COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1996

NOTICE

No. 95-3595

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LOUIS ELIZONDO, JR.,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Judgment affirmed; order reversed and cause remanded*.

EICH, C.J.[1] Louis Elizondo appeals from a judgment convicting him of two counts of misdemeanor welfare fraud, imposing and staying consecutive three-month county jail sentences, and placing him on probation for two years on the condition that he pay restitution in the sum of $4,332.11 and a $100 fine on each count. The judgment was entered on Elizondo's plea of guilty

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

to the charges. He also appeals from an order denying his motion for postconviction relief.

Elizondo argues on appeal that his convictions should be reversed because the trial court erred in: (1) accepting his waiver of counsel as voluntarily and understandingly made; and (2) denying his postconviction plea-withdrawal motion without a hearing. We hold that the trial court did not err in accepting Elizondo's waiver of counsel. However, we believe his motion to withdraw his plea alleges sufficient facts to warrant a hearing under ***State v. Washington***, 176 Wis.2d 205, 500 N.W.2d 331 (Ct. App. 1993). We therefore reverse and remand for purposes of holding a hearing on the merits of Elizondo's motion to withdraw his pleas.

The facts are not in dispute. Elizondo was initially charged with felony welfare fraud--in particular, that in applying for public welfare he failed to disclose his ownership of a parcel of lakefront property in Adams County. At his first appearance on the charges, the court advised Elizondo of his right to be represented by an attorney and that if he could not afford an attorney, one would be appointed for him. The court explained the charges and possible penalties to him and asked whether he wished to be represented by an attorney. He responded: "At this point, no, sir," explaining that he needed more information to decide whether he needed an attorney. The court went on to tell him that he was charged with a serious crime and that an attorney would be able to explain his many options to him. At that point, the prosecutor stated that if Elizondo wished to discuss the charges with him, he would do so--but he felt he could meet with Elizondo only if he was willing to waive counsel.

When Elizondo stated to the court that he would like to talk to the prosecutor, the court questioned him briefly. In response to a question about his education and employment history, Elizondo stated that he had completed two years of college and worked as a construction inspector for the Wisconsin Department of Transportation until he became disabled as the result of an injury. The court then asked Elizondo whether he wished to waive his right to an attorney, and he replied that he did, whereupon the court found that he was competent to waive counsel and was freely and voluntarily doing so.

After a recess to allow the two of them to meet, Elizondo and the prosecutor returned to court and the prosecutor stated that they had reached a plea agreement to the effect that, in exchange for his plea of guilty, the State would reduce the felony charges to misdemeanors and would recommend that he be placed on probation for two years and make restitution of $4,332.11. The prosecutor represented to the court that Elizondo had asked whether he could be released from probation early if he completed the restitution in less than two years, and that he advised him that that would be up to his probation officer and the court. The prosecutor then read the amended misdemeanor complaints for the two charges and, in response to the court's question, Elizondo indicated that he wished to proceed without counsel.

The court then went over the amended charges with Elizondo, pointing out the maximum penalties he was facing, that the court was not bound by the plea agreement, and that, by pleading to the charges, Elizondo was giving up a variety of constitutional rights--including the right to remain silent, the right to call witnesses in his defense and to cross-examine prosecution witnesses, the right to a trial by jury, and the right to be convicted only upon a unanimous jury verdict of guilt beyond a reasonable doubt on each element of the offenses--which the court summarized for Elizondo. At each point in the colloquy, Elizondo indicated that he understood the court's admonitions. His answers were polite and responsive to the court's questions.

The court, finding that Elizondo understood the proceedings, the nature of the charges and possible penalties, the constitutional rights he was giving up by pleading, and that his pleas were freely, voluntarily and intelligently made, adjudged him guilty.[2] When Elizondo did not respond when the court asked whether he wished to say anything prior to sentencing, the court asked him: "Why did you do this?" He responded: "To tell you the truth, sir, when it was done it was done. I don't know this was happening, sir. I didn't know. I didn't know, sir." The prosecutor then pointed out to the court that Elizondo and his wife knew quite well what they were doing, and realized that they "would have to pay back the money if [they were] caught." The court then imposed the agreed-upon sentence.

[2] Under questioning by the court, Elizondo agreed that the facts stated in the complaint provided a factual basis for the pleas.

As indicated, Elizondo challenges the trial court's ruling that he voluntarily and understandingly waived his right to counsel at his initial appearance and its denial of his postconviction plea-withdrawal motion without a hearing.

I. Waiver of Counsel

Elizondo, appearing on this appeal through counsel, argues first that the record does not show a valid waiver of counsel because the court "did not go through the full colloquy required by the cases, and certainly made no attempt to give [him] an awareness of the difficulties and disadvantages of self-representation."

In ***Pickens v. State***, 96 Wis.2d 549, 563-64, 292 N.W.2d 601, 609 (1980), the supreme court held that

in order for an accused's waiver of his right to counsel to be valid,

> the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver will not be found.

The ***Pickens*** court went on to note that even if the specific colloquy falls short of this standard, an appellate court may look to the record as a whole to determine whether the waiver is valid: "If the defendant's understanding of the necessary facts appears in the record other than in response to specific questions put to him by the trial court, a knowing waiver can be found." ***Id***. at 564, 292 N.W.2d at 609 (citations omitted). In holding that the waiver in that case was sufficient, the ***Pickens*** court noted that, as here, the contents of the complaint were made known to the defendant; he was informed of the maximum penalties under the charges; he was aware that they were "serious" charges, and "[h]e ... stated on at

least two occasions that he understood the nature of the charges against him." ***Id***. The ***Pickens*** court also noted the defendant's awareness of the difficulties inherent in self-representation at trial by a person untrained in the law and rules of evidence. ***Id***. at 565, 292 N.W.2d at 609. These latter considerations, of course, are not present in the situation before us.

In this case, the trial court was aware that Elizondo had attended college and held a responsible position in state government. The court elicited Elizondo's understanding of the charges against him and their possible penalties and pointed out to him that an attorney could explain the proceedings and the possibilities to him if he had questions. It is true that Elizondo gave what could be considered an equivocal response when first asked whether, given all that, he wanted to talk to an attorney. He said: "I think I need, I should need an attorney sir, but--" at which time the prosecutor indicated he would be able to discuss the case with him, as we have noted above. When presented with this option, Elizondo said: "I'd like to do that, sir," and that he wished to waive his right to counsel in order to do so.

As we also have noted, the trial court went into considerable detail about the consequences of Elizondo's plea when he and the prosecutor returned to court a short time later to announce that they had reached an agreement with respect to a plea to the reduced charges. Finally, the State points out that, in addition to Elizondo's education and job experience, he was not inexperienced in the workings of the court system. He had served jail time for a traffic violation and was at the time of these proceedings under a warrant for contempt in a non-support action and was out on bail.

Considering the totality of the circumstances reflected in the record, we are satisfied that the court did not err in accepting Elizondo's waiver of his right to counsel.

II. Plea Withdrawal

Elizondo also argues that the trial court "improperly denied his postconviction motion [to withdraw his plea] without allowing him an opportunity to prove his allegations at an evidentiary hearing."

We do not deal here with the merits of Elizondo's claim that he is entitled to withdraw his plea--an entitlement that can come only upon proof, by clear and convincing evidence, that the plea must be permitted to be withdrawn to correct a "`manifest injustice,'" ***State v. Washington***, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993) (citation omitted); rather, we are concerned only with his claim that, based on the allegations in his postconviction motion, the trial court should have granted him a hearing on the motion.

The supreme court held in ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972), that "if a motion to withdraw a guilty plea ... alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing." If, on the other hand, "the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Id***.

Elizondo's motion in this case alleged that, as a result of an earlier back injury, he was on medication for chronic back pain and depression--medication of which he had been deprived in the days prior to the plea hearing as a result of his incarceration. He stated that, during the hearing, he was using an electronic TENS device for pain relief, and because of his physical condition and lack of medication, he was confused and wanted to conclude the proceedings as quickly as possible and was unable to fully understand the charges.

As we noted in ***Washington***, allegations which are conclusory and "unsupported by any factual assertions" are insufficient to require a hearing. ***Washington***, 176 Wis.2d at 214, 500 N.W.2d at 335. But we disagree with the State's argument that Elizondo's allegations are of such a nature. Some, indeed, are conclusory, such as those indicating that his condition "prevented him from fully understanding the factual basis of the charges ...." But he alleges in detail a set of facts concerning his physical condition, the various medications he was taking for that condition, and the fact that he had been deprived of that medication for several days leading up to the hearing. Those facts seem to us to be the type of "factual assertions" ***Washington*** requires.[3]

[3] The defendant's plea-withdrawal motion in ***Washington*** contained only an assertion

We conclude, therefore, that Elizondo's motion to withdraw his plea contains allegations sufficient to entitle him to a hearing on the motion under ***Washington***. We therefore reverse on this issue to permit a hearing on the merits of the motion.

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

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

(..continued)
that he had suffered a "manifest injustice" because his attorney had failed to keep him fully apprised of events and had failed to "fully investigate any and all matters," ***State v. Washington***, 176 Wis.2d 205, 215-16, 500 N.W.2d 331, 336 (Ct. App. 1993); and we said that those conclusory statements were "simply not the type of allegations that raise a question of fact." As we indicate here, we think Elizondo's fact-specific allegations are adequate under this test.