, and intelligent." *See* ***id.*** at ¶70. Moreover, ***Byrge*** did not establish a new procedure for evaluating a defendant's motion to withdraw his plea for alleged violations of WIS. STAT. § 971.08(1). Instead, ***Byrge*** applied an established procedure to the narrow category of cases where the court has the authority to fix a defendant's parole eligibility date. *See* ***id.*** at ¶¶69-70 (citing ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986)).

[5] Peterson frames the threshold issue as follows: "Where a defendant was not provided with required parole eligibility information, and the record is bare of any evidence demonstrating that the defendant's plea was entered knowingly, voluntarily and intelligently, is the State required to have an evidentiary hearing to supplement the record in order to carry its burden?"

¶15 Pursuant to established procedures for evaluating alleged violations of WIS. STAT. § 971.08(1), a defendant is not automatically entitled to an evidentiary hearing. An evidentiary hearing is not required if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Damaske***, 212 Wis. 2d 169, 190, 567 N.W.2d 905 (Ct. App. 1997).

¶16 Although the circuit court did not explicitly state on which ground it was denying Peterson's motion for an evidentiary hearing, the parties at the circuit court and on appeal address the issue as if the hearing was denied because the record conclusively demonstrates that Peterson is not entitled to relief. In effect, Peterson's argument is that the State failed to meet its burden of proof and he should therefore be able to withdraw his plea. Alternatively, Peterson argues that if this court declines to allow outright withdrawal of his plea, he should at least receive an evidentiary hearing, presumably so the circuit court can hear additional evidence and reconsider whether the State met its burden.

¶17 What is problematic about the evidentiary hearing issue is that Peterson has not alleged that there are any relevant facts that were not before the trial court at the time of the hearing. Peterson wanted to be the only witness at an evidentiary hearing, and he strenuously argued against testimony from any other witnesses, especially his former attorneys. Yet Peterson's assertions were already before the court in the form of a written affidavit. Aside from repeating what is already in the affidavit, Peterson has not explained what other information he would have introduced at an evidentiary hearing. Indeed, Peterson seemed to suggest at the circuit court hearing that he was content with a decision based on

the record because he was confident that the State could not meet its burden. His counsel argued:

> I believe that the State's argument that the record shows by clear and convincing evidence that he did not know about this factor on December 10th falls short. I believe that an evidentiary hearing, if the State so desires, it is warranted. Otherwise, if there is not going to be an evidentiary hearing, the State's not asking for one, I believe the Court should allow Mr. Peterson to withdraw his plea to Count 1 of the judgment of conviction.

¶18 This argument suggests that Peterson was satisfied to proceed without an evidentiary hearing because he believed that, based on the record, the State would fail to meet its burden of proof. Consistent with this approach, Peterson does not, on appeal, provide us with reasons why he should have been granted an evidentiary hearing. Accordingly, we decline to address further whether the circuit court should have granted Peterson an evidentiary hearing. We will instead address the determinative issue: whether the State has met its burden of proving that Peterson's plea was entered knowingly, voluntarily and intelligently.

B. The State has met its burden of proof

¶19 Peterson asserts that his plea was not entered knowingly, voluntarily and intelligently because he "did not know that the judge could deny [him] parole, or set [his] parole date beyond the 27 years agreed to in the plea agreement." However, written and oral statements made by and on behalf of Peterson refute

this allegation and support the circuit court's finding that Peterson knew the potential punishment.[6]

¶20 On November 12, 1999, Peterson pled guilty pursuant to the plea agreement that was ultimately vacated. Defense counsel and the district attorney both explicitly noted that Peterson had considered the potential penalties at length before arriving at the decision to plead guilty to conspiracy to commit first-degree intentional homicide. Defense counsel indicated that he had been given sufficient time to discuss the charges with Peterson and continued: "We discussed these, the potential penalties, the charges at great length. Patrick [Peterson] has asked questions regarding them that we've been able to answer. And I believe he understands the procedure that we're doing today."

¶21 In response, the district attorney added: "[I]t's my understanding also from my discussions with [defense counsel] that explicit details of potential prison sentences of the nature of parole eligibility consideration and mandatory release dates, all of those types of calculations under the current law have been discussed as well." Defense counsel responded: "That's correct."

¶22 On December 10, 1999, the defendant again entered a plea of guilty pursuant to a plea agreement. The written plea questionnaire, part of the record, indicates that Peterson agreed to plead guilty to both first-degree intentional homicide and hiding a corpse. On the questionnaire, the maximum penalty on the

[6] Because we conclude that the State met its burden of proof, we do not address the State's argument that in light of the fact that the circuit court followed the plea agreement, Peterson "suffered absolutely no harm from the failure of the [circuit] court to advise him at the plea hearing that the court could have set a higher parole eligibility date [than that agreed on] or denied parole altogether."

homicide is listed as "life," and the plea agreement on the homicide charge is listed as "stip[ulation] to 27 years."

¶23 At the plea hearing, the State stated that the plea agreement was, "a joint recommendation for sentencing of life imprisonment–on Count 1, with parole eligibility after 27 years." Defense counsel agreed that was the recommendation. The circuit court conducted a plea colloquy with Peterson. The court asked Peterson if he had been threatened to plead guilty. The following exchange took place:

> [Peterson]: I was highly pressured but not threatened, no.
>
> [Court]: Okay. Pressured by who?
>
> [Peterson]: From my understanding, my attorneys and the district attorney.
>
> [Court]: Okay. The pressure being anything else other than the possibility that you could get a longer sentence if you went to trial, was convicted?
>
> [Peterson:] Yes. Every week I waited, the parole eligibility date was going to go up.

The court agreed to take a recess so that Peterson could discuss the matter with his attorneys again. Shortly thereafter, Peterson returned and indicated that he wanted to proceed with his guilty pleas.

¶24 The preceding evidence illustrates that Peterson was informed about the explicit details of potential prison sentences, the nature of parole eligibility and mandatory release dates. Peterson's own correspondence to the circuit court in the days just prior to and after sentencing rebuts any belated assertion that Peterson did not understand these issues at the time of his plea.

¶25 In a handwritten letter dated February 27, 2000, Peterson wrote:

> I just don't think I deserve a life sentence. Please, I need something to look forward to your Honor. In all reality life w/ the possibility of parole in twenty-seven years is not to [sic] encouraging, and when would the parole board even let me out? People now a days are doing their M.R. but I don't even got one.

On March 2, four days after sentencing, Peterson again wrote a letter to the court, in which he stated, "I respect your decision I know you could've highered [sic] or lowered my parole eligibility date."

¶26 Finally, as the State pointed out at the postconviction motion hearing, Peterson did not in the weeks before the sentencing hearing or at the hearing itself ever indicate that he was surprised by references to the circuit court's ability to set the parole eligibility date, or ability to deny the possibility of parole. This contradicts Peterson's allegation that he was unaware of the court's power to set his parole eligibility date or to deny him parole.

¶27 At the sentencing hearing, numerous members of the victim's family who addressed the court mentioned the court's power to set a parole eligibility date, or to deny the possibility of parole. Their comments included: "I am not in agreement with the 27-year parole date. I think Pat deserves to spend the rest of his life in prison," and "I don't know about no possibility of parole. I think he should have a parole, because it's too early to tell what could happen in the next 27 years."

¶28 Additionally, the State restated the plea agreement as a recommendation for a life sentence "with the Court setting parole eligibility in 27 years." The defense stipulated that that was the plea agreement. The circuit court

followed the agreement and specifically mentioned twice that he would set the parole eligibility date at no sooner than twenty-seven years.

¶29 Peterson did not before, at, or for eight months after the sentencing hearing ever suggest that he was surprised that the circuit court was considering parole dates or by one family member's suggestion that he should be denied any possibility of parole. This lack of objection, the plea colloquies and the written plea questionnaire support the circuit court's finding that Peterson knew the potential penalties. We conclude that the court's finding is not clearly erroneous.

¶30 The court's finding and our independent review of the record lead us to conclude that the State has established clear and convincing evidence that Peterson's plea was entered knowingly, voluntarily and intelligently. We therefore affirm both the circuit court order denying Peterson's motion to withdraw his plea and the judgment in its entirety.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.