

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 1, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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**No. 99-1131-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**CHRISTOPHER HOLMES,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. Christopher Holmes was convicted of being a party to the crime of armed robbery and was sentenced to thirty-five years in prison. He appeals from an order denying his motion to withdraw his guilty plea, claiming

that it was not entered voluntarily, knowingly and intelligently. We reject the argument and affirm the order.

¶2 The case has been here before. In 1998, we reversed the circuit court's denial of Holmes's plea-withdrawal motion, concluding that he had made a *prima facie* case that the plea colloquy was inadequate; and we remanded for a hearing to permit the state to prove that, despite the inadequacy of the colloquy, Holmes's plea was entered knowingly and voluntarily. *State v. Holmes*, No. 96-2685-CR, unpublished slip op. at 5 (Wis. Ct. App. Apr. 6, 1998).

¶3 Both Holmes and his trial counsel testified at the hearing on remand. At its conclusion, the court again denied Holmes's plea-withdrawal request, and Holmes appeals, claiming that the State failed to carry its burden of establishing that he knew and understood the various constitutional rights he was giving up by entering the plea.

¶4 For a plea to pass constitutional muster, it must be entered knowingly, voluntarily, and intelligently. See *State v. Brandt*, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999). Whether, in a given case, the plea meets that test is a question of constitutional fact which we review de novo. See *State v. Van Camp*, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997).

¶5 Holmes's attorney, Jill Tan, testified that she had had "extensive" discussions with him prior to his entry of the plea. According to Tan, she had a good memory of their conversations and she specifically remembered discussing with Holmes all of the rights set forth in the plea questionnaire he signed at the time. She said she read the rights directly from the form, explaining difficult words and concepts to him. She also explained the elements of armed robbery in her own words, reviewed the party-to-a-crime statute with Holmes, and discussed

what the State believed it could prove at trial. Tan recalled discussing with Holmes all of the factual circumstances of the case which might bear on Holmes's understanding of these matters. When, during their discussions, she noted a discrepancy between Holmes's recollection of the facts relating to his liability as a party to the crime and the way the facts were set forth in the complaint,<sup>1</sup> she analyzed the case under both versions of the facts, discussed it with Holmes, and concluded that there was a factual basis for the plea under both versions. Tan recalled that Holmes asked questions during their discussions, which she characterized as "give and take."

¶6 With respect to the waiver of rights, Tan testified that she had a specific recollection of discussing all of the rights with Holmes, and she said this was in accord with her general practice during twenty years of representing clients in criminal proceedings.<sup>2</sup> She said she went over each paragraph of the rights-waiver form with Holmes, and that she had no reason to believe that he was confused or "had any incompetence" in regard to understanding [the form]"—especially since she had gone over all of these items with Holmes in the course of representing him in entering a guilty plea to a felony charge once before. She was

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<sup>1</sup> According to Tan, the facts related to Holmes's claimed role as a "lookout," rather than an actual participant in the robbery, and whether a lookout could be held just as responsible for the robbery as the person who actually committed it.

<sup>2</sup> Specifically, Tan testified:

A. What I do is read [the rights] to them right off of the ... questionnaire, waiver of rights form, and then if it's one of those ones that's kind of legal[ese], then I translate it a little bit. I remember saying—my general practice was to say that you have a right to remain silent and not to testify. ....

Q. ... And you go over each and every other one of the rights?

A. Yes.

asked again whether she had gone over all of the rights with Holmes, to which she replied that she had. She was then asked: “And did Mr. Holmes understand those rights?” She replied: “I believe he did, yes.”

¶7 Holmes also testified at the hearing. He said he didn’t recall having discussions with Tan regarding the facts of his case, or his potential liability as a party to the crime. He acknowledged that he was familiar with the words “party to a crime,” but said he never knew what they meant. He acknowledged signing the plea questionnaire, and that Tan had read it to him; but he said that he never understood it.<sup>3</sup> He couldn’t remember having a conversation with Tan about entering a guilty plea; his testimony was inconsistent as to whether he could remember the plea hearing. In fact, he didn’t remember that the plea and sentencing hearings were two separate hearings.

¶8 On that record, the circuit court determined that the State had proved by clear and convincing evidence that Holmes “entered his guilty plea knowingly and voluntarily and understood the elements of the crime of [a]rmed [r]obbery as [a] party to a crime and all the constitutional rights he was waving by entering his plea.”

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<sup>3</sup> When questioned about the plea he entered in the earlier case, Holmes acknowledged that Atty. Tan read the plea questionnaire to him at that time, and when asked by the prosecutor in this case whether he understood that document, replied: “I wasn’t trying to understand it.” Yet, as the State points out, he entered a plea in that case which resulted in a *seventy-year* prison sentence.

¶9 Citing *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), Holmes argues on appeal that the court erroneously relied on Tan’s testimony and ignored his. Specifically, he points to the following statement in *Bangert*:

The trial judge in this case did not ascertain that the defendant knew and understood which constitutional rights he was waiving. The plea hearing record indicates only that Bangert’s counsel believed that Bangert knew and understood which constitutional rights [he] was waiving. Defense counsel may not speak for the defendant; the defendant must affirmatively state his own knowledge and understanding when he is capable of doing so.

*Id.* at 270. According to Holmes, the “spirit” of *Bangert* would be violated if his plea in this case were to be upheld because it was based on Tan’s “belief” that he understood the rights he was waiving, rather than his own testimony that he didn’t.

¶10 We don’t think *Bangert* compels the result advocated by Holmes. In that case it was agreed by all parties (including the supreme court) that the plea colloquy was “woefully inadequate.” *Id.* at 265. The only reference to the constitutional rights Bangert was giving up was in a question the court directed to defense counsel:

THE COURT: ... I’m sure that you have advised him of his constitutional rights prior to the time that he’s entering this plea?

[DEFENSE COUNSEL]: Yes, we did, Your Honor.

THE COURT: And you believe that he fully understands them?

[DEFENSE COUNSEL]: Yes I do.

THE COURT: Okay. The court will accept your plea of no contest to the charge of second degree murder....

*Id.* at 264.

¶11 It is true, as we have noted above, that Atty. Tan stated that she “believed” Holmes understood the rights he was waiving by pleading to the charge. But, in stark contrast to the “woefully” meager record in *Bangert*, she also testified at great length as to the extent and nature of her conversations with Holmes. She told of the specific topics they discussed and the painstaking manner in which she explained the nature of the charged crime, the effect of his plea, and the rights he was waiving—explaining in everyday language concepts she thought were difficult or that Holmes might not fully understand. She recalled that Holmes would question her about various matters during her explanations, and she described the “give-and-take” nature of their discussions. From all this—coupled with the fact that Tan had recently represented Holmes on a serious felony plea, going through the same procedures and discussing waiver of the same rights—we are satisfied that the circuit court was correct in ruling that the State had met its burden of establishing that Holmes’s plea was voluntarily and understandingly entered.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

