COURT OF APPEALS
DECISION
DATED AND RELEASED

November 12, 1996

NOTICE

No. 96-0003-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILLIP C. LAMSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Phillip C. Lamson appeals from a judgment of conviction for first-degree reckless homicide, arising from his participation in the shooting death of a fourteen-year-old boy, and from an order denying his motion for postconviction relief. Lamson argues that we should vacate the judgment of conviction because he never entered a plea. Further, Lamson argues that, if we conclude that he did enter a plea, we should allow him to

withdraw it and reverse the trial court's denial of his postconviction motion because he did not understand the crime to which he was pleading guilty. Because the trial court correctly concluded that Lamson knowingly, voluntarily, and intelligently entered his guilty plea, we reject his arguments and affirm.

I. BACKGROUND.

On June 11, 1992, fourteen-year-old Julius Patterson was shot to death on a Milwaukee street. Lamson was one of six people the State identified as participating in the shooting. The trial court charged Lamson with first-degree intentional homicide while armed with a dangerous weapon, as a party to a crime. After originally pleading not guilty, Lamson pleaded guilty to a reduced charge of first-degree reckless homicide, party to a crime, pursuant to a plea agreement with the State. After the following colloquy with Lamson, the trial court accepted his guilty plea:

> THE COURT: You're going to plead guilty to the crime of first degree reckless homicide, party to the crime?
>
> DEFENDANT: Yes, I am.
>
> THE COURT: If you're convicted of that offense and you will be convicted because you are pleading guilty, the Court may impose a term of imprisonment up to 20 years, do you understand that?
>
> DEFENDANT: Yes, I do.
>
> ....
>
> THE COURT: Did you and [Lamson's trial counsel] go through this guilty plea questionnaire and waiver of rights form together?
>
> DEFENDANT: Yes.
>
> THE COURT: Did he explain to you, as he said earlier, what the elements of this offense are and what the District

Attorney would have to prove in order to convict you if this case went to trial?

DEFENDANT: Yes, he did.

....

THE COURT: Did he explain to you what your rights are, including your constitutional rights?

DEFENDANT: Yes.

THE COURT: And did he also explain what rights you're giving up by pleading guilty?

DEFENDANT: Yes.

....

THE COURT: Are you entering this guilty plea completely freely and voluntarily?

DEFENDANT: Yes.

The trial court relied on the State's recitation of evidence, affirmed by Lamson, as the basis to accept the plea. The trial court then sentenced Lamson to an indeterminate prison term not to exceed twenty years. Lamson then filed a postconviction motion to withdraw his guilty plea because he claimed, among other things, he did not correctly understand that he was pleading guilty. After conducting an evidentiary hearing, the trial court denied the motion. This appeal follows.

II. ANALYSIS.

Lamson claims that we should vacate his judgment of conviction because he never entered a plea. He also claims that if we decide that he did enter a plea, we should allow him to withdraw it and reverse the trial court's

denial of his postconviction motion to withdraw the plea. We address each item *seriatim*.

A. The entrance of a plea.

Lamson argues that § 972.13(1), STATS., requires that a defendant actually articulate the words, "I plead guilty." Hence, he argues that "[t]he intentions of the parties are therefore irrelevant to the question of whether this simple, clear mandate was satisfied." We disagree.

A judgment of conviction is governed by § 971.13, STATS., which states in part:

> (1) A judgment of conviction shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, *or a plea of guilty* or no contest.

(Emphasis added.)

> Similar to a confession, the constitutional validity of a plea must be measured in terms of whether it was entered knowingly, voluntarily, and intelligently. ... This includes a showing or an allegation and evidence which shows that the effective waiver of federal constitutional rights was knowing and intelligent. A plea will not be voluntary unless the defendant has a full understanding of the charges against him.

State v. Bangert, 131 Wis.2d 246, 257, 389 N.W.2d 12, 19 (1986).

Our supreme court has decided that a court may consider the totality of the circumstances when determining the voluntariness of the plea. ***Id***. at 258, 389 N.W.2d at 19.

After considering the totality of the record, we conclude Lamson did in fact plead guilty to a charge of first-degree reckless homicide. First, Lamson's counsel stated on the record that because one of the defendants was going to testify for the State, "[a]fter discussing the matter with my client, my client felt that, under all the circumstances ... that it would have been in this best interest to change his plea." Second, the record shows the trial court thoroughly questioned Lamson about his understanding of the plea during the colloquy. This colloquy clearly reflects a concerted effort on the part of the trial court to decide whether Lamson was entering his plea knowingly, intelligently, and voluntarily.

Third, Lamson signed a plea questionnaire that stated that he "wish[ed] to enter a plea of guilty to the offense[] of" first degree reckless homicide. Last, the State recounted facts to support Lamson's conviction and he again acknowledged he was part of the conspiracy that resulted in murder.

Lamson's only argument is that he did not utter the words "I plead guilty." The totality of the record clearly shows, however, that Lamson did knowingly, intelligently, and voluntarily enter a plea of guilty. While § 971.08, STATS., requires a colloquy, its absence is not fatal if the defendant uses an alternative method to effectively waive his constitutional rights. In a case that challenged the use of a guilty plea questionnaire in lieu of a personal colloquy between the judge and the defendant, we said: "[T]he trial court personally questioned the defendant concerning the form. It asked the defendant if he had signed the form, if his attorney had assisted him in understanding the rights being waived and if he understood each of the paragraphs he had initialed. The defendant replied affirmatively to each question. We hold that there was no error." ***State v. Moederndorfer***, 141 Wis.2d 823, 826, 416 N.W.2d 627, 629 (Ct. App. 1987). Similarly, the trial court here questioned Lamson about the offense, the penalty, the elements of the offense, and whether his counsel explained his constitutional rights when going through the guilty plea form. Lamson answered affirmatively.

The trial court could have eliminated this issue by requiring a defendant to say, "I plead guilty," but the totality of the circumstances test in ***Bangert*** adequately resolves the issue here. While Lamson did not use the "magic" words, "I plead guilty," the trial court asked him several times whether he was going to plead guilty and whether he was entering the guilty plea "completely freely and voluntarily." To all these questions Lamson answered affirmatively. Therefore, we agree with the trial court that, given the totality of the circumstances, Lamson did plead guilty as a matter of law.

B. Denial of motion for plea withdrawal.

In the alternative, Lamson argues that we should allow him to withdraw his plea because he "did not understand and/or was misinformed with regard to the concept of party to a crime liability and its elements" when he entered the plea. We reject this argument.

A post-sentencing motion for plea withdrawal is left to the discretion of the trial court and will not be upset on review unless there has been an erroneous exercise of discretion. ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). If a defendant shows a denial of a constitutional right relevant to the plea decision, plea withdrawal becomes a matter of right that, in turn, is a question of law subject to independent review. *See* ***id***. at 864-65, 532 N.W.2d at 118.

Lamson claims his counsel misled him to believe that he would be liable as a conspirator solely because Lamson had been present at the victim's house earlier on the day of the shooting and because Lamson knew the other people the State identified as responsible for the shooting.

Under the Fourteenth Amendment guarantee of due process, a state trial court may accept a plea of guilty only when it has been made knowingly, voluntarily, and intelligently. ***Brady v. United States***, 397 U.S. 742, 747 (1970). The plea colloquy has arisen to insure when the defendant enters the plea he is aware of the nature of the crime charged, the constitutional rights he is waiving, and the direct consequences of the plea. ***Bangert***, 131 Wis.2d at 257, 389 N.W.2d at 19. Further, our supreme court has established a two-step

procedure to evaluate a defendant's postconviction challenge to the constitutional validity of a plea of guilty or no contest:

> The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of Section 971.08(1)(a)[1] ... and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance. The state may then utilize any evidence which substantiates that the plea was knowingly and voluntarily made. In essence, the state will be required to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him.

Bangert, 131 Wis.2d at 274-75, 389 N.W.2d at 26 (citations omitted).

The record of both the plea hearing and the postconviction motion hearing provides a clear and convincing basis to show that Lamson's plea was knowingly, voluntarily, and intelligently entered when he pled guilty to first-degree reckless homicide, party to a crime. First, the prosecutor delineated the

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[1] Section 971.08, STATS., provides in relevant part:

> **Pleas of Guilty and No contest; Withdrawal Thereof; (1)** Before the court accepts a plea of guilty of no contest, it shall do all of the following: (a) Address the defendant personally and determine that the plea is made voluntarily with the understanding of the nature of the charge and the potential punishment if convicted.

State's theories of prosecution at the plea hearing which, if the case went to trial, included testimony from a co-defendant, Timothy Payne, that would have implicated Lamson. Payne was to testify that Lamson went to the location, observed the victim, and was a member of the group that fired shots at the victim. Further, Lamson told the trial court that he "was aware [the shooting] was going to happen, but that really, ... wasn't expecting for it to happen like [it did.]" The trial court then directly asked Lamson if his counsel had explained the theory of conspiracy and whether Lamson believed he was part of the conspiracy that resulted in the death of the victim. To both questions Lamson answered positively.

Second, Lamson submitted a plea questionnaire that both he and his counsel signed. In this document Lamson acknowledged, "I also understand the elements of the offense and their relationship to the facts in this case." Lamson's counsel also stated, "I met with [Lamson] yesterday, went over the [notes of the police interview with Timothy Payne and] ... [e]xplained to [Lamson] the [theory of conspiracy]." The previously quoted plea colloquy also emphasized this under-standing.

Finally, further evidence that Lamson understood his plea was provided at the postconviction hearing on his motion to withdraw his plea. Lamson's counsel stated, "I literally go over everything in terms of me reading it to them, including the jury instruction, giving them examples." Indeed, Lamson bolstered his counsel's testimony by acknowledging that his counsel had read the jury instructions to him. In part, Lamson stated his counsel "underlined the elements to me and told me that, look, here's the elements, and all this and that, and how he put the elements together ... it indicated that ... I had no chance."

The transcript of the postconviction hearing, in conjunction with the plea hearing testimony, is clear and convincing evidence that Lamson entered his plea of guilty knowingly, voluntarily and intelligently. The trial court properly denied his motion to withdraw his guilty plea.

By the Court.—Judgment and order affirmed.

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