COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 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. 02-1892-CR **Cir. Ct. No. 00-CM-1599**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD D. EVERTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Chad D. Everts appeals from a judgment of conviction for party to the crime of battery as a habitual offender and from a trial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

court order denying his motion for plea withdrawal. Everts argues that his plea was not knowingly and intelligently entered because his counsel misinformed him of his potential punishments upon conviction. Everts further argues that he received ineffective assistance of counsel based on this misinformation. We reject Everts' arguments. We conclude that Everts received adequate notice of his potential punishments and effective assistance of counsel. We affirm the judgment and order.

¶2 The State filed charges against Everts on September 21, 2000, alleging misdemeanor battery and disorderly conduct, both as a repeat offender. The charges stemmed from an altercation that took place on September 15, 2000. Pursuant to a plea agreement, Everts pled guilty to the charge of misdemeanor battery on November 19, 2001, and the disorderly conduct charge was dismissed.[2] Both parties were free to argue the appropriate sentence. At the sentencing hearing, the State requested that Everts receive the maximum of three years. Everts' counsel, David Sloan, requested that the trial court find Everts eligible for the Challenge Incarceration Program, commonly referred to as "boot camp," while also stating his belief that Everts would not be eligible. The trial court denied Everts' request for boot camp and sentenced Everts to prison for two and one-half years. In denying Everts' request for boot camp, the trial court indicated that it was unsure whether it had a role in ordering boot camp and would not order it in any event because it would undermine Everts' sentence.

[2] We note the plea negotiations in this case occurred after the matter had proceeded to a jury trial, which was terminated by a mistrial due to prosecutorial misconduct resulting in a dismissal with prejudice. Thereafter, the State filed a motion for reconsideration and the trial court ordered the matter dismissed without prejudice. Everts unsuccessfully appealed that ruling on double jeopardy grounds. *See* ***State v. Everts***, No. 01-0798-CRLV, unpublished slip op. (WI App Aug. 22, 2001).

¶3 On May 7, 2002, Everts filed a motion to withdraw his plea arguing, as he does on appeal, that the plea was not knowingly and intelligently entered because he was unaware that he was statutorily ineligible for boot camp because he was convicted of a WIS. STAT. ch. 940 offense—battery. *See* WIS. STAT. § 302.045(2).[3] In an affidavit accompanying his motion, Everts states: "The only reason why I accepted the State's plea bargain was because I was advised by my trial attorney, David Sloan, that I was eligible for the challenge incarceration program, also known as boot camp."

¶4 The trial court held a motion hearing on June 7, 2002, at which both Everts and Sloan testified. Everts testified that prior to entering into a plea agreement, he asked his attorney whether he would be able to go to boot camp.

[3] WISCONSIN STAT. § 302.045 governs the challenge incarceration program for youthful offenders. It provides in relevant part:

> **(1)** PROGRAM. The department shall provide a challenge incarceration program for inmates selected to participate under sub. (2). The program shall provide participants with strenuous physical exercise, manual labor, personal development counseling, substance abuse treatment and education, military drill and ceremony and counseling in preparation for release on parole or extended supervision. The department shall design the program to include not less than 50 participants at a time and so that a participant may complete the program in not more than 180 days. The department may restrict participant privileges as necessary to maintain discipline.
>
> **(2)** PROGRAM ELIGIBILITY. Except as provided in sub. (4), the department may place any inmate in the challenge incarceration program if the inmate meets all of the following criteria:
>
> ….
>
> (c) The inmate is incarcerated regarding a violation other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.08 or 948.095.

According to Everts, Sloan indicated that he was not sure but he would look into it. Everts testified that at the time of the plea entry, "I was under the impression that I could still go to boot camp for—because of the social worker at [Jackson Correctional Institution] also told me that if I don't have a battery with a weapon I could go to boot camp."

¶5 Sloan testified that Everts had asked him about the boot camp program from the beginning and that he had informed Everts that it was his opinion that if he were convicted of battery he would not be eligible for boot camp. When Everts informed Sloan that his social worker had told him he would be eligible, Sloan told him: "I didn't think that was the case, but if that's what his social workers were telling him, then that may be the case, that they have some kind of rule down there." Sloan testified that he never told Everts he would be eligible for boot camp.

¶6 The trial court denied Everts' motion finding that Sloan's testimony at the motion hearing was consistent with his statements at sentencing that he did not believe Everts to be eligible for boot camp. The trial court found that Everts' testimony was not credible. A written order denying Everts' motion was entered on July 1, 2002. Everts appeals.

¶7 WISCONSIN STAT. § 971.08 represents the statutory codification of the constitutional mandate that a plea be knowing, voluntary, and intelligent and requires that a defendant be aware before entering a plea of the potential punishment upon conviction. *See* ***State v. Bollig***, 2000 WI 6, ¶5, 232 Wis. 2d 561, 605 N.W.2d 199. Everts argues that his plea was not knowing or intelligent because he was not aware at the time of the plea that he was ineligible for boot camp.

¶8 Whether to permit withdrawal of a plea is a discretionary decision for the trial court and we will not disturb the trial court's findings unless the trial court erroneously exercises that discretion. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998). In a motion to withdraw a guilty plea after sentencing, the defendant has the burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). A manifest injustice occurs when a defendant does not knowingly, voluntarily, and intelligently enter his or her plea. ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992).

¶9 A defendant challenging the adequacy of a plea hearing must make two threshold showings. ***State v. Giebel***, 198 Wis. 2d 207, 215-16, 541 N.W.2d 815 (Ct. App. 1995). First, the defendant must show a prima facie violation of WIS. STAT. § 971.08 or other mandatory procedures. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Second, the defendant must allege that he or she did not know or understand the information that should have been, but was not, provided at the plea hearing. ***Giebel***, 198 Wis. 2d at 216. If a defendant makes these showings, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered despite any inadequacies in the record at the time the plea was entered. ***Bangert***, 131 Wis. 2d at 274. Whether a defendant makes a prima facie showing that his or her plea was not entered knowingly, voluntarily and intelligently is a question of constitutional fact that we review de novo. ***Id***. at 283. We will not upset the trial court's findings of historical facts unless they are clearly erroneous. ***Id***. at 283-84.

¶10 Here, Everts contends that he was not advised of the potential penalties of his offense because counsel failed to inform him that he would not be eligible for the Challenge Incarceration Program. We reject Everts' argument. First, the plea colloquy reflects that Everts was informed of the potential penalties of his offense. The trial court stated: "The offense to which you are pleading guilty could result in your imprisonment for up to three years and fines totaling $10,000 regardless of any recommendation which might be made. Do you understand that?" Everts replied, "Yes." The Plea Questionnaire/Waiver of Rights Form also reflects Everts' understanding of the potential penalties of his offense.

¶11 Second, Everts' argument assumes that he was entitled, or somehow guaranteed, to participate in the boot camp program. Based on the record, we agree with the trial court that he received ample warning that he was not. The record reflects that the parties were free to argue the appropriate sentence and, even if the parties were both recommending boot camp, Everts indicated his understanding on the Plea Questionnaire/Waiver of Rights Form that "the judge is not bound by any plea agreement or recommendations." Finally, Sloan testified that he informed Everts that he was not eligible for boot camp. The only evidence to the contrary is Everts' self-serving testimony. The determination of witness credibility is for the trial court. ***Dejmal v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Here, the trial court opted for Sloan's credibility, and we respect that determination under our standard of review.

¶12 We conclude that Everts has failed to make a prima facie showing that his plea was not knowingly and intelligently entered and, therefore, there is no indication that a manifest injustice has occurred. *See* ***Woods***, 173 Wis. 2d at 140.

¶13 Given our approval of the trial court's finding that Everts was informed that he was not eligible for boot camp, we reject Everts' related claim of ineffective assistance of counsel. Everts has not alleged facts sufficient to show that counsel's performance was deficient or that he was prejudiced by counsel's performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the judgment and order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.