COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2002

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. 01-0220-CR

Cir. Ct. No. 99-CF-262

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD G. LAWRENCE,

DEFENDANT-APPELLANT.

APPEAL from an order of the trial court for Wood County: EDWARD F. ZAPPEN, Judge. *Reversed and cause remanded with directions*.[1]

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

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[1] Lawrence also appeals the judgment of conviction; however, because the only issue on appeal is whether Lawrence may withdraw his plea and we are remanding for further proceedings, we will not address the merits of the judgment of conviction.

¶1 PER CURIAM. Richard Lawrence appeals from an order denying his postconviction motion to withdraw his guilty plea. Lawrence pleaded guilty to operating a motor vehicle while intoxicated, his seventh conviction of this offense. Lawrence argues that his plea was not knowingly, intelligently, and voluntarily entered. We reverse the order denying postconviction relief and remand for further proceedings.

¶2 Lawrence pleaded guilty to operating a motor vehicle while intoxicated and was sentenced to three years in prison. After sentencing, Lawrence moved to withdraw his guilty plea on the grounds that it was not knowingly, intelligently, and voluntarily entered. The trial court held a hearing on the motion. After concluding that testimony was not necessary, the court denied the motion based on the arguments of the parties.

¶3 A plea is knowingly and voluntarily entered if the defendant understands the nature of the charge, the potential penalties if convicted, and the various constitutional rights he or she will be waiving if a plea is entered. *See* ***State v. Bangert,*** 131 Wis. 2d 246, 260, 265-66, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08(1) (1999-2000).[2] The trial court must ensure that the plea is knowing and voluntary before accepting it. ***State v. Hansen***, 168 Wis. 2d 749, 754, 485 N.W.2d 74 (1992). The trial court may do so by holding "a detailed colloquy [with] the defendant … or by referring to some portion of the record or communication between the defendant and his lawyer which exhibits the defendant's knowledge." ***Id.***

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

¶4 We review a defendant's challenge to his plea by first reviewing the plea hearing transcript "to determine whether the defendant has made a prima facie showing that the trial court did not comply with the procedures required by [WIS. STAT. § 971.08]." ***State v. McKee***, 212 Wis. 2d 488, 490-91, 569 N.W.2d 93 (Ct. App. 1997). To make the prima facie showing, a defendant must allege that he or she did not know or understand some part of the information required to be provided at the plea hearing, and the defendant must show that the trial court failed to follow the procedures necessary to properly accept a plea. ***Id.*** at 491. If the defendant makes the prima facie showing, the burden shifts to the State to demonstrate by "clear and convincing evidence" that the defendant entered the plea knowingly, voluntarily, and intelligently. ***Id.*** Whether a defendant has made a prima facie showing that the plea hearing procedures were defective is a matter of law which we review *de novo*. ***Id.***

¶5 The trial court held the following colloquy with Lawrence:

> THE COURT: Mr. Lawrence, according to the Complaint here you have a charge of operating a motor vehicle while under the influence of an intoxicant on August 29 of 1999. Do you understand that charge?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: How do you plead?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: When you plead guilty you're admitting you're guilty. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Were you driving a car?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Were you under the influence?

THE DEFENDANT: Yes, sir.

THE COURT: You had a blood alcohol concentration of .29. Do you have any reason to dispute that?

THE DEFENDANT: No, sir.

THE COURT: You're giving up your right to have a jury trial wherein a jury will decide whether you're guilty or not guilty of the charge. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You're giving up the right to face the witnesses that are called to testify against you and to present your own witnesses. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You're also giving up your right to require the State to convince all 12 people on a jury beyond a reasonable doubt that you're guilty. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Did you get along with Mr. Lloyd okay?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand the advice that Mr. Lloyd gave to you?

THE DEFENDANT: Yes.

THE COURT: Mr. Lloyd, do you think your client's plea is freely, voluntarily and intelligently entered?

MR. LLOYD: Yes, Your Honor.

THE COURT: Okay. And you did go through this plea questionnaire with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Okay. Fine. Based upon the foregoing I'll find you guilty of the charge. There is a factual basis.

¶6 We conclude that the trial court did not adequately comply with WIS. STAT. § 971.08 because it did not discuss the potential maximum penalty for the crime with Lawrence, all of the elements of the offense, or all of the constitutional rights Lawrence would be waiving by entering the plea. Lawrence filled out a plea waiver form that addressed these matters but, even so, the trial court did not establish that Lawrence understood that "by entering the plea, he was giving up the rights detailed in the form." ***Hansen***, 168 Wis. 2d at 756. In ***Hansen***, we called this "a subtle, but important, requirement." ***Id.*** Because the colloquy did not meet the standards of § 971.08 and Lawrence has alleged that he did not understand the nature of the offense and the maximum penalty, we conclude that Lawrence has made a prima facie showing that his plea was not knowingly, intelligently, and voluntarily entered.

¶7 "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 … the burden shifts to the [S]tate to show by clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered." ***State v. Bollig***, 2000 WI 6, ¶49, 232 Wis. 2d 561, 605 N.W.2d 199. The State may utilize the entire record to do so. ***Id.*** at ¶53.

¶8 While the State persuasively argues that it can be inferred that Lawrence knew the elements of the offense because this was his seventh OWI conviction, we conclude that this case should be remanded for a hearing before the trial court to determine whether the State can meet its burden of showing by clear and convincing evidence that Lawrence knew the maximum penalty for his seventh OWI. We conclude that the trial court is better situated to make this decision because the record before us is too sparse to allow us to determine whether Lawrence knew the maximum penalty that could be imposed upon him

and other consequences of his plea. Therefore, we reverse the postconviction order and remand for the circuit court to determine whether the State can show that Lawrence knowingly, voluntarily, and intelligently entered his plea.

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

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