COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1118 **Cir. Ct. No. 2002CF3276**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THEODORICK L. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Theodorick Harris appeals from an order denying his motion for postconviction relief.[1] He argues that the circuit court erred when it denied his motion for postconviction relief seeking plea withdrawal without holding a hearing. Because we conclude that the circuit court properly denied his motion without a hearing, we affirm.

¶2 In 2003, Harris pled guilty to one count of armed robbery with threat of force as a party to a crime. The court sentenced him to twenty-two years of initial confinement and fourteen years of extended supervision. Harris did not file a direct appeal from the judgment. In 2006, Harris, acting *pro se*, filed a motion for postconviction relief claiming that he did not enter his plea knowingly, intelligently, and voluntarily because the court did not fully advise him that he was waiving his right against self-incrimination, and his trial counsel was ineffective for failing to ensure that the court informed him that he was waiving this right. He also argued that he did not understand the nature of his plea.

¶3 The circuit court denied the motion without a hearing. The court found that the record belied Harris's assertions that he was not told that he was giving up his right to self-incrimination.

¶4 The standard of review for an order of the circuit court denying a request for an evidentiary hearing is two-part. ***State v. Bentley***, 201 Wis. 2d 303,

[1] Both the State and the appellant labeled their briefs as being an appeal from the judgment of conviction and an order denying a motion for postconviction relief. Both are incorrect. As the circuit court noted in its decision denying the motion for postconviction relief, the appellant's appeal rights under WIS. STAT. RULE 809.30 (2003-04), expired and were not reinstated. Further, the time limits for filing a motion for postconviction relief under WIS. STAT. § 974.02 (2003-04) have also expired. Consequently, this is not a direct appeal. The circuit court treated the motion as one brought under WIS. STAT. § 974.06 (2003-04). We will consider this an appeal from an order denying a motion under § 974.06.

310, 548 N.W.2d 50 (1996). "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** (citations omitted). If the motion does not allege sufficient facts, however, "the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors…." ***Id.*** at 310-11 (citing ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)). Under the ***Nelson*** factors, a circuit court may refuse to hold an evidentiary hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief…." ***Bentley***, 201 Wis. 2d at 309-10 (citations omitted). We review this determination for an erroneous exercise of discretion. ***Id.*** at 311.

¶5 To establish that his plea was not knowingly, intelligently, or voluntarily entered, Harris must first prove that "the trial court failed to comply with the procedural requirements included in WIS. STAT. § 971.08. Then, [he] must properly allege that he did not understand or know the information that should have been provided at the plea hearing." ***State v. Bollig***, 2000 WI 6, ¶48, 232 Wis. 2d 561, 605 N.W.2d 199 (citing ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); footnote omitted).

> Once the defendant has made a prima facie showing that his plea was accepted without compliance with the procedures set forth in Wis. Stat. § 971.08 and has also properly alleged that he did not understand or know the information that should have been provided at the plea hearing, the burden shifts to the state to show by clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered.

Id., ¶49 (citing ***Bangert***, 131 Wis. 2d at 274, and ***State v. Moederndorfer***, 141 Wis. 2d 823, 830, 416 N.W.2d 627 (Ct. App. 1987)). The court may consider the entire record to determine whether a defendant understood the constitutional rights he or she waived by entering a plea. ***Bollig***, 232 Wis. 2d 561, ¶53. Specifically, the court may consider the questions asked and answered, as well as the plea questionnaire. ***Id.***, ¶¶53-54.

¶6 In this case, the circuit court found that Harris signed a plea questionnaire in which he acknowledged that he was giving up his right to remain silent, and that he understood that his silence could not be used against him at trial. Further, the court conducted a thorough plea colloquy with Harris that established his understanding of the plea agreement, and the factual basis for the plea. There is no basis in the record for Harris's allegations that he did not understand the nature of the plea he entered or the rights he waived by entering the plea. Based on our review of the record, we conclude that the circuit court properly exercised its discretion when it denied Harris's motion without holding a hearing. Consequently, 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.