COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2579-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID T. HYLAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Reversed and cause remanded with directions*.

¶1 BROWN, P.J.[1] David T. Hyland appeals from a judgment of conviction for third offense operating while intoxicated (OWI). He contends that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

his no contest plea for his second offense was invalid due to an inadequate plea colloquy. In other words, he claims that the plea in the second offense was not knowing and voluntary. According to Hyland, the defective plea renders the conviction for the second offense null and thus incapable of forming the basis for this third-offense conviction. Because the circuit court failed to inform Hyland of the requirement that the jury's verdict be unanimous, we conclude that the second-offense plea colloquy was insufficient. We thus remand for the State to attempt to show that, regardless of the flawed plea taking, Hyland did enter his second-offense plea knowingly and voluntarily.

¶2 Hyland does not attack the plea in his third-offense OWI conviction, which is the one he is appealing. Rather, he goes back to the plea in his 1994 conviction—the second offense. We acknowledge that Wisconsin law allows Hyland to collaterally attack his prior plea at this stage of the game. *See* ***State v. Foust***, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997) (discussing ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992)). Thus, we look back to the 1994 plea colloquy. If the 1994 plea was defective, that conviction may not be used in applying the penalty enhancer in WIS. STAT. § 346.65(2).

¶3 To attack the validity of a guilty or no contest plea, the defendant bears the initial burden of showing that the plea was accepted without compliance with the procedures set forth in WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 830, 416 N.W.2d 627 (Ct. App. 1987). Whether the defendant has met that burden is a question of law we review de novo. *See* ***Spindler v. Spindler***, 207 Wis. 2d 327, 338, 558 N.W.2d 645 (Ct. App. 1996). If the defendant makes such a showing, the burden then shifts to the State to show "that the plea was knowingly and voluntarily entered despite the inadequacy of the colloquy." ***State***

v. Grant, 230 Wis. 2d 90, 99, 601 N.W.2d 8 (Ct. App.), *review denied*, ___ Wis. 2d ___, 604 N.W.2d 571 (Wis. Oct. 26, 1999) (No. 98-2206-CR).

¶4 Here, Hyland alleges that the plea was deficient in six respects. First, he claims that the court did not adequately assess his education and comprehension. Second, he maintains that the court failed to inform him that he was entitled to a twelve-person jury which would have to unanimously conclude that the State had proven guilt beyond a reasonable doubt. Third, he submits that, although the court asked Hyland if he wanted an opportunity to see a lawyer, the court did not advise Hyland that a lawyer "might discover defenses or mitigating circumstances which would not be apparent to a layman." Fourth, Hyland proposes that the court did not adequately inform him of his right to confront adverse witnesses. Fifth, he alleges that the court "failed to adequately determine that [Hyland] understood the nature of the charges." Sixth, Hyland claims that the court "failed to ascertain whether a factual basis existed to support the plea."

¶5 The decisive allegation is the second—that the circuit court failed to inform Hyland of the unanimity requirement. In ***State v. Resio***, 148 Wis. 2d 687, 696-97, 436 N.W.2d 603 (1989), our supreme court mandated that circuit courts "advise the defendant that the court cannot accept a jury verdict that is not agreed to by each member of the jury." Here, our review of the record confirms that the circuit court did not inform Hyland of the unanimity requirement. Furthermore, Hyland has alleged that he did not understand that requirement. Under ***Grant***, the appropriate remedy in such a case is to remand for the State to show that Hyland's plea was entered knowingly and voluntarily despite the inadequate colloquy. *See* ***Grant***, 230 Wis. 2d at 100-01. Thus, we remand this case for the State to assume its burden.

¶6 Before addressing Hyland's meritless allegations, we note that the plea colloquy was also problematic in that the circuit court did not clearly inform Hyland of his right to confront and cross-examine adverse witnesses. What the court said was: "You have a right to have a trial by jury and to subpoena witnesses that will testify against you and any witnesses for you and require the State to prove you guilty by proof beyond a reasonable doubt." We see this as a slip of the tongue. However, Hyland is correct that this aspect of the colloquy is technically deficient.

¶7 Regarding Hyland's other complaints, we agree with the circuit court that they are without merit. As the judge hearing Hyland's motion to disallow use of the 1994 conviction put it, "there is no script we [judges] are supposed to follow." Neither WIS. STAT. § 971.08 nor ***Bangert*** and its progeny establish "inflexible guidelines which a trial court must follow." ***Bangert***, 131 Wis. 2d at 267. Here, while Hyland is correct that the circuit court never explicitly quizzed him on his educational background, the court did engage Hyland in substantial colloquy—enough to ascertain his general comprehension. The court enumerated the constitutional rights Hyland was giving up and asked him if he understood that he was giving up those rights. While the court did not elaborate on the benefits of counsel, the court did ask Hyland if he had any questions about his right to have a lawyer or to have one appointed for him. This was adequate.

¶8 Adequate as well was the circuit court's determination that Hyland understood the nature of the charges. The circuit court asked Hyland if he knew what OWI is, and Hyland responded, "Yeah. You lose your license." The circuit court went on and asked again if Hyland knew "what it means operating a motor vehicle under the influence of an intoxicant," to which Hyland responded, "Means I drank before I operated." The circuit court further asked Hyland if he

understood that part of the offense was that the "alcohol content was high enough to impair your ability to operate the motor vehicle" and Hyland answered, "Right." This exchange evinces Hyland's understanding of the nature of the charges.

¶9 Finally, we reject Hyland's contention that the circuit court failed to ascertain that a factual basis existed to support the plea. Whether a factual basis exists is a discretionary determination and thus we review the circuit court's conclusion under the clearly erroneous standard. *See* ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). Here, Hyland does not suggest that there was no factual basis; rather, he states that "[t]here is no reflection in the transcript … that the court heard any testimony as a factual basis." But there is no requirement that the circuit court state its reasons for finding a factual basis. We will not overturn a discretionary decision absent a showing that it was against the great weight of the evidence. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). No such showing has been made here.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.24(1)(b)4, STATS.