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June 29, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1298 State of Wisconsin v. Joshua E. Cole (L.C. # 2010CF224)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joshua E. Cole appeals a circuit court order that denied his motion for postconviction relief under WIS. STAT. § 974.06 (2015-16).[1] Based upon our review of the briefs and record, we

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

In May 2011, Cole pled no contest to one count of second-degree sexual assault of a child and one count of child enticement. In November 2016, Cole filed a WIS. STAT. § 974.06 motion seeking to withdraw his plea to child enticement. Cole alleged that the plea colloquy was insufficient because the court did not articulate the elements of child enticement on the record at the plea hearing, and that Cole did not in fact understand the elements of child enticement. The circuit court held a hearing, and then denied the motion based on the court's finding that Cole in fact understood the elements of child enticement at the time Cole entered his plea.[2]

[2] In the circuit court, the State argued that Cole was required to raise his plea withdrawal claim under the rubric of ineffective assistance of counsel. It argued that Cole had the burden to prove that his trial and appellate counsel were deficient by failing to recognize the defect in the plea colloquy and that Cole was prejudiced by the deficient performance. The State argued that it had met its burden to show that Cole's plea was knowing and voluntary, and thus Cole did not establish that he was prejudiced by his counsel's deficient performance. Cole argued that the State had not met its burden to show by clear and convincing evidence that Cole's plea was knowing, intelligent, and voluntary. The circuit court found that the State had established by clear and convincing evidence that Cole understood the elements of child enticement at the time Cole entered his plea.

On appeal, Cole argues that his trial and postconviction counsel were ineffective by failing to recognize the plea colloquy defect, and that Cole was prejudiced because, Cole asserts, he did not understand the elements of child enticement at the time he entered his plea. Cole asserts that the ineffective assistance of his postconviction counsel provides a sufficient reason for why the issue was not raised in a direct appeal. *See* ***State v. Allen***, 2010 WI 89, ¶85, 328 Wis. 2d 1, 786 N.W.2d 124. The State responds that we should not reach Cole's ineffective assistance of counsel claim. It argues that Cole asserts ineffective assistance of counsel only to overcome the procedural bar, and that the procedural bar does not apply to Cole's WIS. STAT. § 974.06 motion because Cole did not file a previous postconviction motion or appeal. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶35, 360 Wis. 2d 522, 849 N.W.2d 668. Thus, the State asserts, this court may reach the plea withdrawal claim without deciding a threshold issue of ineffective assistance of counsel. The State also argues that Cole did not sufficiently develop an ineffective assistance of counsel claim and that, in any event, the court's finding that trial counsel did explain the elements of child enticement to Cole before Cole entered his plea defeats any claim of ineffective assistance of counsel. In reply, Cole states that, based on the State's assertion that the procedural bar does not apply, he does not further address the issue.

(continued)

If a postconviction motion for plea withdrawal makes a prima facie showing of a defect in the plea colloquy and alleges that the defendant did not understand the information that should have been provided, the burden shifts to the State to show that the defendant's plea was nonetheless knowing, intelligent, and voluntary. ***State v. Nichelson***, 220 Wis. 2d 214, 218, 582 N.W.2d 460 (Ct. App. 1998). A circuit court's duties during a plea colloquy include addressing the defendant personally and determining that the defendant understands the nature of the charge. *See* WIS. STAT. § 971.08(1)(a). A defendant must be aware of the essential elements of the offense to understand the nature of the charge. *See* ***Nichelson***, 220 Wis. 2d at 218-21.

Here, Cole asserted in his postconviction motion that the plea colloquy was defective because the circuit court failed to determine that Cole was aware of the elements of child enticement, and alleged that Cole did not understand the elements of child enticement when he entered his plea. The circuit court held a hearing on Cole's motion, and found that the State proved by clear and convincing evidence that Cole's plea was knowing, intelligent, and voluntary despite the defect in the plea colloquy. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986) (where a postconviction motion establishes a prima facie case for plea withdrawal based on a defect in the plea colloquy, the burden shifts to the State to demonstrate by clear and convincing evidence that, despite the deficiency, the defendant otherwise knew or understood the missing information).

Thus, on appeal, the parties have framed the issue as the direct question of whether the State met its burden to show by clear and convincing evidence that Cole's plea was knowing, intelligent, and voluntary despite the defect in the plea colloquy, not within the rubric of ineffective assistance of counsel. We do the same. We note, however, that our conclusion that the State met its burden of establishing that Cole's plea was knowing, intelligent, and voluntary necessarily defeats any ineffective assistance of counsel claim because Cole would not be able to show that he was prejudiced by counsel's failure to recognize the defect.

Cole contends that the State did not meet its burden at the postconviction motion hearing to show by clear and convincing evidence that Cole understood the elements of child enticement at the time he entered his plea. We disagree.

At the motion hearing, Cole's trial counsel testified that he did not have a specific recollection of reviewing the plea questionnaire or the elements of child enticement with Cole prior to the plea hearing, and did not remember witnessing Cole sign the plea questionnaire. However, counsel testified that he and Cole discussed the charges against Cole and the facts in the complaint, and that counsel believed that he would have discussed the facts in terms of the elements that the State would have to prove. Counsel testified that his standard practice was to review the plea questionnaire with a client prior to the plea hearing. Counsel testified that it would have been consistent with his standard practice to review the plea questionnaire and the attached jury instructions for child enticement with Cole before Cole signed the plea questionnaire. Counsel also testified that he did not sign the plea questionnaire on Cole's behalf.

Cole testified that his counsel did not review the elements of child enticement with him before he entered his plea. He also testified that he did not remember signing the plea questionnaire, and that the signature on the form did not appear to be his. Cole acknowledged that, at the plea hearing, he had stated that the signature on the plea questionnaire was his.

The circuit court found that Cole's testimony was not credible. Specifically, the court did not find credible Cole's testimony that he did not sign the plea questionnaire and that counsel never discussed the elements of child enticement with him. Rather, the court found credible counsel's testimony as to his standard practice with clients. The court found that Cole understood the elements of child enticement when he entered his plea.

"Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). We defer to the circuit court's credibility determinations and accept its factual findings if those findings are supported by the record. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

Cole contends that the State did not meet its burden to show that Cole understood the elements of child enticement because Cole's trial counsel had no recollection of reviewing the elements with Cole. Cole contends that his trial counsel was unable to dispute Cole's claim that trial counsel failed to review the elements of child enticement with Cole because counsel had no independent recollection to refute Cole's claims. We are not persuaded. As set forth above, Cole's trial counsel testified that it would have been his usual practice to review the plea questionnaire and attached jury instructions for child enticement with Cole before the plea hearing. The circuit court was entitled to rely on counsel's testimony as to his usual practice to find that counsel followed his usual practice here. *See, e.g.*, ***Williams v. Lemmon***, 557 F.3d 534, 540 (7th Cir. 2009) ("A lawyer's description of his normal practice allows a state court to conclude that he acted in accord with that practice.").[3] The circuit court did not find credible Cole's testimony that he did not review the elements of child enticement with his trial counsel,

[3] Cole points out that ***Williams v. Lemmon***, 557 F.3d 534 (7th Cir. 2009), is not controlling. However, we conclude that ***Williams*** states a correct point of law. Cole cites no precedent for the proposition that a court may not rely on testimony as to routine practice to draw the inference that the routine practice was followed in a particular case.

did not sign the plea questionnaire, and did not understand the elements. The circuit court was entitled to rely on its observations of the witnesses and the entire record, including Cole's statement during the plea colloquy that his signature appeared on the plea questionnaire, in weighing the testimony and drawing inferences. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (explaining that the court's findings based on its credibility determinations and weighing of the evidence "will not be disturbed where more than one reasonable inference can be drawn from credible evidence … because of '... the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony'" (quoted source omitted)). Because the circuit court's finding that Cole understood the elements of child enticement at the time he entered his plea was supported by the court's credibility determinations and was not clearly erroneous, we have no basis to disturb it.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals