COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP680-CR **Cir. Ct. No. 2004CF393**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RENARDO L. CARTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Reversed and cause remanded with directions.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. Renardo Carter appeals from a judgment of conviction and an order denying his postconviction motion to withdraw his pleas of no contest to attempted eluding an officer, contrary to WIS. STAT.

§ 346.04(3)(2003-04),[1] and possession with intent to deliver cocaine in the amount of one gram or less, contrary to WIS. STAT. § 961.41(1m)(cm)1g. Carter contends that his pleas were not knowingly, voluntarily, and intelligently entered because he did not understand the nature of both charges. Because we conclude the State did not meet its burden to show that Carter entered a valid plea as to the eluding charge, we reverse and remand for proceedings consistent with this opinion.[2]

Background

¶2 The following facts are taken from the motion hearings. In November 2004, Renardo Carter was driving his vehicle in Wisconsin Rapids. Wood County Drug Investigator Michael Webster instructed Deputy Raymond Starks to stop Carter's car on information Carter was carrying drugs. Starks located and followed Carter, and eventually observed him drive through a yellow light. In response, Starks activated his lights and siren to initiate a traffic stop. Starks testified that Carter looked at him in his rearview mirror, and then increased his speed.

¶3 Starks and Webster individually pursued Carter for more than two miles. During the course of the chase, which reached speeds of up to fifty m.p.h., Carter's vehicle swerved and struck Webster's vehicle. Carter drove onto the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The parties agree that if Carter's plea must be withdrawn as to the eluding charge, it must be withdrawn as to the possession charge as well. *See* ***State v. Lange***, 2003 WI App 2, ¶32, 259 Wis. 2d 774, 656 N.W.2d 480 ("Wisconsin case law clearly holds that a defendant's repudiation of a portion of the plea agreement constitutes a repudiation of the entire plea agreement."). Thus, we need not address the parties' arguments over the validity of Carter's plea as to the possession charge.

grass, exited his vehicle, and went over a wall and into the Wisconsin River, where he was apprehended by the officers. Starks testified he observed Carter tearing baggies with his teeth and dumping their white, powdery contents into the river. The officers recovered two baggies of cocaine from Carter's car and scooped some additional cocaine from the river.

¶4 The State charged Carter with four offenses: eluding an officer, recklessly endangering safety, possession with intent to deliver cocaine, and resisting an officer. Carter then entered into a plea agreement with the State. Cater pled no contest, as a repeat offender, to eluding an officer and possession with intent to deliver, and the other two counts were dismissed but read in for sentencing purposes. The parties also agreed on the sentencing recommendation.

¶5 After Carter entered his pleas and the court sentenced him, Carter moved the court to withdraw his pleas because they were not knowingly, intelligently, and voluntarily entered. The State conceded that Carter had made a prime facie showing that the plea colloquy was deficient as to the eluding charge, but argued he had not done so as to the possession charge. The court agreed with the State and thus held a hearing limited to the issue of Carter's understanding of the eluding charge. The only witness to testify at the hearing was Carter, and the State relied exclusively on the hearing transcripts to establish that Carter's plea was validly entered. The court concluded that the State had established that, despite the deficiency in the plea colloquy, Carter's plea was knowingly, intelligently, and voluntarily entered, and thus denied Carter's motion to withdraw his plea. Carter appeals from the court's denial of his postconviction motion to withdraw his pleas.

Standard of Review

¶6 A defendant seeking to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that refusal to allow withdrawal would result in manifest injustice. ***State v. Brown***, 2006 WI 100, ¶18, _ Wis. 2d _, 716 N.W.2d 906. Manifest injustice is established if a defendant did not knowingly, intelligently, and voluntarily enter his or her plea. ***Id.*** Such a plea may be withdrawn as a matter of right because it violates due process. ***Id.***, ¶19.

¶7 The issue of whether a plea was knowingly, intelligently, and voluntarily entered presents a question of constitutional fact, which we decide independently. ***Id.*** However, we will not disturb the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous. ***Id.***

Discussion

¶8 Under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), a defendant may move to withdraw his or her plea if the plea colloquy violated WIS. STAT. § 971.08[3] or other court-mandated procedures. ***State v. Hampton***, 2004 WI

[3] WISCONSIN STAT. § 971.08(1) requires a court to do the following before accepting a plea of guilty or no contest:

> (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.
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

(continued)

107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. The defendant has the burden to make a "pointed showing" that the plea was accepted despite a plea colloquy deficiency. ***Id.*** If the defendant's motion shows a plea colloquy deficiency and alleges that the defendant did not, in fact, know or understand the missing information, the court must hold an evidentiary hearing on the plea withdrawal motion. ***Id.*** At the hearing, the burden is on the State to establish by clear and convincing evidence that the defendant's plea was, in fact, knowingly, intelligently, and voluntarily entered. ***Id.***

¶9 Carter contends that he is entitled to withdraw his plea because the plea colloquy was deficient under WIS. STAT. § 971.08(1)(a) by failing to inform him of the "knowingly" mental state element of attempting to elude a traffic officer under WIS. STAT. § 346.04(3),[4] and the State did not thereafter meet its burden to establish that Carter's plea was nonetheless knowingly entered. In the postconviction hearing, the State conceded that Carter had made a prime facie showing under ***Bangert*** and that the burden had thus shifted to it to show by clear and convincing evidence that the plea was validly entered. Now, however, the state argues that despite its concession before the trial, the burden never shifted

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> (d) Inquire of the district attorney whether he or she has complied with s. 971.095 (2).

[4] WISCONSIN STAT. § 346.04(3) states:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

because Carter's motion to withdraw his plea did not, in fact, sufficiently allege a defect in the plea colloquy. Thus, the State urges us to independently review Carter's motion to determine whether he made a prime facie showing that the plea colloquy was defective, disregarding its concession. We decline to do so.

¶10 The State correctly states the general proposition that concessions of law are not binding on appeal. ***Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund***, 2005 WI 125, ¶50, 284 Wis. 2d 573, 701 N.W.2d 440. It further points out that the issue of whether a defendant has sufficiently alleged a ***Bangert*** violation is a question of law. *See* ***Brown***, 2006 WI 100, ¶21. However, we are persuaded that ***State v. Van Camp***, 213 Wis. 2d 131, 569 N.W.2d 577 (1997), governs our review of this issue.

¶11 In ***Van Camp***, the supreme court refused to consider the State's argument that the defendant had not made a prime facie showing under ***Bangert*** because it had conceded as much at the trial level. ***Id.*** at 144. The court explained:

> After reviewing the record, we believe the State waived the issue of whether defendant sufficiently alleged that he in fact did not know or understand the information which should have been provided at the plea hearing. Although it appears that the defendant never expressly alleged that he did not know or understand this information, the State conceded during the postconviction hearing that the defendant had made a prima facie showing under ***Bangert*** and that the burden had shifted to the State to show that the defendant had entered his plea knowingly, voluntarily, and intelligently. The State failed to challenge the sufficiency of defendant's allegations before the trial court or in the briefs submitted to the court of appeals.
>
> This contention, advanced for the first time in briefs before this court, was waived by the State, and we decline to consider it. As a general rule, this court will not address issues for the first time on appeal. The reason for this general rule is to give trial courts the opportunity to correct errors, thus avoiding appeals. Had the State raised this issue below, the defendant

> would have had an opportunity to cure, and the trial court would have had the opportunity to consider, this claimed defect. We are unpersuaded that justice would be served here by entertaining the State's arguments where the trial court was not afforded an opportunity to do so.

Id. (citations omitted).

¶12 We conclude that, as in ***Van Camp***, the State has waived the issue of whether Carter's motion shifted the burden to the State to prove he knowingly, intelligently, and voluntarily entered his plea.[5] Thus, we need not address whether Carter sufficiently alleged a defect in the plea colloquy. *See* ***id.*** at 144-45 (concluding that defendant "met his initial burden under ***Bangert***" despite fact that

[5] The dissent believes that the holding in ***State v. Van Camp***, 213 Wis. 2d 131, 569 N.W.2d 577 (1997), is inapplicable here because Van Camp would have had an opportunity to cure the defect had the State raised it. This distinction focuses on a phrase lifted from ***Van Camp*** and ignores the general rule the court used in its decision. The court said: "As a general rule, this court will not address issues for the first time on appeal. The reason for this general rule is to give trial courts the opportunity to correct errors, thus avoiding appeals." ***Id.*** at 144 (citations omitted).

The problem with the dissent's view is twofold. First, had the ***Van Camp*** court been of the dissent's persuasion, it would have addressed the issue the ***Van Camp*** prosecutor waived. Whether a trial court violates the rule set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), is a question of law. *See* ***State v. Brown***, 2006 WI 100, ¶21, _Wis. 2d _, 716 N.W.2d 906. It would have been easy for the supreme court to read the transcript of Van Camp's plea hearing and decide whether the trial court followed ***Bangert***. But the supreme court did not do that. It concluded that the State had waived the issue by confessing it in the trial court. The message the supreme court was sending was that careful preparation of a case in the first instance is a better and less wasteful way to try a case than waiting to do so until appeal. Not only is application of the waiver doctrine to defendants but not the State patently unfair, but it also sends the message to the State that cases need not be well prepared because the State can usually expect to raise a forgotten issue on appeal.

Secondly, declining to apply waiver in this case waters down the ***Bangert*** rationale that placing the burden of showing voluntariness on the state will "encourage the prosecution in a plea hearing proceeding to assist the trial court in meeting its sec. 971.08 and other expressed obligations." ***Bangert***, 131 Wis. 2d at 275. These factors were not at issue in ***State v. Darcy N.K.***, 218 Wis. 2d 640, 650-51, 581 N.W.2d 567 (Ct. App. 1998), and thus we did not consider them there.

"it appears that the defendant never expressly alleged that he did not know or understand [required] information" because "the State conceded during the postconviction hearing that the defendant had made a prime facie showing under ***Bangert*** and that the burden had shifted to the State"). Thus, the dispositive issue is whether the State met its burden during the postconviction motion to establish that Carter's plea was knowingly, intelligently, and voluntarily entered.

¶13 The State may rely on the totality of the evidence to meet its burden, including testimony of the defendant and defense counsel, the plea questionnaire and waiver of rights form, and transcripts of prior hearings. ***Brown***, 2006 WI 100, ¶40. However, at the postconviction hearing, the State presented no evidence to show that Carter understood the essential elements of attempting to elude when he entered his guilty plea, instead relying on the records of the hearings leading up to Carter's plea and its doubts as to the credibility of Carter's testimony that he did not understand the "knowingly" element of attempting to elude.

¶14 It is undisputed that the record does not reflect the word "knowingly" was ever told to Carter before he entered his plea. The State argues, however, that the record reflects that Carter was informed that he was being charged with attempting to elude, which necessarily includes a "knowingly" element. The State frames this argument as proving Carter did not make a prime facie showing of a deficiency in the plea colloquy, since it follows that Carter was informed of the essential elements of attempted eluding in the plea colloquy. However, we have already concluded that the State waived this argument, and instead we address the State's argument as an issue of whether the transcripts relied on by the State met its burden to show that Carter's plea was entered with the required knowledge and understanding. Thus, we turn to the essential elements of WIS. STAT. § 346.04(3).

¶15 The interpretation of the elements of WIS. STAT. § 346.04(3) is a question of law, which we review de novo. ***State v. Sterzinger***, 2002 WI App 171, ¶5, 256 Wis. 2d 925, 649 N.W.2d 677. We have explained that "knowingly" in § 346.04(3) modifies "flee or attempt to elude." ***Id.***, ¶11. Because the legislature did not intend a strict liability offense, "the statute requires … a knowing 'attempt to elude.'" ***Id.***, ¶7. Further, the jury instructions for § 346.04(3) pairs "knowingly" with both "flees" and "attempts to elude," explaining that a person is guilty of a violation of the statute if that person "knowingly (flees) (attempts to elude) any traffic officer." WIS JI-CRIMINAL 2630. The State argues, however, that "knowing" and "attempt" are redundant, and thus an understanding of "attempt" demonstrates an understanding of "knowing." We disagree. Because we have concluded that "knowing" modifies "attempt to elude," we conclude that the State has not met its burden to show that Carter understood the "knowing" element of § 346.04(3) by demonstrating Carter was informed that he was being charged with "attempted" eluding.

¶16 Tellingly, the State does not argue that it met its burden at the postconviction hearing to show that Carter's plea was knowingly, intelligently, and voluntarily entered. The State's argument at the postconviction hearing was as follows:

> Your Honor, all I can do is rely on the record here of the hearings….
>
> I believe the records in this case, the hearings that we had in this matter is clearly one that Mr. Carter was aware of the elements of what needed to be shown here. And I feel that the testimony that he heard and the information that he had and the proceedings he was at he knew what he was doing, that he knew that the—there was the elements of what he was doing that day to elude an officer. The facts bear that out heavily in this case.

¶17 The court agreed with the state, and said:

> The motion to withdraw the plea is denied. The—and for whatever it may be worth, the testimony of the Defendant is not only incredible, but blatantly incredible. I don't believe much of a word that's coming out of his mouth in any way, shape or form. But looking at the record, we have a man who has an HSED, but has a year of college. Okay. We have a man who says he didn't know anything about attempting to—about elements. But in the plea questionnaire he signed a statement which included the following at page 1 of the plea questionnaire, I understand the crimes to which I am pleading have elements that the State would have to prove beyond a reasonable doubt. These elements have been explained to me by my attorney….
>
> ….
>
> In the entire set of circumstances the issue is whether or not the—at the time the Defendant entered his plea he would have to understand that the State would also have to prove that he knowingly and purposefully sped through the city streets of Wisconsin Rapids and almost ran somebody over and wound up getting rammed by a squad car and ran away and jumped over a four or five foot wall down into a river, a fall of probably about ten feet, and had a dog chase him. And the State would have to prove that he knew he was attempting to elude under those circumstances. And it is absolutely incredible for this Court to find under these circumstances that he now claims that he was unaware that the State would have to—that it was an element of the offense or part of the offense that he did this stuff on purpose as opposed to accident.
>
> So I do not believe for a minute or a New York second that he did not understand the plea. I do not believe that he was misled. I know [defense counsel] spends a lot of time with his clients explaining everything, and, yeah, the element was left out, but it was left out of the charging clause.

¶18 We have explained that the State must provide affirmative evidence to prove that a defendant's plea was knowingly, intelligently, and voluntarily entered. ***State v. Nichelson***, 220 Wis. 2d 214, 223, 582 N.W.2d 460 (Ct. App. 1998). Evidence of the defendant's actual guilt, such as the testimony in the

hearings relied on by the State, is not relevant. *See* ***Van Camp***, 213 Wis. 2d at 153. We have also said that "we do not agree that a defendant's denial, no matter how incredible, can establish that he or she both knew and understood" required information. ***Nichelson***, 220 Wis. 2d at 222-23. Additionally, "[t]he trial court's general opinion of the defense counsel does not establish that the requirements of § 971.08(1)(a), STATS., were met." ***Id***. at 220-21.

¶19 Because the State provided no affirmative evidence that Carter did, in fact, understand the "knowing" element of attempted eluding, we can only conclude that it failed to meet its burden to do so. Accordingly, we reverse and remand for proceedings consistent with this opinion.

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

Not recommended for publication in the official reports.

¶20 VERGERONT, J. (*dissenting*). I would take up and decide the State's argument that the plea colloquy was adequate. I do not agree with the majority that ***State v. Van Camp***, 213 Wis. 2d 131, 569 N.W.2d 577 (1997), governs the question of whether to decide this issue in spite of the State's concession in the circuit court.

¶21 In ***Van Camp***, 213 Wis. 2d at 144, the issue the State sought to raise for the first time before the supreme court was that the defendant's postconviction motion for plea withdrawal under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), failed to allege that he did not understand the information that should have been given to him in the plea colloquy. In the circuit court, the State and the defendant agreed the plea colloquy was inadequate and the State conceded that the motion made the prima facie showing required by ***Bangert*** such that the burden shifted to the State to show that the defendant had entered his plea knowingly, voluntarily, and intelligently. ***Van Camp***, 213 Wis. 2d at 144. The reason the supreme court declined to consider the waived issue of the motion's adequacy on the point of the defendant's understanding is that, had the State raised this issue in the circuit court, "*the defendant would have had the opportunity to cure*, and the circuit court would have had the opportunity to consider, this claimed defect." ***Id.*** (emphasis added). In other words, the defendant could have amended his motion to allege that he did not understand the information, thus curing the asserted deficiency.

¶22 In contrast, the issue of the adequacy of the plea colloquy, which the State seeks to raise for the first time on appeal in this case, does not involve a

deficiency in Carter's motion that he could have cured had the State raised it in the circuit court. By the time Carter brought his motion, the plea colloquy had already occurred, the transcript provided a record of it, and the question of whether the colloquy was adequate under ***Bangert*** was and is a question of law. *See* ***State v. Brandt***, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999). There is nothing that Carter could have put in his motion or presented at the evidentiary hearing that would affect the outcome of the legal issue of whether the plea colloquy was adequate. True, we do not have the benefit of the circuit court's analysis of this legal issue, but our review is de novo. *See* ***id.***

¶23 As the supreme court explained in ***Van Camp***, 213 Wis. 2d at 144, the reason appellate courts do not generally address issues raised for the first time on appeal "is to give trial courts the opportunity to correct errors, thus avoiding appeals." However, the waiver rule is one of judicial administration only, and appellate courts have the authority to choose whether to decide an issue that was not raised in the circuit court. ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980). Appellate courts properly exercise their discretion in choosing to do so where the issue is one of law, the factual record is fully developed, the parties have had the opportunity on appeal to fully brief the issue, and the other party is not prejudiced by the timing of the issue being first raised on appeal. *See* ***id.***; *see also* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 650-51, 581 N.W.2d 567 (Ct. App. 1998). In ***Darcy N.K.***, we distinguished ***Van Camp*** because, as in this case, there was nothing the party could have done to add to the record in the circuit court had the waived issue been raised in the circuit court; and we relied on the rule that respondents may advance on appeal any argument to sustain the circuit court's ruling if there is no unfair prejudice to the other side. ***Id.***

¶24 Because the adequacy of the plea colloquy presents a question of law, the factual record is fully developed, the parties have fully briefed the issue on appeal, and there is no unfair prejudice to Carter in considering this issue now, I would choose to decide the issue.

¶25 Turning to the merits of the issue—whether the plea colloquy is inadequate because the circuit court did not tell Carter that an element was that he *knowingly* attempted to elude a traffic officer—I conclude the court fulfilled its obligations under ***Bangert*** and WIS. STAT. § 971.08.

¶26 The circuit court's obligation as relevant to this appeal was to "inform [the] defendant of the nature of the charge or, alternatively, to first ascertain that the defendant possesses accurate information about the charge. The court must then ascertain the defendant's understanding of the nature of the charge as expressly required by sec. 971.08(1)(a)."[1] ***Bangert***, 131 Wis. 2d at 267.

¶27 The plea colloquy regarding the nature of this offense was as follows:

> THE COURT: All righty. The first count accuses you of the following two crimes on November 18, 2004 in the City of Wisconsin Rapids, County of Wood, State of Wisconsin, the first as an operator of a vehicle after having received a visual signal from a marked police vehicle attempted to elude that vehicle by increasing the speed of your car in

[1] WISCONSIN STAT. § 971.08(1)(a) provides:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (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.

> violation of 346.04(3). That's a Class I felony. You're looking at a fine of up to $10,000, and because you are a habitual criminal you're looking at 7 – 7 1/2 years in the State Prison System. Do you understand that?
>
> THE DEFENDANT: Yeah.

The plea questionnaire contained essentially the same description of the elements of the crime. In response to the court's questions, Carter said he had gone over the questionnaire with his lawyer, his lawyer explained it to him, he understood his lawyer's explanations, and he had no questions.

¶28 I agree with the State that "attempt to elude any traffic officer …" necessarily implies that the person who is attempting to elude a traffic officer knows that he is attempting to elude a traffic officer. I can see no reasonable meaning of the phrase that does not implicitly carry with it the mental state of knowing that one is attempting to elude a traffic officer. I therefore disagree with the majority's analysis in paragraph 15 of the opinion.

¶29 It is true that the statute states "knowingly flee or attempt to elude"; and I agree that we held in ***State v. Sterzinger***, 2002 WI App 171, ¶11, 256 Wis. 2d 925, 649 N.W.2d 677, that "knowingly" modifies "flee" and "attempt to elude." However, in my view, ***Sterzinger*** does not resolve the issue presented in this case. In ***Sterzinger***, the defendant argued that the language of WIS. STAT. § 346.04(3) required that the State must prove not only "that he knowingly disobeyed an officer's signal by fleeing or attempting to elude the officer, but that it must also prove that he knowingly interfered with or endangered another vehicle or person." ***Id.***, ¶6. We stated: "There is no dispute that the statute plainly requires knowledge [which we also referred to as scienter or mens rea] in the first element ('knowingly flee or attempt to elude') and, thus, the legislature did not intend to create 'a strict liability' felony offense." ***Id.***, ¶7. However, we

concluded, "'knowingly'… applies to only 'flee or attempt to elude' and not to 'interfere with or endanger,'" ***id.*** at ¶11; therefore, the State did not need to prove that he intended to interfere with or endanger.

¶30 ***Sterzinger*** does not address whether the phrase "attempt to elude" in itself conveys the concept of "knowingly." The legislature's use of "knowingly" does not necessarily mean that without that word, "attempt to elude" could be reasonably construed as an accidental, unintended, or unknowing act. The legislature may have simply wanted to emphasize that scienter was required for this element.

¶31 The common meaning of "elude" is "to avoid slyly or adroitly (as by artifice, stratagem, or dexterity)." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 738 (1999). The common meaning of "attempt" is "to make an effort to do, to accomplish, solve or effect…." ***Id.*** at 140. *See also* BLACK'S LAW DICTIONARY 137 (8th ed. 2004) ("[t]he act or an instance of making an effort to accomplish something, esp. without success"). When "attempt" is used in a criminal law context it means, in general, "[a]n overt act that is done with the intent to commit a crime but that falls short of completing the crime." ***Id.*** Consistent with this general criminal law definition of "attempt" in BLACK'S LAW DICTIONARY, WIS. STAT. § 939.32(3) requires that "[a]n attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime…." I recognize that the "attempt" in WIS. STAT. § 346.04(3) is not to commit a crime but to "elude an officer…." But the point is that, according to both common usage and legal usage, "attempting" to do something conveys that the person is trying to accomplish that thing, which necessarily that implies he or she is acting with the knowledge of what he or she is trying to accomplish.

¶32 The majority also points out that the jury instruction modifies both "flees" and "attempts to elude" with "knowingly": the instruction describes this element as "knowingly (fled) (attempted to elude) a traffic officer." WIS JI—CRIMINAL 2630. However, for the reasons I have already discussed, it does not follow that without the word "knowingly" one might reasonably believe an attempt to elude any traffic officer could be done accidentally or without intent or unknowingly.

¶33 Because I conclude the plea colloquy did not violate WIS. STAT. § 971.08 or other mandated procedures, I conclude that Carter has not made a prima facie showing under ***Bangert***. The circuit court therefore could have properly denied his motion without an evidentiary hearing.[2] I would therefore affirm the circuit court's denial of the motion after an evidentiary hearing on this alternative ground.

¶34 For these reasons, I respectfully dissent.[3]

[2] Carter did not allege in his motion and does not argue on appeal, that even if the plea colloquy was adequate, his plea was not knowingly and voluntarily entered for other specified reasons. *See* ***State v. Howell***, 2006 WI App 182, ¶¶16-17, ___ Wis. 2d ___, 722 N.W.2d 567, *review granted* (Dec. 08, 2006) (No. 05AP731-CR).

[3] Because I am writing in dissent, I do not address the issue of Carter's plea to the other charge, which the majority does not address.