COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 3, 1996

Nos. 96-0600-CR & 96-1509-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD J. VAN CAMP,

Defendant-Appellant.

APPEAL from an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Gerald J. Van Camp appeals an order denying his motion for postconviction relief following a conviction and sentence to a charge of false imprisonment for which sentence was withheld and a term of probation imposed. Van Camp seeks to withdraw his plea of no contest on grounds that it was not entered knowingly and voluntarily and also asserts a claim of ineffective counsel. We conclude that the trial court acted within its discretionary authority in denying the motion to withdraw the plea, and that Van Camp waived his right to pursue the alleged ineffective counsel claim by entry of his plea. We therefore affirm the order.

Postconviction motions to withdraw a plea are addressed to the discretion of the trial court and are permitted "only when necessary to correct a manifest injustice." ***State v. Clement***, 153 Wis.2d 287, 292, 450 N.W.2d 789, 790 (Ct. App. 1989). This standard applies equally to no contest pleas. ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). A manifest injustice is established when a plea is involuntary or entered without knowledge of the charge or the potential penalties. ***State v. Rock***, 92 Wis.2d 554, 558-59, 285 N.W.2d 739, 741-42 (1979). The defendant has the burden of proving grounds for withdrawal by clear and convincing evidence. ***Id.*** at 559, 285 N.W.2d at 742.

A guilty plea must be made knowingly, voluntarily and intelligently. ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 19 (1986).

> 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 sec. 971.08, STATS., or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of sec. 971.08(1)(a) or other mandatory duties, 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 also utilize the entire record to demonstrate by clear and convincing evidence that the defendant knew and understood the constitutional rights which he would be waiving.

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

Whether a plea was entered correctly is a question of constitutional fact and is examined independently on appeal, while the circuit court's findings of historical facts are viewed under the clearly erroneous

standard. *See* ***State v. Kywanda F.***, 200 Wis.2d 26, 42, 546 N.W.2d 440, 448 (1996).

The State concedes that the plea colloquy is inadequate because Van Camp was not informed of the constitutional rights he was waiving by entry of the plea, the maximum penalty for the false imprisonment charge or the effect of having a kidnapping charge that was dismissed "read in" for purposes of sentencing.

We conclude, however, that an examination of the entire record demonstrates a knowing, voluntary and intelligent plea because that record supports the trial court's finding of historical facts.

Van Camp does not directly state what constitutional rights he was, in fact, unaware of at the time of his plea. In any case, his trial attorney testified at the postconviction hearing that he was certain that he had fully reviewed Van Camp's constitutional rights with him at some point prior to trial. Whether a defendant was advised of his rights is a matter of historical fact. ***Harrell***. The trial court in this case heard the testimony and implicitly but unmistakably accepted trial counsel's testimony because the court concluded that Van Camp's plea was knowing and voluntary.

The statutory penalty for false imprisonment was set forth both in the amended complaint and the information. Trial counsel testified unequivocally that he discussed the two-year maximum sentence for this crime during the discussion of the plea bargain immediately preceding the plea hearing. Counsel also testified that he also told Van Camp that the read-in of the kidnapping charge meant they could not be reinstated, and that while the judge could consider it for purposes of sentencing, the read-in would not subject Van Camp to any additional penalty beyond the maximum for the false imprisonment. Counsel's testimony was similarly implicitly accepted as credible by the trial court.

Apparently Van Camp is also contending that the trial court failed to obtain an independent and express admission of guilt to the read-in kidnapping charge. According to ***State v. Cleaves***, 181 Wis.2d 73, 78, 510 N.W.2d 143, 145 (Ct. App. 1993), "when a defendant agrees to the read-in, he or she admits that the crime occurred." Here, Van Camp expressly agreed at the

plea hearing to the plea agreement whereby the kidnapping was to be dismissed but considered a read-in.

The trial court concluded that Van Camp merely regretted his plea and sought to delay proceedings by bringing the motion to withdraw his plea. In any case, Van Camp has failed to show a manifest injustice that required the trial court to permit a plea withdrawal.

Van Camp argues in the alternative that a manifest injustice is demonstrated by ineffective trial counsel. We agree with the State's contention that the no contest plea waived any challenge to the alleged grounds for ineffective counsel. Van Camp contends that counsel failed to adequately research issues relating to the elements of kidnapping, and should have realized the charge would ultimately fail.

A no contest plea, knowingly and intelligently made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of constitutional rights violations. ***State v. Skamfer***, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993). Further, Van Camp has failed to make a proper record to preserve the claim by presenting the testimony of trial counsel in this respect. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 909 (Ct. App. 1979).

Van Camp's ineffective counsel arguments on appeal do not go to the validity of his plea, but to the performance of counsel prior to the plea bargain. At the postconviction hearing, in fact, it was the State who called trial counsel over a relevancy objection by Van Camp. There was no attempt to examine trial counsel regarding the lack of preparation now claimed, and the trial court was advised that the motion of ineffective counsel was included in the postconviction motion "only to preserve the issue for appeal." There is therefore no need to address the matter further. The order denying postconviction relief is therefore affirmed.

By the Court.—Order affirmed.

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