COURT OF APPEALS
DECISION
DATED AND RELEASED

June 1, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-1092
95-1093

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN N. MCCOY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed*.

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. John N. McCoy appeals from an order denying his motion for postconviction relief. The issue is whether his plea was entered knowingly, voluntarily and intelligently. We conclude it was. We affirm.

In October 1991, McCoy pleaded no contest to, and was convicted of, second-degree recklessly endangering safety, criminal trespass to a dwelling and resisting an officer.[1] Sentence was withheld and he was placed on probation. Following revocation of his probation, McCoy was sentenced to prison in February 1993. He then filed a postconviction motion seeking to withdraw his pleas on the grounds that the trial court had inaccurately described the elements of the charges and had failed to determine whether he understood the charges in relation to the facts of his case. Although the motion was initially treated as one under RULE 809.30, STATS., it must be construed as one under § 974.06, STATS.[2] The trial court denied the motion. McCoy appeals.

If a defendant seeking to withdraw his plea makes a prima facie showing that the trial court's plea colloquy did not comply with § 971.08(1), STATS., or ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), the burden shifts to the State to show by clear and convincing evidence at a postconviction hearing that his plea was entered knowingly, voluntarily and intelligently. ***Id.*** at 274-75, 389 N.W.2d at 26-27. McCoy argues that the plea colloquy failed to comply with § 971.08(1) and ***Bangert*** because the trial court misstated the elements of the three charges.

The State disputes this argument on only one of the counts, the resisting an officer charge, and appears to concede that the trial court misstated the elements of the endangering safety and criminal trespass charges. The trial court is required to ascertain that the defendant possesses accurate information about the nature of the charge. ***Bangert***, 131 Wis.2d at 267-69, 389 N.W.2d at 23-24. We conclude that the trial court failed to do so in this case. The trial court misinformed the defendant about the nature of at least two of the charges. The burden shifts to the State to show by clear and convincing evidence that McCoy's plea was entered knowingly, voluntarily and intelligently.

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[1] McCoy also pleaded no contest to other charges which are not at issue in this appeal.

[2] When McCoy filed the motion, the time to appeal from the original judgment of conviction had expired. Therefore, the motion was not made under RULE 809.30, STATS., and must be construed as one under § 974.06, STATS. *See* ***State v. Drake***, 184 Wis.2d 396, 399, 515 N.W.2d 923, 925 (Ct. App. 1994).

At the postconviction hearing, McCoy testified that he was not aware of certain elements of the charges when he pled guilty, and that he did not think the State could have proven those elements. He testified that his trial counsel had not explained the elements to him. McCoy's trial counsel testified that he did explain the elements to McCoy. Although the plea questionnaire is not of record, the trial court noted at the postconviction hearing that it did not list the elements of the charges. Based on its evaluation of the credibility of the witnesses, the trial court found that the State had shown by clear and convincing evidence that McCoy understood the elements of the charges at the time of his plea.

McCoy does not attack the trial court's decision to accept the testimony of trial counsel over his own. Instead, he argues that the ultimate finding that he understood is erroneous because the State has not shown that the trial court's misstatement of the elements did not confuse him. He argues that even if his attorney informed him of the elements before the plea, the trial court's misstatements create doubt about what McCoy believed at the time he actually went through with the pleas. However, the trial court could reasonably infer that McCoy's understanding was not affected by the misstatement of the elements. Furthermore, McCoy's argument is inconsistent with his testimony. He did not testify that he was confused because the trial court's recitation of the elements was different from his lawyer's. Rather, he testified that he was never told the elements by either his lawyer or the trial court.

Therefore, we conclude that the trial court properly denied McCoy's postconviction motion.

By the Court.—Order affirmed.

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