COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2416 **Cir. Ct. No. 1997CF973585**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN RAY MCCLOUD,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: TIMOTHY M.WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Kevin Ray McCloud appeals from postconviction orders denying his petition and amended motion for *habeas corpus* relief. The issues are whether McCloud was entitled to an evidentiary hearing on the validity of his guilty and no-contest pleas, and the alleged ineffectiveness of his

postconviction counsel for failing to previously raise the related plea withdrawal issue. We conclude that McCloud has not shown that the plea colloquy was inadequate, and that the trial court did not err by accepting the parties' stipulation to use the complaint as a factual basis for his pleas; consequently, McCloud has not met the requisites necessary for an evidentiary hearing, also negating any ineffective assistance of counsel claim. Therefore, we affirm.

> ¶2 On August 12, 1997, McCloud carjacked a car owned by David Shelby. Shelby and his friend, Betty Dunn, were driving through the State of Wisconsin and stopped at a Walgreens located in the 6200 block of South 27th Street at approximately 11:00 p.m. Shelby exited the car, but Dunn remained seated in it. McCloud and his wife were searching the area for someone to rob. McCloud observed Shelby exit his car. McCloud walked over to Shelby's car and got in the driver's side. He told Dunn to get out. At this point, Shelby returned and observed Dunn struggling with McCloud. Shelby confronted McCloud, but after McCloud stated, "Do you want to die?" Shelby gave up and McCloud drove off in the car. Dunn was thrown from the car, run over and died as a result of the injuries.

See ***State v. McCloud***, No. 98-2961-CR, unpublished slip op. at 2 (Ct. App. Dec. 13, 1999).

¶3 McCloud pled guilty to operating a vehicle without the owner's consent and to two counts of robbery, each as a party to the crime, and he entered a no-contest plea to second-degree reckless homicide.[1] On direct appeal, McCloud contended that his "convicti[ons] … of both robbery and operating a

[1] A no-contest plea means that the defendant does not claim innocence, but refuses to admit guilt. *See* WIS. STAT. § 971.06(1)(c) (1997–98); *see also* ***Cross v. State***, 45 Wis. 2d 593, 599, 173 N.W.2d 589 (1970).

vehicle without [the] owner's consent under the facts here constitutes double jeopardy." ***Id.*** at 3. We rejected that challenge and affirmed. *See* ***id.*** at 6.

¶4 In 2008, McCloud petitioned for a writ of *habeas corpus*, alleging that his postconviction counsel was ineffective for failing to challenge the validity of his guilty and no-contest pleas. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). McCloud contended that he was entitled to plea withdrawal because he did not understand the elements of the crimes to which he was pleading. The trial court summarily denied the motion, ruling that McCloud had not established that the trial court failed to comply with the requisites of WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), when it accepted his pleas. McCloud then amended his petition to include the claim that the trial court erred in accepting the parties' stipulation to its use of the complaint as a factual basis for his pleas, and that he did not understand how his conduct could support two counts of robbery. The trial court summarily denied that motion, explaining that "there were two robbery victims, and therefore, there were two robbery crimes. The identity of each victim … is a fact unique to each of these counts." The trial court also noted that McCloud had told the trial court during the plea colloquy that "he had gone over the complaint with his lawyer, that he understood its contents and that the statements therein were substantially true." McCloud appeals.

¶5 "A defendant wishing to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. Milanes***, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94. In a claim for plea withdrawal based on an inadequate plea colloquy,

> the defendant [must] make a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of sec. 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Bangert, 131 Wis. 2d at 274 (citations omitted). The ***Bangert*** analysis was addressed and applied in ***State v. Howell***, 2007 WI 75, ¶7, 301 Wis. 2d 350, 734 N.W.2d 48, where the issue was whether the defendant was entitled to an evidentiary hearing on his plea withdrawal motion alleging that his plea was invalid because the plea colloquy was defective. *See* ***id.*** We review the trial court's summary denial of McCloud's plea withdrawal motion as a question of law. *See* ***id.***, ¶¶30-31.

¶6 McCloud contends that the perfunctory nature of the plea colloquy does not prove that he understood the elements of the charges to which he pled. It is McCloud's *prima facie* burden to establish that the colloquy was defective. *See* ***Bangert***, 131 Wis. 2d at 274. He has not met that burden.

¶7 Before accepting McCloud's guilty and no-contest pleas, the trial court asked McCloud if his "lawyer [went] over with [him] that each of these offenses has certain elements or parts to it the State has to prove and then did he identify for you what the elements are?" McCloud responded affirmatively. McCloud also signed a plea questionnaire and waiver of rights form indicating his understanding of the elements of the crimes to which he sought to enter pleas. Also indicative of McCloud's understanding, he entered a no-contest plea to the homicide, as opposed to a guilty plea, expressly because his counsel said that

McCloud claimed that he "ha[d] no recollection nor did he observe running over this individual and therefore cannot stipulate to the fact that it actually happened." While not conclusive of his understanding of the elements of all of the offenses to which he entered pleas, this certainly exhibits an understanding of the distinction of a guilty versus a no-contest plea, and McCloud's recognition that his inability to recall killing one of the victims by running her over in the car that he stole lent itself to a no-contest, as opposed to a guilty plea.

¶8 At sentencing, McCloud's lawyer explained to the court that McCloud

> questioned why am I charged with two robbery counts instead of one. And why is it a robbery count instead of a theft.
>
> [McCloud] understands that it was his intent to take that car. It was – he understands that he wanted Betty Dunn out of that car in order to take it and that he participated in the removal of her. He understands that he is responsible for the reckless conduct of killing her.

McCloud was in the courtroom, presumably listening to those comments. Following those comments, McCloud addressed the court. During his allocution, McCloud had the opportunity to question, clarify, or correct his lawyer's comments. McCloud did not intimate, question, or claim not to understand the charges against him.

¶9 McCloud pursued a postconviction motion and a direct appeal on the issue of multiplicity. It is unlikely that he would challenge the robbery and the operating a vehicle without the owner's consent as multiplicitous without understanding the elements of those crimes.

¶10 McCloud has not met his *prima facie* burden that the trial court did not comply with WIS. STAT. § 971.08 and ***Bangert***. He has also not persuaded us that he failed to understand that he was pleading guilty to robbing Shelby and Dunn, and to taking their car without their consent. His admissions and his lawyer's explanations were sufficient to explain why McCloud was entering a plea, albeit no-contest as opposed to guilty, to second-degree reckless homicide.

¶11 McCloud also contends that the trial court erred by accepting the parties' stipulation to the use of the criminal complaint as a factual basis for his pleas. The prosecutor, McCloud's lawyer and McCloud all agreed that the trial court could use the complaint's allegations as a factual basis for McCloud's pleas. McCloud has not shown why the trial court should have rejected the stipulation to use the complaint as a factual basis for his pleas.

¶12 The prosecutor suggested that the parties stipulate to the facts in the complaint. Defense counsel responded:

> Your Honor, I believe we can do that. As far as the no contest plea is concerned, I would also indicate that in various meetings with Mr. McCloud I have reviewed copies of photos regarding the injuries to the victim and photos of the vehicle involved and tire track testing that was done. I have also reviewed with him [McCloud] the results of tests that were done of the State Crime Lab regarding – or with other experts regarding the matching of the tires from the vehicle which was taken by Mr. McCloud and ultimately those matched up with the tire tracks found on the victim's clothing and the body.
>
> So based on that I think I am comfortable in stipulating to the allegations as made in the complaint, Your Honor, even though as indicated Mr. McCloud does not have a recollection of the event in Count 1 [the homicide to which he entered a no-contest plea].
>
> THE COURT: Sir, there is a criminal complaint in the file. Have you and your lawyer gone over that document together?

THE DEFENDANT: Yes, we have.

THE COURT: Are you satisfied you understand it?

THE DEFENDANT: Yes.

THE COURT: Are the statements in there substantially true?

THE DEFENDANT: Yes.

¶13 Insofar as McCloud is contending that he did not understand or stipulate to the complaint's use as a factual basis, his contentions are belied by the record. If McCloud is contending that he did not understand the allegations of the complaint, he has waived that challenge. McCloud has not shown any error or impropriety in the trial court's acceptance of the parties' stipulation to the use of the complaint's allegations as a factual basis for his pleas. *See* ***State v. Thomas***, 2000 WI 13, ¶¶18-24, 232 Wis. 2d 714, 605 N.W.2d 836.

¶14 In his appellate reply brief, McCloud contends for the first time that he had not realized that "conscious disregard [wa]s an essential element of criminal recklessness," and did not understand the elements of accomplice liability pursuant to WIS. STAT. § 939.05 (1997–98). We generally do not address issues raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). We see no reason to deviate from that general rule in the context of a collateral attack ten years after the conviction.

¶15 McCloud contends that as someone "neither verse[d] with law, nor as a *pro se* litigant equipped with legal expertise to effectuate an effective argument," he has provided a sufficient reason to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). We view his contention of postconviction counsel's ineffectiveness as a sufficient reason to overcome ***Escalona***'s procedural bar. *See* ***Rothering***, 205 Wis. 2d at

682 (postconviction counsel's alleged ineffectiveness "may be in some circumstances … a sufficient reason as to why an issue which could have been raised on direct appeal was not."). Our rejection of McCloud's contentions in the context of plea withdrawal however, renders it unnecessary to reconsider those contentions in the more stringent context of proving postconviction counsel's ineffectiveness. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense.).

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).