COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2007

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 No. 2005AP3146

Cir. Ct. No. 1997CF972171

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOOKER J. COLLINS,
A/K/A BOOKER SMITH,
A/K/A JODI COLLINS,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Booker J. Collins appeals from the order denying his motion to withdraw his ***Alford*** plea.[1] He argues that he is entitled to withdraw

[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

his plea because he did not understand one of the elements of the crime to which he pled. Because we conclude that the State proved by clear and convincing evidence that he did understand, we affirm.

¶2 In 1997, Collins was charged with eleven counts for sexual activities with his two daughters. He eventually accepted the State's plea offer and entered ***Alford*** pleas to one count of second-degree sexual assault of an unconscious victim, and one count of second-degree sexual assault of a child. The circuit court sentenced him to ten years in prison, with seven years of probation and eighteen years imposed and stayed.

¶3 Collins did not appeal his conviction. In 2005, Collins brought a motion to withdraw his pleas. He argued that he did not understand the element of "sexual contact," and that no one ever explained it to him. The circuit court held a hearing on the motion at which Collins and his trial counsel testified. The circuit court found that the State had proven by clear and convincing evidence that Collins knowingly and voluntarily entered the pleas.

¶4 A motion to withdraw a plea is addressed to the circuit court's discretion and we will reverse only if the circuit court has failed to properly exercise its discretion. ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***Id.*** at 235. A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily and intelligently. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). The initial burden is on the defendant to show that the circuit court did not conform to the mandatory requirements before accepting his or her plea. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¶5 Once the defendant makes a *prima facie* showing that the plea colloquy was not adequate, and alleges that he or she did not understand the information that should have been provided, the burden then switches to the State to show by clear and convincing evidence that the defendant entered the plea knowingly, intelligently, and voluntarily. ***Id.*** The State must show that the defendant "in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him." ***Id.*** at 275 (citation omitted). The State may use any evidence to make this showing, including examining the defendant and his or her counsel, or searching the record "to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea." ***Id.***

¶6 In this case, Collins alleged that he did not understand at the time he entered his plea that the "sexual contact" had to be done with the intent to become sexually aroused or gratified, or to sexually degrade or humiliate the victim. After hearing the testimony of Collins and his trial attorney, the circuit court concluded that the State had proven by clear and convincing evidence that Collins understood this element of the crime. Specifically, the circuit court considered the testimony of trial counsel that he was sure that he had discussed the elements of the offense with Collins, and that he had gone over the plea questionnaire with Collins in great detail. The circuit court noted that there were a number of marks and changes to the plea questionnaire that supported this testimony.

¶7 We conclude that the circuit court properly denied the motion to withdraw. Both the evidence at the postconviction hearing, and the record, support the circuit court's conclusion that Collins understood the elements of the crime. As the circuit court found, the record establishes that trial counsel discussed the elements of the crime with Collins before Collins entered his pleas.

The record also shows that Collins had previously been convicted of sexual assault in Illinois, and that he testified at the postconviction hearing that he understood that the Illinois crime required sexual contact for the purpose of sexual arousal or gratification or to humiliate the victim. Based on the evidence presented at the hearing and the court record, we agree that the State proved by clear and convincing evidence that Collins understood the element of sexual contact. Therefore, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.