COURT OF APPEALS DECISION DATED AND FILED

February 13, 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. 01-0422-CR

Cir. Ct. No. 99-CF-886

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUANE A. EARLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Duane A. Earley has appealed from a judgment convicting him of causing great bodily injury by the operation of a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT.

§ 940.25(1)(a) (1999-2000).[1] He has also appealed from an order denying his motion to withdraw his no contest plea. We affirm the judgment and order.

¶2 Earley's conviction arose from a motor vehicle accident which occurred in the early morning hours of August 22, 1999. Earley's pickup truck collided with a motorcycle driven by Daniel Kerkman. According to the criminal complaint filed against Earley, two witnesses told the police that they "had seen the motorcycle struck by the pickup truck." As a result of the accident, Kerkman's foot was amputated. Evidence indicated that Earley was intoxicated at the time of the accident. Earley subsequently pled no contest to a charge of violating WIS. STAT. § 940.25(1)(a), which prohibits "caus[ing] great bodily harm to another human being by the operation of a vehicle while under the influence of an intoxicant."

¶3 A defendant is entitled to withdraw a no contest plea if he or she establishes by clear and convincing evidence that failure to allow the withdrawal would result in a manifest injustice. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. We review the trial court's denial of a motion to withdraw a no contest plea under an erroneous exercise of discretion standard. ***Id.***

¶4 A manifest injustice exists if the defendant's plea was not knowingly, voluntarily and intelligently entered. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A plea is not knowing and intelligent unless the defendant has a full understanding of the nature of the charges against him or her. ***State v. Bollig***, 2000 WI 6, ¶47, 232 Wis. 2d 561, 605 N.W.2d 199. "An understanding of the nature of the charge must include an awareness of the

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

essential elements of the crime." ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986).

¶5 To establish that he or she lacked an understanding of the charges against him or her, a defendant must show that the trial court failed to comply with the procedural requirements included in WIS. STAT. § 971.08, and must allege that he or she did not understand or know the information that should have been provided at the plea hearing. ***Bollig***, 2000 WI 6 at ¶48. If the defendant makes a prima facie showing that his or her plea was accepted without compliance with the procedures set forth in WIS. STAT. § 971.08 and has also properly alleged that he or she 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, despite the inadequacy of the record at the time of the plea's acceptance. ***Bollig***, 2000 WI 6 at ¶49; ***Bangert***, 131 Wis. 2d at 274. The State may utilize the entire record, including the record created at the hearing on the motion to withdraw the plea, to demonstrate that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him or her. ***Bangert***, 131 Wis. 2d at 274-75.

¶6 On appellate review of an order denying a motion to withdraw a no contest plea, we will not upset the trial court's findings of historical or evidentiary facts unless they are clearly erroneous. ***Bollig***, 2000 WI 6 at ¶13. However, the issue of whether the plea was knowingly and intelligently entered presents a question of constitutional fact which we review independently of the trial court. ***Id.***

¶7 As set forth in WIS JI—CRIMINAL 1262 (2001), the elements of a violation of WIS. STAT. § 940.25(1)(a) are:

> First, that the defendant operated a vehicle.
>
> Second, that the defendant's operation of the vehicle caused great bodily harm to (name of victim).
>
> Third, that the defendant was under the influence of an intoxicant at the time he operated a vehicle.

¶8 WISCONSIN JI—CRIMINAL 1262 further states:

> The second element requires that the defendant's operation of a vehicle caused great bodily harm to (name of victim).
>
> "Cause" means that the defendant's operation of a vehicle was a substantial factor in producing great bodily harm.

¶9 Pursuant to WIS. STAT. § 940.25(2), a defendant charged with violating § 940.25(1)(a) has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and had not been under the influence of an intoxicant or driving with a prohibited blood alcohol level.

¶10 Prior to entry of his no contest plea, Earley executed a guilty plea questionnaire which enumerated the elements of the crime to which he was pleading as "driving under influence of alcohol," "a cause of accident" and "cause great bodily harm." At the plea hearing, the trial court asked Earley how he wished to plead to the charge that he caused great bodily harm to Kerkman by the operation of a vehicle while under the influence of an intoxicant. The trial court asked him whether he understood that it would accept as true the statements contained in the criminal complaint, indicating that Earley operated a motor vehicle while his ability to do so was impaired by alcohol, that he was involved in an accident while operating the vehicle, and that the accident caused Kerkman to

have his foot amputated. No additional discussion of the elements of a violation of WIS. STAT. § 940.25(1)(a) occurred at the plea hearing.

¶11 Earley contends that he is entitled to withdraw his no contest plea because he was not informed at either the plea hearing or in the plea questionnaire that his operation of his motor vehicle had to be a substantial factor in causing Kerkman's injuries, nor was he informed that a defense existed if the injuries were caused by the victim, rather than by Earley's operation of his truck. He further contends that he did not understand the causation element and believed that he was guilty of the offense merely by being involved in an accident while intoxicated. Earley also relies on the results of a private investigation of the accident which indicated that Kerkman was drinking alcohol before the accident and that Earley was already pulled out into the roadway and was either stopped or going only one to two miles per hour when struck by Kerkman.

¶12 We agree that the plea colloquy and the description in the plea questionnaire inadequately informed Earley that his operation of his truck had to cause, or be a substantial factor in producing, Kerkman's injuries. Instead, as set forth in the plea colloquy and questionnaire, a defendant could conclude that merely being involved in an accident while operating a motor vehicle while intoxicated rendered him or her guilty of violating WIS. STAT. § 940.25(1)(a), provided the victim suffered great bodily harm.

¶13 Nevertheless, a review of the entire record reveals that Earley was informed prior to the entry of his no contest plea that a violation of the charged offense required that his operation of his truck caused, or was a substantial factor in producing, Kerkman's injuries, and that a defense existed if Kerkman's injuries

would have occurred even if Earley had been exercising due care and had not been under the influence of an intoxicant.

¶14 The sentencing memorandum provided by Earley to the trial court at sentencing, the presentence investigation report (PSI), and comments made by Earley's counsel at sentencing all indicate that prior to the entry of Earley's no contest plea, Earley and his trial counsel discussed whether Earley's driving caused the accident and Kerkman's injuries, and discussed whether Kerkman's conduct contributed to causing his injuries.[2] Specifically, in the sentencing memorandum prepared by the defense, Earley's attorney stated that "it is clear that the accident did not happen the way the complaint indicates." He then referred to the information obtained by the defense through its own investigation, indicating that Kerkman had been drinking alcohol with friends on the night of the accident, had left a bar shortly before the collision, and smelled of alcohol when admitted to the hospital.[3] The sentencing memorandum also indicated that two witnesses to the collision, who had never been interviewed by the police, stated that at the time of the collision Earley had already pulled out and was attempting to turn south on 30th Avenue. The memorandum identified one witness who indicated that Kerkman was operating his motorcycle at a speed of at least forty-five miles per

[2] In his reply brief, Earley contends that this court cannot consider statements in the PSI or anything else that occurred after the plea hearing because nothing after that date can provide insight into what occurred when the trial court accepted Earley's no contest plea. Earley is mistaken. Although Earley is correct that a defendant's understanding of the nature of the charge must be measured at the time the plea is entered, the reviewing court may look to the entire record to make that measurement. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). In this case, comments made by Earley and his counsel in the private sentencing memorandum, the PSI, and at sentencing can provide insight into what Earley had been informed of and understood at the time he entered his no contest plea.

[3] At the hearing on his motion to withdraw his plea, Earley acknowledged that this private defense investigation was conducted prior to the time he entered his no contest plea.

hour and did not appear to notice that Earley's truck was stopped. The memorandum also identified a passenger in Earley's truck who indicated that the Kerkman motorcycle struck the truck while the truck was either stopped or going one to two miles per hour.

¶15 After setting forth the results of the defense investigation, Earley's counsel pointed out that it was unclear how Kerkman's consumption of alcohol contributed to the accident. He further stated that he did not believe, after reviewing all of the evidence, that "an incorrect police report and an inadequate police investigation would take the Defendant off the hook legally, because the burden of proof is that the accident would have happened regardless of the alcohol and that was a burden the defense could not meet." Defense counsel also stated that "[t]he defendant has clearly stated to counsel that he is responsible for what occurred …. He cannot prove, and has not attempted to do so, to the psychological detriment of the victim, that the accident would have happened even if the Defendant had not consumed alcohol." In addition, defense counsel stated that "[d]efendant is willing to take responsibility for his actions, even though he did have 'a shot,' if he would have tried this case."

¶16 The sentencing memorandum thus establishes that Earley, through his discussions with his counsel, was informed that his operation of his truck had to have caused, or been a substantial factor in producing, Kerkman's injuries. The sentencing memorandum also establishes that Earley and his counsel considered whether Earley could defend the charge on the ground that the accident and injuries would have occurred because of Kerkman's conduct, regardless of whether Earley was exercising due care and under the influence of an intoxicant. This conclusion is corroborated by statements made by the PSI writer in her report indicating that:

> The defendant feels the accident report is incorrect due to the fact that he had moved his vehicle prior to the police arriving on the scene. The defendant believes that the victim should not have accelerated. If he had not done this, it may have lessened the severity of the accident. He also feels that the victim could have possibly "laid his bike down or locked his tires" to have avoided the collision. The defendant feels this way based on witness accounts, physical damage to the vehicle and the victim's own statement. The defendant then went on to state, "I don't feel the victim was at fault" and takes responsibility for the accident due to not seeing the victim.

¶17 At the sentencing hearing, defense counsel indicated that he and Earley had reviewed the PSI. When asked if there were any corrections, counsel discussed two unrelated matters. In reference to the comments set forth above, counsel also stated:

> I think, to explain what the defendant was saying to the presentence writer—I did do an extensive investigation on this case, and what I believe the defendant was saying in describing what happened is that it did not happen as was indicated in the accident report and witnesses' statements. With that being said, it is still true that the defendant is responsible for what he did and takes full responsibility. That is the sequence of questioning that he went through with the pre-sentence examination—that my lawyer found certain things out—but, notwithstanding that, it's my fault, I did something wrong, I have to pay for it. That's what he said, and that's what he said to me all along.

¶18 The record thus establishes that prior to entry of his no contest plea, Earley knew that a violation of WIS. STAT. § 940.25(1)(a) required that his operation of his truck was a substantial factor in producing Kerkman's injuries, and that a defense to the charge existed if he could establish that the injuries would have occurred regardless of whether he was exercising due care or was intoxicated. The discussion in Earley's sentencing memorandum, the PSI, and at the sentencing hearing further indicates that Earley knowingly rejected pursuing

these issues, concluding that he was unlikely to prevail on them at trial and electing to accept responsibility for the offense.

¶19 Earley's abandonment of any issue or defense involving causation was confirmed when he entered his no contest plea. At that hearing, he acknowledged that the trial court could accept the allegations of the complaint as true, and that he was waiving his right to confront the State's witnesses. His waiver thus included his right to confront the witnesses whose statements were recounted in the criminal complaint and who told police that they observed Earley's truck strike Kerkman's motorcycle.[4] Earley also acknowledged that he was waiving his right to present a defense or to present his own witnesses, which included the witnesses who indicated that he was stopped or going one to two miles per hour when the accident occurred.

¶20 The totality of the record thus establishes that Earley understood that his operation of his truck had to be a substantial factor in producing Kerkman's injuries, and that he knowingly elected to forgo pursuing any issue or defense regarding causation at trial. Because Earley's plea therefore was knowingly, voluntarily and intelligently entered, the trial court properly exercised its discretion in denying his motion to withdraw it.

By the Court.—Judgment and order affirmed.

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

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[4] Earley's waiver of his right to confront the State's witnesses would also have included his right to cross-examine Kerkman, who, according to the sentencing memorandum filed by the defense, made a statement indicating that his motorcycle was broadsided by Earley's truck as Earley pulled out of a parking lot.