COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 1997

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.

No. 96-1485-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID KARICH,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Rock County: JAMES P. DALEY, Judge. *Judgment affirmed; judgment modified and, as modified, affirmed and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. David Karich appeals from two judgments of conviction. The issues relate to Karich's efforts to withdraw his plea. We affirm.

As part of a plea bargain Karich pleaded no contest to three felony counts (two counts of delivery of cocaine and one count of bail jumping) and one misdemeanor (possession of cocaine).[1] After pleading, but before sentencing, Karich moved to withdraw his plea. No written motion is of record, but the record does contain a letter brief in support of an oral motion. The grounds for the motion, as expressed in the letter, were that Karich had misunderstood the nature of the plea bargain because he believed the felony charges were being reduced to misdemeanors. Furthermore, the letter asserted that the plea colloquy did not comply with the requirements of § 971.08, STATS., and ***State v. Bangert,*** 131 Wis.2d 246, 389 N.W.2d 12 (1986), because the trial court did not adequately ascertain Karich's understanding of the nature of the charges. The circuit court denied the motion because it did not believe Karich's explanation about a misunderstanding of the plea bargain, and because it concluded the plea colloquy was adequate. Karich appeals.

Karich first argues that the motion to withdraw his plea before sentencing was supported by a "fair and just reason." This is the proper standard to be applied to such a motion. *See* ***State v. Canedy***, 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). However, when the circuit court does not believe the asserted reason for withdrawing the plea, there is no fair and just reason to grant the motion. *See* ***id.*** at 585-86, 469 N.W.2d at 171-72. This question is essentially one of fact, and we will not take on the role of the trier of fact. *See* ***id.*** at 586, 469 N.W.2d at 172.

[1] We note that the judgment of conviction in case number 94-CF-1657 appears to be erroneous. It states that count one in that case was a felony conviction for "possession of cocaine" contrary to § 161.41(1m)(cm), STATS. However, that statute number is for possession with intent to deliver. The record appears clear, and the parties do not dispute, that Karich actually pleaded to one count of simple possession, § 161.41(3m), a misdemeanor.

Karich points to evidence that would support a finding that he misunderstood the plea bargain. However, in reviewing a finding of fact we search for evidence that supports the finding actually made. ***In re Estate of Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). The court's finding here was based primarily on its reading and recollection of the plea colloquy, which we conclude were reasonable ones. The finding is not clearly erroneous.

Karich argues that another fair and just reason to withdraw his plea was that he discovered, after pleading, that certain tape recordings might not be admissible under Wisconsin law. However, the record contains no evidence to support the argument. Karich did not testify that he wanted to withdraw his plea for that reason. The issue was not argued to the circuit court in either the letter brief or oral argument on the motion, and the court made no decision on the issue. We consider it to be raised for the first time on appeal and do not address it further. ***State v. Monje***, 109 Wis.2d 138, 153-153a, 327 N.W.2d 641, 641 (1982) (on reconsideration) (issues other than sufficiency of the evidence or issues previously raised must be raised by postconviction motion to be appealed as of right); *see* § 974.02(2), STATS.

Karich also argues that he should be allowed to withdraw his plea because the plea colloquy did not comply with ***Bangert***, in which the supreme court established certain standards that a plea colloquy must meet. Before accepting a guilty or no contest plea, the court must address the defendant personally and determine that the plea is made voluntarily, with an understanding of the nature of the charge and the potential punishment. Section 971.08(1)(a), STATS.; ***Bangert***, 131 Wis.2d at 266-70, 389 N.W.2d at 22-25. Whenever the § 971.08 procedure is not undertaken, and the defendant alleges that he did not know or understand the information that should have been provided at the plea hearing, the burden shifts to

the State to show by clear and convincing evidence that the plea was entered knowingly, voluntarily and intelligently. ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26.

We reject Karich's argument. The colloquy included a review of the elements of the crime through the trial court's questions to the defendant relevant to his understanding of the plea agreement form. And, as we previously noted, the trial court did not believe Karich's claim that he did not understand the nature of the charges to which he was pleading. The trial court found that Karich did, in fact, understand the nature of the charges.

Karich also relies on ***State v. Hansen,*** 168 Wis.2d 749, 485 N.W.2d 74 (Ct. App. 1992), to argue that the plea colloquy was inadequate as to his understanding of the constitutional rights he was waiving by pleading. This issue was not presented to the circuit court in either the letter brief or oral argument on the motion. As we stated above, a defendant must not only show that the plea colloquy was inadequate; he must also allege that he did not know or understand the information that should have been provided at the plea hearing. Karich did not make such an allegation in circuit court, and therefore did not make a sufficient showing to shift the burden to the State.

We therefore affirm the convictions for delivery of cocaine and bail jumping and affirm the conviction for possession of cocaine as modified. On remand the circuit court shall amend the judgment to correct the error noted in footnote one above.

By the Court.—Judgment affirmed; judgment modified and, as modified, affirmed, and cause remanded with directions.

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