

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal Nos. 2005AP1403-CR
2005AP1404-CR**

STATE OF WISCONSIN

**Cir. Ct. Nos. 1994CF940507
1994CF944147**

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CARLOS ALBERTO ABADIA,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and ELSA C. LAMELAS, Judges.
Affirmed.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Carlos Alberto Abadia appeals from judgments entered on his guilty pleas to three counts of first-degree sexual assault, one count of second-

degree sexual assault, and one count of armed robbery. *See* WIS. STAT. §§ 940.225(1)(b) & (2)(a) (1991–92), 943.32(2) (1991–92). He also appeals from an order denying his postconviction motion.¹ Abadia claims that his pleas were not knowing and voluntary.² We affirm.

I.

¶2 In 1994, the State charged Abadia with four counts of first-degree sexual assault and one count of armed robbery in appeal number 2005AP1403-CR (Milwaukee County Circuit Court case number 1994CF940507). It charged him with second-degree sexual assault in appeal number 2005AP1404-CR (Milwaukee County Circuit Court case number 1994CF944147). The cases were handled together and, as the result of a plea bargain, Abadia agreed to plead guilty to all but one of the charges. In exchange, the State agreed to seek dismissal of one of

¹ The Honorable Stanley A. Miller accepted Abadia’s guilty pleas, entered the judgments of conviction, and sentenced him. The Honorable Elsa C. Lamelas denied Abadia’s motion for postconviction relief.

² On March 27, 2006, Carlos Alberto Abadia sent a letter to this court saying that he wanted to withdraw his appeal. On April 7, 2006, his appellate lawyer wrote to us: “Recently Mr. Abadia sent a letter to court instructing the court to dismiss the appeal. I have since counseled Mr. Abadia on this matter and he has authorized me to informat [*sic*] the court that his letter was improvidently sent to the court and to request that it be withdrawn.” On April 21, 2006, Abadia wrote to us again, again requesting “that his appeal, not be decided or heard as I voluntarily want it to be dismissed.”

A defendant who is represented by a lawyer, as is Abadia, may not independently communicate with a court. *State v. Wanta*, 224 Wis. 2d 679, 699, 592 N.W.2d 645, 655 (Ct. App. 1999) (“While a defendant has a constitutional right to be represented at trial, he has no constitutional right to concurrent self-representation and representation by counsel.”). Abadia has not sought to dismiss his appellate lawyer, and his appellate lawyer has not sought to withdraw. Accordingly, we reject Abadia’s on-and-off independent attempts to voluntarily dismiss this appeal.

the first-degree sexual-assault charges and recommend a “lengthy prison sentence” without making a specific sentencing recommendation.

¶3 The trial court sentenced Abadia to a total of forty years of imprisonment out of a maximum possible sentence of ninety years of imprisonment. *See* WIS. STAT. §§ 940.225(1)(b) (1991–92) (first-degree sexual assault Class B felony), 943.32(2) (1991–92) (armed robbery Class B felony), 939.50(3)(b) (1991–92) (maximum term of imprisonment for Class B felony twenty years), 940.225(2)(a) (1991–92) (second-degree sexual assault Class C felony), 939.50(3)(c) (1991–92) (maximum term of imprisonment for Class C felony ten years).

¶4 In January of 2004, we reinstated Abadia’s postconviction and appellate rights under WIS. STAT. RULE 809.30. The trial court held an evidentiary hearing on Abadia’s claims, and, as noted, denied his motion. We consolidated the cases for appeal.

II.

¶5 Abadia contends that his pleas were not knowing and voluntary because, he claims, the trial court did not explain, and he did not understand, the elements of the crimes to which he pled guilty. He also claims that he did not understand that the trial court was not bound by the plea bargain. We address these assertions in turn.

¶6 After sentencing, a defendant is entitled to withdraw a plea if he or she establishes by clear and convincing evidence that it would be a “manifest injustice” to hold the defendant to his pleas. *State v. Trochinski*, 2002 WI 56,

¶15, 253 Wis. 2d 38, 53–54, 644 N.W.2d 891, 898. There is a manifest injustice if a defendant’s guilty plea is not knowing and voluntary. *Ibid.*

¶7 WISCONSIN STAT. § 971.08(1) seeks to ensure that a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment, and the rights being given up. *See State v. Bangert*, 131 Wis. 2d 246, 260–262, 389 N.W.2d 12, 20–21 (1986). A trial court satisfies its obligations under § 971.08(1) by “personally” explaining these things to the defendant, orally and in open court. *See* § 971.08(1). If this is not done, a defendant may still be shown to have understood his or her rights by matters appearing in the Record, such as, for example, communications between the defendant and his or her lawyer that show that the defendant knew the elements of the charges to which he or she pled guilty, and the rights he or she was giving up. *See Bangert*, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24. One way to show this is by a defendant’s acknowledgement in a document (such as a waiver-of-rights form) that he or she signs before pleading guilty. *See ibid.*; *State v. Moederndorfer*, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987).

¶8 A defendant challenging the adequacy of a plea hearing must make two threshold allegations. *Bangert*, 131 Wis. 2d at 274, 389 N.W.2d at 26. First, the defendant must show that the trial court did not comply with what WIS. STAT. § 971.08 requires. *Bangert*, 131 Wis. 2d at 274, 389 N.W.2d at 26. Second, if so, the defendant must then allege that he or she did not know or understand the information that the trial court should have explained. *State v. Giebel*, 198 Wis. 2d 207, 216, 541 N.W.2d 815, 818–819 (Ct. App. 1995). If the defendant does both of these things, the burden shifts to the State to show by clear and convincing evidence that the defendant’s plea was knowing and voluntary. *Bangert*, 131 Wis. 2d at 274–275, 389 N.W.2d at 26.

¶9 At the plea hearing, the trial court, the Honorable Stanley A. Miller, presiding, said the following to Abadia about the elements of the crimes to which Abadia was pleading guilty:

THE COURT: As to each case and the counts contained therein, do you understand the elements of the offense and the facts in the criminal complaint charging you with each count?

THE DEFENDANT: Yes.

Abadia also told the trial court that he had signed a guilty plea questionnaire and waiver-of-rights form, that he had gone over the form with his trial lawyer, and that he understood what he had signed. As material, the form Abadia signed asserted:

I have read (~~or have had read to me~~) 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.

(Cross-out handwritten in original.) Moreover, Abadia's lawyer then confirmed that he had "gone over the guilty plea questionnaire and waiver of rights form with [Abadia] as it applies to each case and the counts contained therein." *See Moederndorfer*, 141 Wis. 2d at 827, 416 N.W.2d at 629 (trial court may refer to a signed plea questionnaire and waiver-of-rights form to establish defendant understood elements). Abadia has thus not satisfied his initial burden to show that the trial court, albeit in an abbreviated way, did not comply with WIS. STAT. § 971.08(1). Accordingly, we do not discuss his contention that despite all of the assurances he gave to the trial court when he entered his pleas, he did not nevertheless understand the elements of the crimes to which he was pleading

guilty. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶10 Abadia also asserts that his pleas were not knowing and voluntary because the trial court did not tell him, and Abadia claims that he did not know, that the trial court was not bound by the plea bargain. *See State v. Hampton*, 2004 WI 107, ¶20, 274 Wis. 2d 379, 390, 683 N.W.2d 14, 19. We disagree.

¶11 First, as we have seen, the State did not agree to make a specific sentencing recommendation, and the State adhered to that aspect of the plea bargain. Second, the trial court told Abadia that Abadia could be sentenced to the maximum terms of imprisonment. This is what the trial court told Abadia at the plea hearing:

THE COURT: The final amended information in this case charges you in count one with first degree sexual assault, count two, first degree sexual assault, count three armed robbery, and count four, first degree sexual assault. Each of the counts is a Class B felony carrying a maximum term of incarceration as to each count of twenty years. So as to each count, then, or based on the twenty year exposure as to each count, you're exposed to imprisonment as a maximum for up to eighty years. Do you understand the maximum penalties to which you're exposed as to each count and the total that you're exposed to at the time of sentencing?

THE DEFENDANT: Yes.

THE COURT: Did you hear the State's recommendation in this matter, that after requesting a presentence investigation that the State would be recommending to the court that you be sentenced to the Wisconsin state prison system for a lengthy term of incarceration; do you understand that?

THE DEFENDANT: Yes.

....

THE COURT: In case number F-94-4147, you're charged with second degree sexual assault, that's a separate case, and upon conviction you're exposed to imprisonment for up to ten years and a fine of up to ten thousand dollars. Do you understand the maximum penalties to which you're exposed upon conviction in that case?

THE DEFENDANT: Yes, I do.

....

THE COURT: So Mr. Abadia, do you understand that your maximum exposure as to the second case is ten years and combining that with your exposure on the older case, is a total of ninety years?

THE DEFENDANT: Yes, I do.

Third, as we have already seen, Abadia also told the trial court that he had reviewed the guilty plea questionnaire and waiver-of-rights form with his lawyer. By signing that form, Abadia acknowledged that: "I understand that the Judge is not bound to follow any plea agreement or any recommendation made by the District Attorney, my attorney, or any pre-sentence report. I understand that the Judge is free to sentence me to the maximum possible penalties in this case." The Record supports the trial court's finding that Abadia did, in fact, know that the trial court was not bound by the plea bargain. *See State v. Plank*, 2005 WI App 109, ¶¶9–10, 282 Wis. 2d 522, 530–531, 699 N.W.2d 235, 239.

By the Court.—Judgments and order affirmed.

Publication in the official reports is not recommended.

