COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0509-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY CEMBROWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and TIMOTHY G. DUGAN, Judges.[1] *Affirmed.*

[1] The Honorable Stanley A. Miller presided over the plea hearing and issued the judgment; the Honorable Timothy G. Dugan presided over the postconviction motion and issued the order denying relief.

SCHUDSON, J.[2] Gary Cembrowski appeals from a judgment of conviction after he pleaded guilty to criminal damage to property, in violation of § 943.01(1), STATS. He also appeals from the trial court's order denying his postconvition motion to withdraw his guilty plea. Cembrowski argues that his guilty plea was not knowing and voluntary because the trial court failed: (1) to inform him of the elements of the crime to which he was entering his plea; and (2) to determine whether he understood the rights he was waiving by entering his guilty plea. This court rejects his arguments and affirms.

I. BACKGROUND

On May 12, 1995, Cembrowski was charged with the Class D Felony of Criminal Damage to Property for damaging the vehicle of Warren Wilson. The complaint alleged that Cembrowski was seen rubbing a substance on the vehicle which caused the paint to peel. The complaint also alleged that three of the vehicle's tires had been slashed. On May 22, 1996, pursuant to plea negotiations, Cembrowski pleaded guilty to the amended charge of the Class A Misdemeanor of Criminal Damage to Property. On July 9, 1996, the trial court sentenced Cembrowski to nine months, imposed and stayed, and placed him on probation for two years, with ninety days in the House of Correction as a condition of probation, which would be permanently stayed if he promptly paid $200, in addition to the $125 he had brought to court, towards his restitution total of $2,250.

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

After sentencing, Cembrowski moved to withdraw his plea, claiming that he had not understood the elements of the crime or the rights he surrendered by pleading guilty. The trial court denied Cembrowski's motion without a hearing.

II. ANALYSIS

"After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries a heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Krieger***, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991) (citation omitted). To challenge a plea, a defendant must meet two threshold requirements. ***State v. Giebel***, 198 Wis.2d 207, 212, 541 N.W.2d 815, 817 (Ct. App. 1995). "First, the defendant must make a showing of a prima facie violation of § 971.08, STATS. ***Id.*** Whether a defendant has made a prima facie showing is a question of law, which this court reviews *de novo*. ***State v. James***, 176 Wis.2d 230, 237, 500 N.W.2d 345, 348 (Ct. App. 1993). "Second, the defendant must allege that he or she in fact did not know or understand the information that should have been provided at the plea hearing." ***Giebel***, 198 Wis.2d at 216, 541 N.W.2d at 818.

If the defendant makes a showing of a prima facie violation, then the burden shifts to the State to show by clear and convincing evidence that, despite the defect, the plea was knowingly, voluntarily, and intelligently entered. ***Id.*** Whether, in spite of the plea defect, the defendant nonetheless knowingly, voluntarily, and intelligently entered his or her plea is a matter within the discretion of the trial court. ***State v. Mohr***, 201 Wis.2d 693, 701, 549 N.W.2d 497, 500 (Ct. App. 1996). A trial court's discretionary determination will be upheld on appeal if it is consistent with the facts of record and established legal

principles. *See* ***McCleary v. State***, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971).

Cembrowski claims that the plea colloquy was deficient under ***State v. Bangert***, 131 Wis.2d 246, 389, N.W.2d 12 (1986), because the trial court failed to "instruct him regarding the elements" of the offense to which he was pleading guilty. Cembrowski does not contend, however, that his lawyer never told him about the elements of the crime or the rights he would forfeit upon entering a guilty plea. In fact, on the plea questionnaire, Cembrowski acknowledged:

> I have read ... the criminal complaint and the information in this case, and I understand what I am charged with, what the penalties are and why I have been charged. I also understand the elements of the offense and their relationship to the facts in this case and how the evidence establishes my guilt.

Nevertheless, Cembrowski contends that the trial court was required to further explain the information in the plea questionnaire, including the elements of the charge. Cembrowski is incorrect.

Prior to accepting a guilty plea, the trial court must "[a]ddress the defendant personally and determine whether the plea is made voluntarily with understanding of the nature of the charge." Section 971.08(1)(a), STATS. The trial court must establish that the defendant "has an awareness of the essential elements of the crime." ***Bangert***, 131 Wis.2d at 267, 389 N.W.2d at 23. To determine whether the defendant has the requisite understanding, the trial court may: (1) summarize the elements for the defendant; (2) ask defense counsel whether he or she explained the essential elements of the crime to the defendant, and then ask counsel to reiterate what he or she told the defendant; or (3) refer to the record or other evidence of the defendant's knowledge of the nature of the charge

established prior to the plea hearing. ***Id***. at 268, 389 N.W.2d at 23. "In giving examples of what may constitute compliance with the third alternative, ***Bangert*** explained: 'A trial judge may also specifically refer to and summarize any signed statement of the defendant which might demonstrate the defendant has notice of the nature of the charge.'" ***State v. Johnson***, 210 Wis.2d 197, 201, 565 N.W.2d 191, 193-94 (Ct. App. 1997); *see also* ***State v. Moederndorfer***, 141 Wis.2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987).

At the plea hearing, the trial court, with Cembrowski's Guilty Plea and Waiver of Rights Form in hand, ascertained that Cembrowski was a thirty-three-year-old high school graduate who had completed eighty-eight credits at Milwaukee Area Technical College. The Guilty Plea and Waiver of Rights Form also indicated that Cembrowski had read and understood the elements of the charged offense, the maximum penalty, and the rights which would be waived upon entering a plea of guilty. When the trial court personally addressed Cembrowski to determine whether he understood the amended charge, he answered in the affirmative. In addition, the trial court questioned Cembrowski's counsel who reported that she had reviewed the charges with him and believed he understood the rights he was waiving by entering his plea.

Cembrowski also testified under oath that he was entering his plea freely and not in response to any threats or promises. When asked whether he was satisfied with his attorney, he responded affirmatively, but added that he was dissatisfied with the investigator whom his attorney hired to investigate his case. After Cembrowski voiced this complaint, the trial court posed additional questions and then made repeated offers to adjourn the proceedings so that he could have a "clear mind" before entering his plea. Cembrowski, however, rejected the trial

court's offer, stating that he wished to "[p]roceed with the plea" despite his dissatisfaction with the investigator.

Following this exchange, the trial court completed the colloquy and concluded that Cembrowski entered his plea freely, voluntarily, and intelligently with full understanding of the nature of the charge, maximum possible penalty, and all the rights he was giving up by entering his plea of guilty. This court agrees and, accordingly, concludes that Cembrowski failed to meet his burden of making a prima facie showing of a defective plea.[3]

By the Court.–Judgment and order affirmed.

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

[3] This court also notes two areas of additional concern. First, Cembrowski's brief to this court states, "When the court stated it would not accept a no-contest plea, Mr. Cembrowski changed his plea to guilty." Nothing in the record, however, reflects that assertion. This court admonishes counsel to avoid any assertions that cannot be supported by the record. *See* RULE 809.83, STATS.; *see also* ***State v. Pettit***, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992). Second, the record states, however, that discussions were held off the record. When the trial court went back on the record, defense counsel stated, "If I can amend the form, Your honor." This court understands that, conceivably, the discussion to which appellate counsel refers may have occurred off the record. If so, this court admonishes the trial court that all discussions between court and counsel regarding plea agreements should be on the record. *See* ***State v. Wolfe***, 46 Wis.2d 478, 487, 175 N.W.2d 216, 220 (1970).