COURT OF APPEALS DECISION DATED AND RELEASED

August 13, 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. 97-0677-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK D. O'KRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Reversed and cause remanded.*

NETTESHEIM, J. Mark D. O'Kray appeals from a judgment of conviction for battery as a repeater contrary to §§ 940.19 and 939.62(1)(a), STATS., and violation of a domestic abuse injunction as a repeater contrary to §§ 813.12 and 939.62(1)(a), STATS. O'Kray additionally appeals from a trial court order denying his motion for postconviction relief.

O'Kray raises three arguments on appeal. First, O'Kray argues that the trial court erroneously denied his presentence motion to withdraw his no contest plea because he presented a fair and just reason in support of his request. Second, O'Kray argues that the trial court erroneously denied his postconviction motion to withdraw his plea because it was not knowingly and voluntarily entered and because he did not have an accurate understanding of the elements of the charge. Finally, O'Kray argues that he is entitled to resentencing because he was unconstitutionally denied his right to counsel at sentencing.

We deem dispositive the trial court's denial of O'Kray's postconviction motion to withdraw his no contest plea.[1] As to this issue, we conclude that the plea colloquy was deficient under ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), and that an examination of the entire record does not otherwise demonstrate that O'Kray's plea was knowingly and voluntarily made. Accordingly, we reverse the postconviction order and the judgment of conviction and we remand for further proceedings.

FACTS

On February 9, 1996, O'Kray was charged with battery as a repeater contrary to §§ 940.19 and 939.62(1)(a), STATS., and violation of a domestic abuse injunction as a repeater contrary to §§ 813.12 and 939.62(1)(a), STATS.[2] On February 14, 1996, O'Kray entered a plea of not guilty and not guilty by reason of mental disease or defect. Subsequently, O'Kray completed a plea questionnaire

[1] Thus, we need not reach O'Kray's remaining arguments on appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

[2] O'Kray was additionally charged with criminal damage to property as a repeater contrary to §§ 943.01(1), 939.62(1)(a) and 939.51(3)(a), STATS. This count was dismissed.

and waiver of rights form indicating a desire to withdraw his initial pleas and enter a plea of no contest to both counts. After a brief colloquy with O'Kray, the trial court accepted the plea and found O'Kray guilty of the charges and scheduled the matter for sentencing.

Just prior to O'Kray's sentencing hearing, O'Kray's counsel filed a motion to withdraw O'Kray's no contest plea and a motion to withdraw as counsel. In his motion for plea withdrawal, O'Kray alleged that "[a]t the time when the plea was entered … [he] was under the impression that his probation agent … would be recommending a sentence that would provide for treatment … in lieu of incarceration." The probation officer's report in fact recommended the maximum possible sentence. The court denied O'Kray's motion for plea withdrawal finding that the probation officer's statement to O'Kray, whether made or not, did not constitute a basis for plea withdrawal. The court did however grant counsel's request to withdraw from representation.

O'Kray's sentencing hearing was rescheduled to allow him two weeks to obtain counsel. However, when O'Kray was sentenced on April 29, 1996, he had not yet retained counsel. Nonetheless, the court proceeded with the sentencing and imposed a maximum sentence of two consecutive terms of three years.

On December 2, 1996, O'Kray filed a postconviction motion, again seeking to withdraw his no contest plea. In support, he renewed the grounds for his earlier presentence motion for withdrawal of the pleas. Citing its earlier ruling, the trial court denied this request. However, O'Kray additionally argued that his plea was not knowingly and voluntarily entered because he did not understand the

charges and was not advised of the elements of the offense. Without substantively addressing the argument, the court also denied this motion. This appeal followed.

DISCUSSION

As noted above, the dispositive issue in this case is whether O'Kray's plea was knowingly and voluntarily made. We conclude that it was not. The State relies on the plea colloquy and plea questionnaire in support of its argument that O'Kray's plea was knowingly and voluntarily made. The State argues, correctly, that even if the plea colloquy was deficient, this court must look at the entire record to determine if O'Kray was aware of the nature of the charges. *See* ***Bangert***, 131 Wis.2d at 265, 389 N.W.2d at 22. We have done so and are unpersuaded.

"The Constitution sets forth the standard that a guilty or no contest plea must be affirmatively shown to be knowing, voluntary, and intelligent." ***Id.*** at 260, 389 N.W.2d at 20. A defendant wishing to withdraw a guilty plea after sentencing must show by clear and convincing evidence that the plea was not voluntarily entered and that withdrawal is necessary to correct a manifest injustice. *See* ***State v. Woods***, 173 Wis.2d 129, 136, 496 N.W.2d 144, 147 (Ct. App. 1992). Whether to allow a postsentencing plea withdrawal is within the trial court's discretion. *See* ***State v. Canedy***, 161 Wis.2d 565, 579-80, 469 N.W.2d 163, 169 (1991). We will uphold the trial court's findings of fact on such matters unless they are clearly erroneous. *See* ***State v. Turner,*** 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987).

O'Kray argues on appeal that his no contest pleas were not knowingly and voluntarily entered because, contrary to § 971.08(1)(a), STATS., he

did not have an accurate understanding of the elements of the charges.[3] When a defendant makes a prima facie showing that the plea was accepted without compliance with the procedures set out in ***Bangert*** and § 971.08, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. *See* ***State v. Hansen***, 168 Wis.2d 749, 754-55, 485 N.W.2d 74, 76-77 (Ct. App. 1992). Whether a defendant has established a prima facie case presents a question of law which we review independently of the trial court. *See* ***id***. at 755, 485 N.W.2d at 77.

In support of his argument that his no contest plea was not knowingly and voluntarily entered, O'Kray points to the cursory plea colloquy conducted by the trial court and the plea questionnaire, neither of which set forth the elements of the crimes charged or otherwise described, other than by label, the nature of the crimes charged.[4] ***Bangert*** makes clear that, prior to the entry of a plea, the court and the defendant must engage in a colloquy establishing, among other things, that the defendant understands the nature of the crime charged and the range of punishments which it carries. *See* ***Bangert***, 131 Wis.2d at 262, 389 N.W.2d at 21.

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

> **Pleas of guilty and no contest; withdrawal thereof**. **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
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> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

[4] We note that on the plea questionnaire in the space provided underneath the statement, "My attorney has told me that the elements of this charge which the state could have to prove are the following:" there is a notation, "explained by atty."

The colloquy which occurred at the plea hearing in this case was as follows:

> COURT: Mr. O'Kray, the Court has received a, a Plea Questionnaire and Waiver of Rights Form, from you, wherein you're indicating a desire to, to withdraw your plea of not guilty, and not guilty by reason of mental disease or defect and enter a plea of no contest to the two remaining charges. Are you doing that freely and voluntarily, sir?
>
> MR. O'KRAY: Yes, I have.
>
> COURT: Do you have any questions about any of the information that is contained on this document?
>
> MR. O'KRAY: No, I don't.
>
> COURT: Do you need more time to discuss this matter with your attorney?
>
> ….
>
> MR. O'KRAY: No, I don't.
>
> ….
>
> COURT: Okay. [Defense counsel], you're satisfied that your client is entering his plea freely and voluntarily?
>
> DEFENSE COUNSEL: I am, your honor.
>
> COURT: You're also satisfied there is a factual basis for that plea?
>
> DEFENSE COUNSEL: Yes, I am.
>
> COURT: The Court then will accept the plea of no contest to Count One and Count Three, and will find that the defendant understands and waives his Constitutional Rights. The Court also will find there is a factual basis for the plea, and find the defendant guilty on each of those two remaining Counts and enter a Judgment of Conviction, accordingly.

It is apparent from this record that, as in ***Bangert***, the colloquy in this case was inadequate in that it did not advise O'Kray of the elements of the offenses or

otherwise characterize the nature of the crimes in a general manner. *See* ***id.*** at 265, 389 N.W.2d at 22.

We acknowledge that ***Bangert*** allows for some flexibility in the manner in which the trial court ascertains the defendant's understanding of the nature of the crime charged. For example, the trial court may summarize the nature of the crime charged by reading the appropriate jury instruction or the trial court may ask defense counsel if he or she has explained the nature of the charge and request a reiteration of the elements of the charge. *See* ***id***. at 267-68, 389 N.W.2d at 23. Although this list is not exhaustive and there are many ways a trial court may demonstrate at the plea hearing that the defendant has notice of the nature of the charge, *see* ***id***., there is nothing in the record of this plea hearing or elsewhere which indicates that the court did so in this case. We conclude that O'Kray has made a prima facie showing that his plea was accepted without compliance with the procedures set forth in ***Bangert*** and § 971.08, STATS. *See* ***Hansen***, 168 Wis.2d at 754, 485 N.W.2d at 76.

The State correctly argues that even if the plea colloquy is defective, this does not require the withdrawal of the plea because the court may look at the entire record to determine the defendant's notice of the nature of the charge. *See* ***Bangert***, 131 Wis.2d at 251-52, 389 N.W.2d at 16. In support, the State points to the plea questionnaire and waiver form signed by O'Kray. While the record includes the form signed by O'Kray, the form does not list the elements of the crimes charged or explain the nature of the offenses. Rather the form indicates only that the elements were "explained by atty." In addition, a plea questionnaire and waiver form does not "eliminate the need for the court to make a record demonstrating the defendant's understanding that the plea results in the waiver of the applicable constitutional rights." ***Hansen,*** 168 Wis.2d at 756, 485 N.W.2d at

77. This is especially important in a case such as this where the plea questionnaire form does not list the elements of the crimes charged or explain the nature of the offenses.

In ***Hansen***, this court stated that a "colloquy … limited to whether [the defendant] had gone over the [plea questionnaire and waiver] form with his attorney before he signed it and whether [the defendant] understood the form[] … is not the *substantive* kind of personal exchange between the trial court and the defendant which ***Bangert***, sec. 971.08, Stats., and ***Moederndorfer*** require." *See* ***Hansen,*** 168 Wis.2d at 755, 485 N.W.2d at 77; *see also* **State v. *Moederndorfer***, 141 Wis.2d 823, 828-29, 416 N.W.2d 627, 630 (Ct. App. 1987) ("waiver of rights" form approved).

O'Kray established on a prima facie basis that the plea colloquy was deficient. As such, the burden shifted to the State. But the State has failed to show that O'Kray's plea was otherwise knowingly and voluntarily entered. We reverse the judgment of conviction and the postconviction order. We remand for further proceedings.

By the Court.—Judgment and order reversed and cause remanded.

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