COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2764-CR **Cir. Ct. No. 00-CF-702**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. BRANTLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Edward Brantley appeals a judgment entered on his no contest plea to one count of reckless abuse of a child by a person responsible for the child's welfare and an order denying his motion for postconviction relief. Brantley contends the trial court erred when it failed to allow him to withdraw his plea both before and after sentencing because he did not understand the element of

recklessness and therefore did not knowingly enter his plea. He also argues he should be resentenced because his trial counsel developed a conflict of interest when Brantley requested a new attorney prior to sentencing. We conclude that the record shows Brantley knowingly entered his plea and that he has not demonstrated that an actual conflict had developed between him and his attorney. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 In August 2000, Brantley was charged with intentional physical abuse of a child by a person responsible for the child's welfare. The charges stemmed from injuries suffered by Brantley's three-month-old daughter. Brantley maintained the injuries were caused accidentally, although medical reports, including one prepared for the defense, concluded this was unlikely.

¶3 The parties eventually reached a plea agreement in September 2001, and two days before the scheduled trial Brantley pled no contest to reckless physical abuse of a child by a person responsible for the child's welfare. At the plea hearing, Brantley's attorney Christopher Froelich told the court:

> Judge, I can advise the Court that my client and I have reviewed the plea questionnaire and waiver of rights form. I have explained to Mr. Brantley that he has a right to have a trial starting on Wednesday of this week. I have explained to him all his rights that go along with that. We filled out the plea form, I believe he understands the elements. We have gone over that and he signed the form.
>
> My client and I have reviewed Dr. Janice Openhoven's report. She was the forensic pathologist that the defense hired to review all the records and I have reviewed her report and conclusions and opinions with my client. We also reviewed some information that we got from Mr. Luetscher regarding a birth to three program. We have also previously talked about the case; talked about the case over the weekend; I have talked to him again this morning and I

believe that my client is making this decision freely and voluntarily. I know he's consulted with his wife and I believe he consulted with relatives as well.

I believe he's had enough time to decide what he wants to do and I believe he's making a decision that's free from any pressure or coercion or threats or anything of that sort.

So I do have the plea questionnaire and waiver of rights form available for the Court.

¶4 The court's colloquy with Brantley consisted partly of the following:

THE COURT: Mr. Brantley, you understand that you are now charged with a violation of Section 948.03(3)(a) which is, whoever recklessly causes great bodily harm to a child, may be guilty of a Class D Felony. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: That carries with it a fine up to $10,000.00 and imprisonment for no more than ten years; do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Now are you the father of [A.] Brantley?

THE DEFENDANT: Yes, I am.

THE COURT: You understand further that the maximum of imprisonment may be increased by five years as a result of that relationship; do you understand that sir?

THE DEFENDANT: Yes.

THE COURT: Have you gone through the elements of this offense with your attorney?

THE DEFENDANT: Yes.

THE COURT: And you have had an opportunity to review the facts in this case to determine whether they are accurate for purposes of entering your plea to this amended charge?

THE DEFENDANT: Yes.

¶5 The court accepted Brantley's no contest plea, found him guilty and ordered a presentence investigation.

¶6 Immediately before sentencing, Brantley moved to withdraw his plea contending, among other things, that his plea was not knowingly made because he did not understand the crime's recklessness element. Specifically, Brantley claimed he thought he was entering a plea to accidentally injuring his child. He said he "thought reckless was different from physical abuse of a child," and that Froelich had "not totally" explained the difference between intentional and reckless and he "didn't totally understand" the difference. Brantley also argued that he felt rushed to accept the offer and his low educational level deprived him of an opportunity to fully understand the plea.

¶7 The court rejected these arguments, finding Brantley's testimony not credible and further concluding there was an adequate basis in the plea hearing record to conclude Brantley knowingly entered his plea. The court specifically pointed to Froelich's and Brantley's statements that he understood the elements of the offense and they had enough time to discuss the plea. Brantley then asked the court to appoint a new attorney, expressing dissatisfaction with Froelich's diligence and communication. The court denied this request and sentenced Brantley to nine years' imprisonment and six years' extended supervision.[1]

¶8 Brantley then filed a motion for postconviction relief, seeking again to withdraw his plea and also requesting resentencing because he claimed a

[1] At Brantley's postconviction hearing, the trial court reduced Brantley's extended supervision term to five years after he and the State both noted that five years was the maximum allowed.

conflict of interest had developed between him and Froelich prior to sentencing. He again argued that he did not understand the meaning of reckless and therefore his plea was not knowingly made. The court disagreed. Pointing to several portions of the record, it concluded Brantley understood the elements of the offense as required by ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and therefore made a knowing plea.

¶9 In terms of the conflict of interest, Brantley argued it developed because Froelich represented him on both the sentencing and the plea withdrawal motions. Brantley argued that once the court denied his request for a new attorney, his interests in having an advocate conflicted with Froelich's own interests in his reputation and duties as an officer of the court. As a result, Brantley claimed his assistance of counsel at sentencing was per se ineffective and therefore he was entitled to be resentenced. The court also rejected this motion. Brantley appeals.

DISCUSSION

¶10 Brantley raises the same issues on appeal. We first address his claims that the trial court erred when it refused to allow him to withdraw his plea both before and after sentencing. The burden a defendant faces when moving to withdraw his or her plea varies substantially with the timing of the motion. ***State v. Kivioja***, 225 Wis. 2d 271, 287, 592 N.W.2d 220 (1999). Prior to sentencing, the circuit court is to look only for a fair and just reason and should freely allow the withdrawal, unless the prosecution would be substantially prejudiced. ***State v. Canedy***, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). A fair and just reason is some adequate reason for the defendant's change of heart other than a desire to have a trial. ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). A

fair and just reason includes a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, or coercion on the part of trial counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). The defendant must demonstrate the fair and just reason by a preponderance of the evidence. ***Canedy***, 161 Wis. 2d at 584. We will uphold the trial court's decision unless we determine it erroneously exercised its discretion. *See* ***id.*** at 579. A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. ***Id.*** at 580.

¶11 In contrast, to withdraw a plea postsentencing, a defendant must show a manifest injustice would result without the withdrawal. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A plea which is not knowingly made is a manifest injustice. *See* ***State v. Trochinski***, 2002 WI 56, ¶17, 253 Wis. 2d 38, 644 N.W.2d 891. Whether Brantley's plea was knowingly and intelligently entered poses a constitutional fact question, which we independently review, benefiting from the trial court's analysis. *See* ***id.***, ¶16 ("A plea violates due process unless the defendant has a full understanding of the nature of the charges."); *see also* ***State v. Brandt***, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999) (Application of a set of facts to the appropriate legal standard is a question of law we review independently.). The historical or evidentiary facts we apply to the legal standard are determined by the circuit court, and we will not upset these findings unless they are clearly erroneous. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. Although Brantley raised several arguments in the trial court in support of both his pre- and post-sentencing withdrawals, he only makes one argument in support of both on appeal: that he

did not understand the crime's reckless element as required for a valid plea under ***Bangert***, and therefore his plea was not knowingly made.

¶12 We first examine Brantley's claim the trial court erred when it refused to allow him to withdraw his plea pre-sentencing. The court noted it "should permit the withdrawal for any fair and just reason," and that Brantley had to show this was a fair and just reason by the preponderance of the evidence. In rejecting Brantley's claim he did not understand the recklessness element of the crime, the court relied on Froelich's assertion at the plea hearing that he discussed the elements with Brantley and that he believed Brantley understood them. In addition, the court pointed to Brantley's agreement with this statement and his admission he understood the elements. This reflects a proper exercise of the court's discretion.

¶13 Brantley contends the court erred, however, when it relied on other factors in concluding that Brantley had knowingly entered his plea. The court concluded that Brantley had "a sophisticated understanding of human nature" because he said he agreed to the plea agreement in part to prevent the strain and stress on his five-year-old daughter, who would have had to testify at trial. The court concluded his concern for the psychological well-being of his daughter showed a level of intelligence that belied his claim he did not understand his plea. Brantley claims this was irrelevant. Our review of the record, however, reveals that the court made this statement in response to Brantley's claim that his lack of education contributed in part to his lack of understanding. Viewed in this context, it was an appropriate consideration.

¶14 In addition, Brantley takes issue with the trial court's determination that he intentionally delayed telling Froelich he wanted to withdraw his plea.

Brantley did not tell Froelich of his wishes until the day before the sentencing hearing. Although Brantley said this was because Froelich never responded to his messages, the prosecution argued it was because Brantley was disappointed with the presentence investigation's recommendations, which he had only recently seen.

¶15 Brantley contends his inability to reach Froelich and discuss the withdrawal undermines the court's conclusion that his plea was knowingly made. The trial court chose to reject Brantley's claim as not credible; this is the trial court's exclusive prerogative. *See* WIS. STAT. § 805.17(2).[2] Further, the link between the timing of Brantley's decision to seek withdrawal, whenever it actually occurred, and his understanding of the elements of his offense is somewhat tenuous. It seems speculative to suggest that because Brantley was unable to inform Froelich of his desire to withdraw his plea that somehow his plea was not knowingly made. In any event, the trial court rejected this argument and we are satisfied it does not amount to an erroneous exercise of discretion.

¶16 We next address Brantley's claim the trial court erred by not allowing him to withdraw his plea postsentencing. The standard procedure for determining whether a plea is knowing, intelligent and voluntary is laid out in WIS. STAT. § 971.08 and ***Bangert***, 131 Wis. 2d at 274. To withdraw his plea successfully, Brantley must first establish a prima facie case that the circuit court violated § 971.08 and allege that he did not know or understand the information that the court should have provided at the plea hearing. *See* ***Bangert***, 131 Wis. 2d

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

at 274. If Brantley makes this showing, the burden then shifts to the State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered." *See* ***id.***

¶17 Brantley claims that the plea colloquy did not comply with ***Bangert*** and more specifically, that the record fails to disclose that Brantley understood the crime's reckless element. We disagree. In ***Bangert***, the supreme court offered a nonexhaustive list of methods for trial courts to determine the defendant's understanding of his or her plea. ***Id.*** at 268. One is for the court to summarize the elements of the crime from jury instructions or the statute. ***Id.*** Another is for the court to ask defense counsel whether he or she explained the nature of the charge to the defendant and request a description of the extent of the summary, including a reiteration of the elements, at the plea hearing. ***Id.*** The last option given is for the court to refer to portions of the record or other evidence demonstrating the defendant's knowledge of the charge, such as a signed statement. ***Id.*** at 268-69.

¶18 At the outset, we are satisfied the court's colloquy complied with ***Bangert***'s requirements. The court read the statute to Brantley and asked if he understood it. In addition, the court accepted Froelich's statement that he discussed the elements with Brantley and Brantley confirmed this and said he understood the elements. Finally, the court referred to Brantley's signed plea questionnaire and waiver of rights form. In it, Brantley specifically acknowledged the elements of the crime are "recklessly causing great bodily harm." A properly executed plea questionnaire and waiver of rights form alone may satisfy ***Bangert***'s requirements. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 828, 416 N.W.2d 627 (Ct. App. 1987). The court's colloquy complied with ***Bangert***.

¶19 Further, we reject Brantley's claim he did not fully understand his crime's recklessness element. In particular, he argues that he did not understand the difference between accidental and reckless or that he did not understand that his plea meant his actions were not accidental. Under our supreme court's decision in ***Trochinski***, WIS. STAT. § 971.08 and ***Bangert*** require that a defendant know and understand the elements of the offense. ***Trochinski***, 253 Wis. 2d 38, ¶22. Nothing in ***Bangert*** required a circuit court to "describe the elements of the offense and ensure the defendant specifically understands *how* the State must prove each element." ***Id.***

¶20 We agree with the trial court that the record shows Brantley understood the crime's reckless element and also that he understood that he was pleading to a nonaccidental action. As noted, Brantley was aware that recklessness was an element of the crime. Further, a doctor had prepared a report for the State concluding that the injuries to Brantley's daughter were not accidental and Brantley's explanation was at odds with the injuries. At the presentencing withdrawal hearing, the State summarized this report and asked Brantley if he agreed that was the doctor's conclusion. Brantley answered, "Yes, I think so, yes." The trial court determined this belied Brantley's claim that he did not know the difference between accidental and reckless and we agree.

¶21 Brantley also suggests the trial court should have explained what aspects of his conduct were reckless. ***Trochinski*** does not require this. As noted, the trial court is not required to ensure the defendant understands how the State must prove each element. ***Id.*** at ¶22. Instead, the defendant must know and understand the elements of the crime, and the record here supports the trial court's finding that Brantley did. He has not established a prima facie case that his plea was not knowingly made.

¶22 Finally, Brantley contends he is entitled to resentencing because he and Froelich developed a conflict of interest after the presentence plea withdrawal motion that rendered Froelich's assistance of counsel per se ineffective. Brantley argues the court should have granted his motion for a new attorney after it denied the withdrawal. A defendant's conflict of interest claim involving his or her attorney is treated analytically as a subspecies of ineffective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 691-92 (1984). A defendant must show his or her attorney's performance was deficient and also caused prejudice to succeed on an ineffective assistance claim. ***Id.*** If an attorney has an actual conflict of interest, however, counsel is per se ineffective and the defendant need not show prejudice. ***State v. Love***, 227 Wis. 2d 60, 71, 594 N.W.2d 806 (1999).

¶23 If the defendant does not raise the conflict objection at trial, he or she must demonstrate by clear and convincing evidence that the actual conflict existed. ***Id.*** Determining what constitutes an actual conflict depends on the facts of the case. ***Id.*** An actual conflict exists when the defendant's attorney was actively representing a conflicting interest so that the attorney's performance was adversely affected. ***Id.*** On an ineffective assistance claim, we do not overturn the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 67. Whether counsel's performance was deficient and whether this caused prejudice, however, are questions of law we review without deference to the trial court. ***Id.***

¶24 Brantley frames the conflict as one between his desire to withdraw his plea and Froelich's reputation and integrity before the court. He argues Froelich could only effectively assist in the plea withdrawal if Froelich admitted he failed to inform Brantley of the crime's elements, which it was not in his interest to do. In addition, he claims Froelich may have had access to privileged information regarding Brantley's understanding of the plea that he could not

disclose to the court. Further, Brantley points to several other circumstances of his case to support his conflict claim; namely that the sentencing immediately followed his withdrawal request; that Froelich only learned the day before the hearing that Brantley wanted to withdraw his plea; and the dispute regarding who was more responsible for the lack of communication between Froelich and Brantley.

¶25 We conclude that Brantley has not shown by the preponderance of the evidence that an actual conflict existed. First, although the evidence he offers in support of his claim could be viewed as giving rise to a potential conflict, we note the trial court rejected Brantley's claims regarding Froelich's diligence and the communication problems. This represents a finding of fact regarding credibility on which we defer to the trial court. WIS. STAT. § 805.17(2). Second, Brantley's burden is to show an *actual* conflict developed, that is, he must demonstrate that any conflict that existed adversely affected Froelich's performance at sentencing. *See* ***Love***, 227 Wis. 2d at 71. Brantley claims the conflict existed because Froelich's interests in his reputation and integrity before the court hindered his ability to be an advocate at sentencing. This argument, however, only suggests the possibility of a conflict, not that one actually existed. Brantley does not argue, nor does the record demonstrate, that this conflict, even if it existed, affected Froelich's advocacy at sentencing. Therefore, we reject Brantley's request for resentencing.

By the Court.—Judgment and order affirmed.

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