COURT OF APPEALS
DECISION
DATED AND RELEASED

October 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2931-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GILBERTO FLORES,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

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

PER CURIAM. Gilberto Flores appeals from an order denying his motion for postconviction relief. He argues that the trial court erred in denying his request for an evidentiary hearing on his motion to withdraw his guilty pleas. He also argues that the trial court erred in denying without a hearing his motion for postconviction relief claiming ineffective assistance of appellate counsel. We affirm.

Flores was charged with two counts of retail theft, two counts of obstructing a police officer, one count of resisting a police officer, one count of battery to a police officer, one count of bail jumping, and one count of felony escape. Flores agreed to plead guilty to all counts and was sentenced. Subsequently, Flores filed a postconviction motion, seeking to withdraw his guilty pleas. The trial court denied the motion, holding that Flores failed to provide the trial court with a sufficient factual basis to set the matter for a hearing. Flores's counsel then failed to initiate an appeal. After receiving successor appellate counsel, Flores appealed the judgment of conviction and the trial court's sentencing order. This court summarily affirmed the trial court, noting that Flores had not made a proper record in support of his motion. *See* ***State v. Flores***, Nos. 94-1376-CR, 94-1377-CR, 94-1379-CR, 94-1380-CR, 94-1769-CR, unpublished summary order at 5 (Wis. Ct. App. April 21, 1995).

Flores then filed another postconviction motion arguing that his pleas were not constitutionally taken because he did not understand the nature of the charges and was not advised of the rights he was waiving by entering the pleas. Flores also alleged that his first appellate attorney was ineffective because he failed to make a proper postconviction record and failed to perfect Flores's appeal.

The trial court ordered Flores to file a supplemental motion to "set forth by affidavit or other offer of proof the particular information which he claims he failed to understand and of which he should have been advised." Flores filed a supplemental affidavit in response to the trial court's order. The trial court denied Flores's motion without a hearing, ruling that the affidavit was merely conclusory. The trial court also ruled that Flores's claim of ineffective assistance of appellate counsel must be raised by petition in the court of appeals. *See* ***State v. Knight***, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992).

After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A plea is manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. ***State v. Giebel***, 198 Wis.2d 207, 212, 541 N.W.2d 815, 817 (Ct. App. 1995). In order to assure that a plea is so entered, the trial court is obligated by § 971.08(1)(a), STATS., to ascertain that a defendant understands the nature of and potential punishment for the charge and that a factual basis exists for a finding of guilt. ***State v. Bangert***, 131 Wis.2d

246, 260-261, 389 N.W.2d 12, 20 (1986). It must also ascertain that the defendant understands the constitutional rights he or she is waiving. ***Id.***, 131 Wis.2d at 270-272, 389 N.W.2d at 24-25. To withdraw a plea, a defendant must first make a *prima facie* showing of noncompliance by the trial court, and allege that he or she did not understand the information that "should have been provided at the plea hearing." ***Id.***, 131 Wis.2d at 274, 389 N.W.2d at 26.

Flores contends on appeal that he was entitled to withdraw his guilty pleas because he did not understand the nature of the charges to which he was entering the pleas and that he was not advised that he was waiving his constitutional right not to incriminate himself by entering the pleas. He bases his argument on the following plea colloquy:

> THE COURT: So that you understand that by entering pleas of guilty to these charges, all of these charges, what you're telling me, the Court, is that you're guilty of what's contained in the criminal complaint.
>
> THE DEFENDANT: Yes, that's true.
>
> THE COURT: And you have read all of these criminal complaints and you understand what you're charged with?
>
> THE DEFENDANT: Yes.

....

> THE COURT: You understand how the facts in each of those cases relate to the charges made in those cases?
>
> THE DEFENDANT: Yes, I understand.

The State concedes, and we agree, that the above noted plea colloquy was insufficient to meet the requirements of ***Bangert***. *See* § 971.08(1)(a), STATS. A *prima facie* showing of noncompliance with the mandatory procedures,

however, does not automatically entitle a defendant to either an evidentiary hearing or postconviction relief. As noted, a defendant must allege that he or she, in fact, "did not know or understand the information which should have been provided at the plea hearing." ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26.

Flores filed an affidavit in support of his claim that he was not properly informed of the nature of the crimes:

> Due to the inadequate plea colloquy between the Honorable Rudolph Randa and the Defendant, the Defendant was not aware of the elements of each offense to which he was pleading guilty. The trial court never read, summarized, referred to statute, requested counsel to summarize, nor in any other manner assured that Defendant knew or understood the elements of: 1) battery to peace officer; 2) retail theft; 3) obstruction of peace officer; 4) resisting arrest; or 5) escape.

With respect to Flores's claim that he was not properly advised of the constitutional rights he was waiving by entering a guilty plea, Flores alleged in his affidavit:

> Moreover, even though the trial court explained that Defendant was waiving certain rights, it never mentioned three basic Constitutional rights which were being waived: 1) the right not to incriminate himself; 2) the right to present evidence in his own behalf; and 3) the right to confront his accusors [sic]. Again, knowledge of these rights cannot be assumed, since the trial court did not adequately address defense counsel to determine whether counsel explained these rights to Defendant.

Based on the above affidavit, the trial court ruled that Flores had not alleged sufficient facts to warrant an evidentiary hearing or to entitle him to postconviction relief. We agree. Flores has not alleged, except in a conclusory fashion, what he in fact did not understand regarding the nature of the crimes or what he did not understand regarding the constitutional rights he was waiving by entering the guilty pleas. Without such allegations, the trial court was not required to grant Flores an evidentiary hearing and properly denied his motion to withdraw his guilty pleas. *See* ***State v. Saunders***, 196 Wis.2d 45, 49-52, 538 N.W.2d 546, 548-549 (Ct. App. 1995).

Flores also argues that he received ineffective assistance of appellate counsel. He claims that counsel was ineffective for filing an inadequately drafted postconviction motion and because he failed to file an appeal from the trial court's order denying relief. Regardless of the validity of Flores's arguments, his claims are moot because he received replacement counsel who brought a second postconviction motion and two appeals. Flores has had ample opportunity to develop his claims of error, and has been given the direct appeal he claims that his prior appellate counsel did not pursue.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.