COURT OF APPEALS
DECISION
DATED AND RELEASED

September 28, 1995

No. 95-0516-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. CONWAY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Jefferson County: ARNOLD SCHUMANN, Judge. *Affirmed*.

Before Dykman, Sundby, and Vergeront, JJ.

VERGERONT, J. Steven Conway appeals from a judgment of conviction and an order denying his postconviction motion to withdraw his plea of no contest to attempted first-degree intentional homicide. He argues that he has made a *prima facie* showing that the plea colloquy was inadequate and therefore the State has the burden of proving the plea was validly entered, which it has not done. Alternatively, he argues that even if the plea colloquy was adequate, he is entitled to the opportunity to present evidence to show that

he did not understand the charge against him. We conclude the plea colloquy satisfies the requirements of ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), and that the trial court did not err in not permitting Conway to testify to his understanding. We therefore affirm.

Conway was charged with attempted first-degree intentional homicide while armed in violation of §§ 940.01(1), 939.32 and 939.63(1)(a)2, STATS., and battery in violation of § 940.19(1), STATS., with penalty enhancements for habitual criminality under § 939.62, STATS. He was committed to the Mendota Mental Health Institute for a competency observation period and two evaluations were prepared. At the hearing scheduled to determine competency, defense counsel took the position that Conway was competent to proceed and the trial court agreed. Before the hearing, Conway and the State had reached a plea agreement whereby the State would move to dismiss the battery charge, Conway would enter a plea of no contest to the attempted first-degree intentional homicide charge, and the State would recommend a sentence of thirteen years. The court then proceeded to question Conway concerning the plea.

THE COURT: ... So for purposes of my questions, Mr. Conway, the charge that we're talking about is an attempted first degree homicide. Do you understand?

MR. CONWAY: Yes.

THE COURT: Okay. Now, there's a Request to Enter Plea and Waiver of Rights before me. Did you sign that form, sir?

MR. CONWAY: Yes, I did.

THE COURT: Did you read the document?

MR. CONWAY: Yes.

THE COURT: Do you understand it?

MR. CONWAY: Yes.

THE COURT: Do you have any question about it at all?

MR. CONWAY: No.

THE COURT: Did you have enough time to talk to Mr. Michel about these matters?

MR. CONWAY: Yes, I did.

THE COURT: All right. You understand then that if you were to be convicted of attempted first degree homicide, the penalty, the maximum penalty could be 20 years in prison. There would be an additional enhancement of two years with a weapon's enhancer of five years for a total exposure of 27 years in prison. You understand that?

MR. CONWAY: Yes.

THE COURT: You understand there will not be a trial at which the State would have to prove you guilty beyond a reasonable doubt as to each element of the offense as those elements are referred to in paragraph 11, and they are also recited in an attached jury instruction, 1070, attached to the document which you signed. You understand each element of the offense?

MR. CONWAY: Yes.

THE COURT: And you understand there will be no trial at which the State would have to prove those elements beyond a reasonable doubt?

MR. CONWAY: Yes.

THE COURT: Now, knowing that there will be no trial at which the State has to prove you guilty, knowing that you could receive the maximum sentence and knowing that you're giving up the other constitutional rights recited in this document, is it your intention to plead

either guilty or no contest to the attempted first degree homicide charge?

MR. CONWAY: Yes, I do.

THE COURT: Mr. Michel, are you satisfied the defendant understands the nature of the charge and the implications of his plea?

MR. MICHEL: Yes, your Honor. He intends to enter the no contest plea under an Alford situation, and I went over that with him; while he believes that in his mind he did not intend to kill, that he does not want to run the risk of suffering harsher consequences, and under those circumstances he is entering an Alford plea of no contest, and I believe he understands the consequences.

THE COURT: And an Alford plea in effect, Mr. Conway, you understand says that "I didn't do precisely what is charged, but I'm satisfied that if the State went to trial it could prove what it alleges." Do you understand that?

MR. CONWAY: Yes.

THE COURT: That is your desire?

MR. CONWAY: Yes, sir.

The trial court then determined there was a factual basis for the plea, accepted Conway's plea, found him guilty of attempted first-degree intentional homicide and sentenced him to thirteen years in the prison system.

Conway filed a postconviction motion seeking to withdraw his no contest plea on the ground that he did not understand the nature of the charge and, in particular, did not understand the elements of attempt.[1] The trial court

[1] Conway also claimed that the trial court erred in finding him competent. However, he is not appealing the trial court's denial of the motion on that ground.

denied the motion, concluding that the record of the plea hearing established that the requirements of ***Bangert*** were satisfied and it was unnecessary to have Conway testify.

Section 971.08(1)(a), STATS., requires that at a plea hearing the trial court address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted. In ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), the court affirmed the trial court's duty under the statute to ascertain a defendant's understanding of the nature of the charge and added a mandatory obligation that the trial court inform the defendant of the charge's nature or, instead, determine that the defendant, in fact, possesses such information. ***Id.*** at 267, 389 N.W.2d at 23. One of the acceptable methods of ascertaining that the defendant has been informed of the nature of the charge is to refer to and summarize a signed statement of the defendant which demonstrates that the defendant had notice of the nature of the charge. ***Id.*** at 268, 389 N.W.2d at 23-24.

When a defendant makes a *prima facie* showing that his plea was accepted without compliance with § 971.08, STATS., and ***Bangert***, and alleges that he did not know or understand the information that should have been provided at the plea hearing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered despite the inadequacy of the record at the time of the plea's acceptance. ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26. Whether a defendant has established a *prima facie* case presents a question of law that we review *de novo*. ***State v. Hansen***, 168 Wis.2d 749, 755, 485 N.W.2d 74, 77 (Ct. App. 1992).

Conway contends that the trial court's colloquy was inadequate to establish that he understood the elements of the crime with which he was charged for two reasons. First, the plea questionnaire did not itself state the elements of attempted first-degree intentional homicide, but instead referred to the jury instructions for that offense. Second, the trial court's question to Conway on his understanding of the elements of the offense was a compound question. We conclude that neither of these points makes the colloquy inadequate.

Item 11 of the Request to Enter Plea and Waiver of Rights form states: "I understand that in order to obtain a conviction in my case, the State must prove beyond a reasonable doubt all of the elements of the offense(s) to which I am pleading guilty or no contest and that those elements are: ...." In the blank immediately following was written, "See attached Jury Instruction 1070 a copy of which was provided to defendant." WIS J I—CRIMINAL 1070 (Attempted First Degree Intentional Homicide) is attached to the plea questionnaire. It states and defines the two elements of the offense: (1) that the defendant intended to kill the victim, and (2) that the defendant's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed the victim except for the intervention of another person or some other extraneous factor.

The reference to WIS J I—CRIMINAL 1070 in the plea questionnaire, coupled with its attachment to the questionnaire, is an adequate substitute for describing the elements of the crime in the blank following item 11. Indeed, the jury instruction provided more information about the elements of the offense than could be written in the blank. When the trial court referred to the plea questionnaire and asked Conway whether he signed it, read it, understood it, and had any questions about it, those questions can be reasonably understood to include the attached jury instruction as well as the form itself. The form expressly referred to the instruction and said it was attached and had been provided to Conway.

When the trial court questioned Conway about his understanding of the elements of the crime, it expressly referred to the elements as being "recited in an attached jury instruction, 1070, attached to the document which you signed." This reference was immediately followed by the question: "You understand each element of the offense?" to which Conway answered yes.

We reject Conway's contention that the sentence preceding this question created a compound question that was confusing. The preceding sentence did refer both to the fact that the plea meant that there would not be a trial and to the elements of the offense. But following that sentence the trial court asked two questions--one directed to Conway's understanding of the elements of the offense and one directed to his understanding that there would be no trial at which the State would have to prove those elements beyond a reasonable doubt. Conway answered yes to both questions. We see no confusion here.

We conclude that the trial court did comply with the requirements of ***Bangert*** and § 971.08(1)(a), STATS., by establishing that Conway had been informed of the elements of the offense and that he understood that information.

We turn to Conway's contention that even if the plea colloquy is adequate, the trial court erred in not permitting him to testify to show that he did not in fact understand the elements of the offense. Conway relies on ***State v. Washington***, 176 Wis.2d 205, 500 N.W.2d 331 (Ct. App. 1993), in which we held that on a motion to withdraw a guilty plea for ineffective assistance of counsel, a defendant is entitled to an evidentiary hearing only if the motion makes factual assertions which, if true, would entitle the defendant to relief. ***Id***. at 215, 500 N.W.2d at 336.

Washington does not provide support for Conway's position. Assuming for purposes of discussion that the right to an evidentiary hearing under the conditions described in ***Washington*** applies even if a plea colloquy is adequate, Conway's motion did not make any pertinent factual assertions. The only factual assertions are those specifying the alleged inadequacies in the colloquy. The motion then states, "In light of the aforesaid defendant entered a plea of no contest without understanding the nature of the charge, and in particular did not understand the elements of an `attempt.' Accordingly, defendant's plea was not knowingly and voluntarily entered." This is a conclusory allegation. The motion does not contain any factual assertions that indicate what evidence Conway would present if the colloquy were found to be adequate.

In this case, the trial court did hold a hearing on the motion. Conway's counsel asked that Conway be permitted to testify, but did not indicate what Conway would testify to that would require a withdrawal of the plea if the colloquy were determined to be adequate. In light of this, and the lack of factual assertions in the motion, we conclude Conway was not entitled to testify, even if ***Washington*** did apply in this context.

Conway also reads ***Hansen*** to entitle him to an evidentiary hearing even if the plea colloquy was adequate. In ***Hansen***, we concluded that there *was* a *prima facie* showing that the plea hearing was inadequate. ***Hansen,*** 168 Wis.2d at 756, 485 N.W.2d at 77. We determined that the trial court did not ascertain

that the defendant understood that by entering the plea he was giving up the constitutional rights detailed in the plea questionnaire and waiver of rights form. We remanded for the court to determine whether the State met its burden of showing by clear and convincing evidence that the plea was nevertheless valid. We noted that although the trial court did assess the full evidentiary record, "this was not done under the correct burden of proof assigned to the proper party." ***Id.*** at 756, 485 N.W.2d at 77. This phrase refers to the fact that the trial court had erred in assessing the evidentiary record without assigning the burden of proof to the State.

Conway reads too much into this phrase from ***Hansen***. He argues that it means that an evidentiary hearing is required whether or not the defendant makes a *prima facie* showing that the colloquy was inadequate.[2] It does not. The procedures established in ***Bangert*** to satisfy the constitutional and statutory requirements for a voluntary and knowing plea would have little meaning if, in every instance where the procedures were followed, the defendant was nevertheless entitled to an evidentiary hearing to show that the plea was not voluntary and knowing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[2] The trial court in ***Hansen*** did initially determine that the defendant had not made a *prima facie* showing that the colloquy was inadequate, based on the transcript of the plea hearing, but then proceeded to take evidence. At the conclusion of the hearing the court denied the motion. ***State v. Hansen***, 168 Wis.2d 749, 753, 485 N.W.2d 74, 76 (Ct. App. 1992). However, the issue of whether the trial court was required to continue the hearing to take evidence after the initial determination was not addressed on appeal.