State of Wisconsin
Court of Appeals
District 2
Appeal No. 2014AP1531

State of Wisconsin,

Plaintiff-Respondent,

v.

Lennis Reynolds,

Defendant-Appellant.

On appeal from a judgment of the Racine County Circuit Court, The Honorable Charles Constantine, presiding

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Defendant-Appellant's Brief and Appendix

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Table of Authority

Cases

Statutes

Table of Contents

Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

Whether the circuit court erred in denying Reynolds' postconviction motion to withdraw his guilty plea to first degree reckless injury where:

- At the plea hearing the judge did not explain the elements of the offense to Reynolds but, instead, relied upon defense counsel's statement that he had gone over the elements with Reynolds;
- The "elements sheet" that defense counsel attached to the plea questionnaire did not explain the concept of "criminally reckless conduct";
- Reynolds testified at the motion hearing that he did not understand the concept of criminally reckless conduct; and the defense lawyer testified that he could not be sure that he had discussed criminally reckless conduct with Reynolds; and,
- The judge used the criminal complaint as a factual basis for the plea, but the criminal complaint fails to allege the

circumstances under which Reynolds fired the shot that struck the victim

Answered by the circuit court: Even though the plea colloquy was defective, the state met its burden of proving that Reynolds understood the essential nature of the offense; and the criminal complaint was a sufficient factual basis for the plea.

Summary of the Argument

As a matter of constitutional fact, Reynolds' guilty plea was not knowingly and voluntarily entered. The plea colloquy was defective because the circuit judge failed to explain the nature of the offense to Reynolds. The judge also failed to personally address Reynolds concerning his understanding of the offense.

The state failed to meet its burden of proving that, despite the defective plea colloquy, Reynolds nevertheless understood the nature of the offense. The state offered the plea questionnaire as proof that Reynolds understood the offense. However, the plea questionnaire is also defective because it fails to define criminal recklessness. Defense counsel testified that he assumed that he orally discussed the concept of criminal recklessness with Reynolds but, because it is not written on the plea questionnaire, he could not be

certain. This evidence is wholly insufficient to establish that Reynolds understood the concept.

Additionally, the criminal complaint fails to state an adequate factual basis because the complaint fails to allege the circumstances under which Reynolds fired the shot. As such, no inference may be drawn that Reynolds engaged in criminally reckless conduct.

Statement of the Case[1]

The defendant-appellant, Lennis Reynolds (hereinafter "Reynolds"), was charged in a criminal complaint with attempted first degree intentional homicide and with delivery of marijuana (Racine County No. 2009CF1349). In a separate complaint he was charged with delivery of cocaine. (Racine County No. 2009CF1381) Reynolds eventually reached a plea agreement whereby the state would amend the attempted first degree intentional homicide charge to first degree recklessly endangering safety. Reynolds would plead guilty to the amended charge on that case, and the marijuana count would be dismissed. Reynolds would also plead guilty to the delivery of cocaine charge.

Concerning the attempted first degree intentional homicide case, the complaint (R:1) alleges that on October 16,

[1] The claim on appeal is that the circuit court erred in denying Reynolds' motion to withdraw his guilty plea. Thus, there will not be a separate statement of the facts. The facts will be set forth as is necessary for a clear understanding of the procedural posture of the case.

2009, Reynolds was sitting in a car with a man named Williams. The complaint alleges merely that Williams was shot, and that Reynolds was the shooter. *Id.* There were no further facts alleged as to the circumstances under which the shot was fired.

On March 15, 2010, the case was called for a change of plea hearing. Concerning the elements of the offenses to which Reynolds was pleading guilty, the court merely asked Reynolds' attorney whether he had gone over the elements of the offense with Reynolds. (R:43-4, 5) The defense lawyer indicated that he had done so. The court then asked the lawyer whether Reynolds understands the elements, and the lawyer said that Reynolds did. *id.* Significantly, the judge never asked Reynolds personally whether he understood the elements and, further, the record of the plea colloquy contains no recitation of the elements of the offense.

Reynolds, however, did sign a plea questionnaire (R:10), and attached to the plea questionnaire was a statement of the elements drafted by defense counsel. The elements sheet, though, does not define the concept of criminal recklessness.

Concerning the factual basis for the plea, the court "looked to the criminal complaint" and found that it served as a sufficient factual basis. (R:43-6)

On October 21, 2013, Reynolds filed a postconviction

motion to withdraw his guilty plea. (R:29)[2] The motion alleged that Reynolds' plea was not intelligently entered because the judge did not explain the essential nature of the offense to him; and Reynolds alleged that he did not know the essential nature of the offense. Specifically, during the plea colloquy, the judge merely asked defense counsel whether he (the lawyer) had gone over the elements of the offense with Reynolds. The lawyer indicated that he had done so; however, the "elements sheet" attached to the guilty plea questionnaire did not define criminally reckless conduct.

Further, the motion alleged that there was not a factual basis for the plea because the court relied upon the criminal complaint, and the complaint does not allege sufficient facts to constitute the offense to which Reynolds pleaded guilty. Rather, the complaint merely alleges that Reynolds and Williams were in a car, and that Reynolds fired a shot that struck Williams. The factual basis is particularly important in this case because in his statement to police, Reynolds claimed

[2] For the sake of clarity, a portion of the procedural history of the case is omitted. Following his conviction, Reynolds filed a notice of intent to pursue postconviction relief and he was appointed postconviction counsel (not the undersigned). Appointed counsel filed a no merit report, and Reynolds responded. The court of appeals rejected the no merit report and directed defense counsel to consider whether to file a motion to withdraw Reynolds' guilty plea on the grounds that the plea colloquy was defective. Defense counsel filed a motion. The motion was heard, denied, and then Reynolds appealed. While the appeal was pending, new counsel (the undersigned) was appointed. Reynolds then filed a motion to dismiss the appeal and to reinstate his original postconvicton/appellate rights. The motion alleged that the original appointed attorney was ineffective and, given the status of the record, Reynolds could not prosecute the appeal. The court granted the motion. This is why there was a significant lapse of time between the sentencing hearing and filing of the motion to withdraw the guilty plea.

that he and Williams struggled over a pistol and it went off, striking Williams. (R:29)

The circuit court conducted an evidentiary hearing into the motion on April 28, 2014. Reynolds testified that his attorney never explained the concept of criminal recklessness, and that he did not understand the concept of criminally reckless conduct. (R:47-10)

However, Reynolds' trial counsel testified that:

> This [meaning the plea questionnaire] does not have the definition of criminally reckless conduct. So I would assume I did, but I don't have it written there, and so I can't affirmatively tell you 100 percent that I went over every -- every aspect there. I -- I assume I would have, but I can't tell you for sure because I don't have an independent recollection.

(R:47-29).

On June 26, 2014, the circuit court issued a memorandum decision denying Reynolds' postconviction motion to withdraw his guilty plea. (R:32) The judge found that the state had met its burden of proving that Reynolds did understand the nature of the offense. The judge wrote:

> [W]here the specific elements were not discussed during the plea colloquy, but, based on the attorney's testimony about his usual process as well as the prior record, it is clear that the defendant understood the elements of the plea. Reynolds admitted meeting with [trial counsel] to discuss the plea . . . . [trial counsel's] description of his standard practices, as well as the details provided in the record about their meetings, is credible evidence that Reynolds was well advised on the

> elements of his charge. The court concludes that Reynolds entered knowingly, intelligently, and voluntarily into his plea to first degree reckless injury.

(R:32-4).

Additionally, the judge found that the criminal complaint did, in fact, serve as a proper factual basis for the plea. According to the judge, "The time, location, and circumstances of the incident provide a factual basis for finding that Reynolds acted in a criminal reckless manner . . . " (R:32-5)

Reynolds timely filed a notice of appeal.

Argument

I. The plea colloquy was defective in that the court failed to explain the nature of the offense to Reynolds, and the state failed to meet its burden of proving that Reynolds understood the nature of the offense.

The guilty plea colloquy in this case was defective because the circuit judge failed to personally address Reynolds in order to ensure that Reynolds had an understanding of the nature of the charge. Rather, the circuit judge asked defense counsel whether he explained the elements of the offense to Reynolds. The lawyer said that he did. Significantly, though, the judge did not ask Reynolds personally whether he understood the nature of the offense.

Consequently, the court conducted an evidentiary

hearing at which trial counsel testified that, although criminal recklessness is not defined on the elements sheet attached to the plea questionnaire, he "assumed" that he explained criminal recklessness to Reynolds, but that he had no specific recollection of doing so in this case.

Reynolds testified that he did not understand the concept of criminally reckless conduct and, had he had a proper understanding, he would not have pleaded guilty.

Nevertheless, the circuit judge found that trial counsel's testimony concerning his usual practice to be sufficient to prove that Reynolds had an understanding of the nature of the offense.

Whether Reynolds' plea was knowingly entered is a question of constitutional fact, though. On appeal the court pays no deference to the circuit judge's determination of constitutional fact. Here, the evidence presented at the postconviction motion was insufficient to establish that Reynolds had an understanding of the nature of the offense because: (1) Even assuming that trial counsel did follow his usual practice, and orally explained the concept of criminal recklessness to Reynolds, it only establishes that the attorney provided this information to Reynolds, it does not establish that Reynolds understood the information; (2) The law requires that Reynolds understand the nature of the offense at the time he enters his guilty plea, and the fact that Reynolds had the

information provided to him earlier permits no inference that Reynolds understood those elements at the time he entered his plea.

For these reasons, the circuit court erred in denying Reynolds' motion to withdraw his plea.

A. Standard of Appellate Review

> On review of the circuit court's decision [denying the defendant's motion to withdraw his guilty plea] we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. *State v. Turner,* 136 Wis. 2d 333, 343, 401 N.W.2d 827 (1987). The standard also applies to credibility determinations. Cf. *Canedy*, 161 Wis. 2d at 579; *Dudrey v. State*, 74 Wis. 2d 480, 483, 247 N.W.2d 105 (1976). In reviewing factual determinations as part of a review of discretion, we look to whether the court has examined the relevant facts and whether the court's examination is supported by the record. *State v. Shanks,* 152 Wis. 2d 284, 289, 448 N.W.2d 264 (Ct. App. 1989).

State v. Jenkins, 2007 WI 96, P33-P35. Where there are no remaining issues of fact, the appellate court pays no deference to the trial court's legal determination of whether the defendant has shown sufficient grounds to permit withdrawal of his guilty plea. On this point, the court in *State v. Williams,* 2003 WI App 116, P10 (Wis. Ct. App. 2003), wrote:

> [T]he determination of whether a plea is voluntarily made presents a question of constitutional fact. [citation omitted]. We

> review questions of constitutional fact independent of a circuit court's determination. [citation omitted] However, we will not upset a circuit court's findings of evidentiary or historical fact unless the findings are clearly erroneous.

Thus, in this case, the circuit court's finding concerning what defense counsel said to Reynolds is a question of historical fact subject to the clearly erroneous standard of appellate review. On the other hand, whether Reynolds' guilty plea was "knowing and voluntary" is a question of constitutional fact. The appellate court pays no deference to the finding of the circuit court in that regard.

B. The procedure.

In, *State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232, 233-234 (Wis. 1996), the court stated, "Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice." One of the situations where plea withdrawal is necessary to correct a manifest injustice is where the plea was entered without knowledge of the charge. *State v. Trochinski*, 253 Wis.2d 38, 644 N.W.2d 891 (2002).

The requirements for acceptance of a guilty plea are prescribed by statute. §971.08(1), Stats., provides that, "Before the court accepts a plea of guilty or no contest, it shall do all of the following: (a) Address the defendant *personally* and determine that the plea is made voluntarily with

understanding of the nature of the charge and *t*he potential punishment if convicted." (emphasis provided).

A defendant seeking to withdraw his plea on the grounds that he did not understand the nature of the charge, must show the following: (1) Establish that the record of the plea hearing was inadequate; and, (2) Affirmatively allege that the defendant did not understand the nature of the charge. If this is accomplished, the court must then conduct a hearing into whether the plea was validly entered. *See, e.g., State v. Howell,* 2007 WI 75, P27 (Wis. 2007) At such a hearing, the burden of proof is upon the state to establish that the defendant's plea was, nonetheless, knowing and voluntary.

C. The plea colloquy was inadequate because the court did not address Reynolds personally, and the the judge did not establish on the record that Reynolds understood the elements of the offense.

In this case, the plea colloquy was defective in that the circuit judge failed to personally address Reynolds, on the record, concerning whether he understood the nature of the charges. Instead, the judge asked Reynolds' attorney whether he (the attorney) explained the elements of the offense to Reynolds and whether, in the attorney's opinion, Reynolds understood the charge. This is a defective plea colloquy

under the statute.[3] Thus, the court conducted an evidentiary hearing to determine whether the state could prove that Reynolds' plea was knowingly and voluntarily entered.

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D. The evidence presented by the state failed to establish that Reynolds understood the nature of the charges.

1. The plea questionnaire, alone, does not establish that Reynolds understood the concept of criminal recklessness

At the hearing, the state offered-- among other evidence-- the plea questionnaire that was completed by Reynolds and his attorney. Where the plea questionnaire is relied upon, the sufficiency of the plea questionnaire must be considered. In, *State v. Brandt*, 226 Wis. 2d 610, 621-622 (Wis. 1999), the Supreme Court held that where, "[T[he plea questionnaire is the underlying basis on which the plea is accepted, the sufficiency of the questionnaire drives the sufficiency of the plea. If the relied upon part of the questionnaire is deficient, so too is the plea taken in reliance of that part of the questionnaire."

In, *State v. Brown*, 2006 WI 100, P19 (Wis. 2006), which also involved a *post-sentencing* motion to withdraw a guilty plea, the plea colloquy concerning the element of the offense

[3] In fact, in the circuit court's memorandum decision, the judge conceded that the plea colloquy was defective in this regard.

that was was nearly identical to the court's colloquy in the present case. In *Brown*, the court addressed the defendant as follows:

> THE COURT: All right. Then he can sign the one that he's got.
> MR. EARLE: I wasn't able to put all the elements of all three offenses on each one. I started to fill out one and decided I could do it orally with him. So I don't have three for him to sign, just this one. I would have to do three more.
> THE COURT: But he understands those elements of the offenses?
> MR. EARLE: Yes.
> THE COURT: You've gone over those elements with him?
> MR. EARLE: Yes.
> THE COURT: Okay. Sir, do you understand what you're charged with, the **charges** against you? The first degree sexual assault while armed; is that correct?
> THE DEFENDANT: Yeah.
> THE COURT: And the armed robbery, party to a crime?
> THE DEFENDANT: Yeah.
> THE COURT: And the kidnapping, party to a crime?
> THE DEFENDANT: Yeah.
> THE COURT: You have read the Complaint or had it read to you?
> THE DEFENDANT: Yeah.
> THE COURT: So you understand it?
> THE DEFENDANT: Yes.

In *Brown*, the Supreme Court found this very plea colloquy to be woefully inadequate to meet the statutory requirement that, before accepting a guilty plea, the court

personally address the defendant concerning the essential nature of the charges, and that the defendant understands the charges. The *Brown* court wrote:

> In the present case, the circuit court did not follow any of the methods established in *Bangert*. The circuit court never enumerated, explained, or discussed the elements of first-degree sexual assault, armed robbery, or kidnapping, or the facts making up the elements. Although Brown's attorney stated that he had explained the nature of the charges to Brown, *the circuit court never asked either Brown or his attorney to summarize the extent of the explanation or the elements of the crimes on the record*. The circuit court never referred to the record from prior court proceedings *to establish that Brown understood the nature of the charges*. The circuit court never referred to or summarized the charges as found in a plea questionnaire or other writing signed by Brown, because there were no such documents.

Brown, 2006 WI 100, P53.

> 2. The fact that the circuit court found trial counsel's testimony more credible does not establish that Reynolds understood the nature of the charge.

Here, the circuit court found that trial counsel's testimony concerning his "assumption" that he discussed criminal recklessness with Reynolds was more compelling than Reynolds' testimony that trial counsel did not explain criminal recklessness to him, and that he did not understand the concept. Concerning his private discussions with defense

counsel about the guilty plea, Reynolds cannot meet the burden of showing on appeal that the trial court's credibility determinations are clearly erroneous. Fortunately, though, this is not necessary. The outcome of this appeal does not depend upon a credibility determination. It depends upon the circuit court's finding of constitutional fact that Reynolds understood the nature of the offense. On this point, the appellate court pays no deference to the finding of the circuit court.

Trial counsel's testimony was that he *assumed* that he discussed the concept of criminal recklessness with Reynolds even though it was not written on the elements shee attached to the plea questionnaire. However, trial counsel admitted that he had no recollection of whether he did so in this case. Reynolds, on the other hand, testified that counsel did not explain the concept of criminal recklessness to him, and that he did not understand the the concept.

Even accepting trial counsel's testimony as true, and assuming that Reynolds's testimony is false, there is still no basis in the record of the postconviction motion hearing to make a finding of constitutional fact that Reynolds understood the nature of the offense.

The best inference that may be drawn from trial counsel's testimony is that he had a conversation with Reynolds about criminal recklessness. This, however, does

not permit any inference that Reynolds understood what was being explained to him. There was no testimony from trial counsel that he ever *asked* Reynolds whether he *understood*. Similarly, at the plea hearing, the circuit judge never asked Reynolds personally whether he understood what trial counsel said to him concerning criminal recklessness.

Additionally, the law requires that the defendant understand the nature of the offense *at time he enters the guilty plea*, not some time earlier. The fact that the nature of the offense was explained to Reynolds on some earlier occasion permits no inference that, at the time of his guilty plea, Reynolds had an adequate understanding of the nature of the offense at the time he entered his guilty plea. No lawyer or judge pretends to memorize the law. Even though we may have read a statute three weeks earlier, we routinely refer to the book to make sure that our understanding is correct. Reynolds, a layman, ought not be held to a higher standard of understanding of the law. This is why it is critical for the judge at a plea hearing to ask the defendant personally whether he understands the nature of the offense.

Thus, as a matter of constitutional fact, the court of appeals should find that Reynolds' guilty was not knowingly and intelligently entered.

II. The criminal complaint does not establish a factual basis for the guilty plea.

Reynolds' motion to withdraw his guilty plea also alleged that the plea was defective because the court failed to establish on the record that there was a sufficient factual basis for Reynolds' guilty plea. At the plea hearing, the judge relied wholly on the criminal complaint for the factual basis.

As will be set forth in more detail below, the criminal complaint utterly fails to allege the circumstances under which Reynolds fired the shot that injured the victim. As such, no inference may be drawn that Reynolds engaged in criminally reckless conduct. For this additional reason, Reynolds must be permitted to withdraw his guilty plea.

B. Standard of appellate review

In, *State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232, 233-234 (Wis. 1996)[4], the court stated,

> Withdrawal of a plea following sentencing is not allowed unless it

[4] Counsel draws the court's attention to the fact that there is an apparent conflict concerning the standard of appellate review between *Bangert* and *Smith*. As the *Bangert* court pointed out, where a defendant establishes a manifest injustice, the trial court possesses no discretion. Withdrawal of the plea is a matter of right. The *Smith* court holds that an insufficient factual basis is a manifest injustice; but then goes on to hold that whether a factual basis exists is a matter of discretion, presumably subject to the "erroneous exercise of discretion" on appeal. In, *State v. Thomas*, 2000 WI 13 (Wis. 2000) the Supreme Court discussed what is necessary in terms of a factual basis for a guilty plea; however, the case is of little help here because the court did not discuss the standard of appellate review. Because, here, the state presented no evidence at the posconviction motion concerning the factual basis, the trial court decided the motion based only on a review of the criminal complaint. As such, it seems that a *de novo* review is more appropriate.

> is necessary to correct a manifest injustice. See *State v. Rock*, 92 Wis.2d 554, 558-59, 285 N.W.2d 739 (1979). Historically, one type of manifest injustice is the failure of the trial court to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads. See *White v. State*, 85 Wis.2d 485, 488, 271 N.W.2d 97 (1978). . . . . in the context of a negotiated guilty plea, this court has held that a court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." See *Broadie v. State*, 68 Wis.2d 420, 423-24, 228 N.W.2d 687 (1975). The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous. See *Broadie*, 68 Wis.2d at 423, 228 N.W.2d 687.

Here, a review of the criminal complaint reveals that it is only alleged that Williams was shot, and that Reynolds was the shooter. There are no facts alleged in the criminal complaint to establish the circumstances under which the shots were fired. In the absence of such facts, it was impossible for the circuit judge to determine that there was a factual basis to believe that Reynolds acted in a criminally reckless manner.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse the order of the circuit court denying Reynolds' motion to withdraw his guilty plea to the charge of first degree recklessly endangering safety; and, further, to remand the matter to the circuit court with instructions to enter

an order granting Reynolds' motion.

Dated at Milwaukee, Wisconsin, this _____ day of September, 2014.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4420 words.

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Dated this _____ day of September, 2014:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 2
Appeal No. 2014AP1531

State of Wisconsin,

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Lennis Reynolds,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Memorandum decision denying motion to withdraw guilty plea (R:32)

C. Transcript of guilty plea hearing (R:43)

D. Criminal complaint (R:1)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written

rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Jeffrey W. Jensen