COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2630 **Cir. Ct. No. 2001CF5885**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY GARRISON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Anthony Garrison pled guilty to one count of conspiracy to misappropriate personal identifying information as a habitual

criminal. *See* WIS. STAT. §§ 943.201(2), 939.31, 939.62 (1999-2000).[1] He appeals from an order denying without a hearing his WIS. STAT. § 974.06 (2005-06) motion to withdraw the guilty plea. He claimed that the plea was not knowingly, voluntarily or intelligently entered and that his trial attorney was ineffective in failing to object to entry of the plea. We affirm.

¶2 Garrison entered his guilty plea pursuant to WIS. STAT. § 971.08 following a personal colloquy with the court. Among other matters, the court established that Garrison had signed a guilty plea questionnaire, had gone over it with his attorney, and had understood it. The questionnaire has a marked box next to the statement: "I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty." Garrison affirmed on the record his understanding that by pleading guilty he was giving up his "right to have a jury decide whether [he] committed this crime." Garrison contends that the record is inadequate to show his knowing waiver of a unanimous twelve–member jury and that in fact he did not know or understand the nature of a jury trial at the time of the plea.

¶3 To withdraw a guilty plea after sentencing, a defendant must establish by clear and convincing evidence that withdrawal is necessary to avoid manifest injustice. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A manifest injustice occurs when a plea is not knowing, voluntary and intelligent. ***State v. Brown***, 2004 WI App 179, ¶4, 276 Wis. 2d 559, 687

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

N.W.2d 543. To ensure that pleas are knowing, voluntary and intelligent, trial courts must engage defendants in adequate plea colloquies that satisfy WIS. STAT. § 971.08 and other court-mandated duties. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). A defendant is entitled to an evidentiary hearing on a motion to withdraw a guilty plea when: (1) the defendant makes a *prima facie* showing that the circuit court's plea colloquy did not conform with WIS. STAT. § 971.08 or other procedures mandated at a plea hearing; and (2) the defendant alleges lack of knowledge or understanding as to the information that should have been provided at the plea hearing. ***Brown***, 293 Wis. 2d 594, ¶2 (citations omitted).

¶4 ***Bangert*** requires trial courts "[t]o inform the defendant of the constitutional rights that are waived by a plea, or determine whether the defendant already possesses this knowledge, and then ascertain whether the defendant understands that he is giving up these rights by entering a plea." ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14. The defendant need not specifically waive each right; rather, the record or other evidence must show knowing and voluntary entry with understanding of the rights being waived. ***Bangert***, 131 Wis. 2d at 270.

¶5 Plea questionnaires detailing a defendant's constitutional rights were developed in response to this ***Bangert*** mandate. *See* ***Hampton***, 274 Wis. 2d 379, ¶25. These forms permit the defendant to acknowledge the rights being waived and the trial court then follows up on the record. ***Id.*** Our supreme court has not retreated from its position that trial courts may use a variety of means to ensure a defendant's knowledge and understanding. Rather than an oral description from the trial court of each constitutional right waived, ***Bangert*** requires a record sufficient to show defendant's knowledge and understanding of the rights.

Compare ***State v. Trochinski***, 2002 WI 56, ¶¶21-22, 253 Wis. 2d 38, 644 N.W.2d 891 (***Bangert*** does not require that the court describe each element of the offense and ensure the defendant understands how the State must prove them, but may use one of several methods of determining defendant's understanding of the elements). Well-settled law confirms that use of a plea questionnaire during the colloquy is proper so long as the questionnaire "exhibits defendant's knowledge of the constitutional rights waived." ***State v. Moederndoerfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987).

¶6 Here, the trial court engaged Garrison in an extended colloquy as to his waiver of rights and Garrison also signed a guilty plea questionnaire and waiver of rights form, both of which included express discussion of the right to a jury trial. This procedure reflects Garrison's understanding that he was waiving the right to a unanimous jury of twelve.

¶7 Garrison nonetheless contends that the colloquy was inadequate under ***State v. Anderson***, 2002 WI 7, 249 Wis. 2d 586, 638 N.W.2d 301. ***Anderson*** addresses waiver of a jury trial in favor of a trial to the court pursuant to WIS. STAT. § 972.02 and it mandates a colloquy between court and defendant in every such case. ***Anderson*** holds that "[t]o prove a valid jury trial waiver, the circuit court must conduct a colloquy designed to ensure that the defendant … was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged." ***Id.***, ¶24.

¶8 ***Anderson*** and its requirements for waiving a jury trial under WIS. STAT. § 972.02 do not supplant the well-established procedures for entering a plea pursuant to WIS. STAT. § 971.08 and ***Bangert***. In plea proceedings, Wisconsin courts rely on ***Bangert***, as they have since 1986. *See* ***Trochinski***, 253 Wis. 2d 38,

¶22. Because Garrison has not shown that the colloquy failed to conform to the procedure of § 971.08 or other court-mandated duties, he has not made a *prima facie* showing entitling him to a hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶2.

¶9 Garrison also claims that his trial attorney was ineffective in failing to object to entry of the plea in light of the defects in the colloquy. To prevail in a claim of ineffective assistance of counsel, Garrison must show that his attorney's performance was deficient and that the deficiency prejudiced his defense. *See* ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis. 2d 642, 679 N.W.2d 893. If Garrison is unable to satisfy either component, the claim fails. *See* ***id.***, ¶14.

¶10 Whether a trial attorney's actions were deficient or prejudicial is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The circuit court's findings of fact will not be reversed unless they are clearly erroneous. ***Id.*** at 634. Whether the actions violated the defendant's right to effective assistance of counsel is a legal determination that this court decides *de novo*. *See* ***id.***

¶11 The circuit court did not address Garrison's ineffective assistance claim and made no findings of fact on the issue. While in some circumstances this might necessitate our remanding the matter for fact-finding, we are not required to do so here. Garrison has not alleged facts that, if true, entitle him to relief. *See* ***State v. Maloney***, 2006 WI 15, ¶18, 288 Wis. 2d 551, 709 N.W.2d 436. Garrison merely alleges that he "would have insisted on going to trial" had his attorney reminded the trial court to explain the jury trial waiver in detail. His allegation is unsupported by objective factual assertions showing prejudice, and it is therefore insufficient to secure a remand. ***Hampton***, 274 Wis. 2d 379, ¶60 ("defendant must

do more than merely allege that he would have pleaded differently but for the alleged deficient performance").

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).