COURT OF APPEALS
DECISION
DATED AND RELEASED

July 15, 1997

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. 96-0852-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STANLEY HESS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

PER CURIAM. Stanley Hess, after entering a no-contest plea, appeals from a judgment of conviction for first-degree recklessly endangering

safety.[1] Hess also appeals from an order denying his motion for postconviction relief. Hess raises two issues for review: (1) whether the trial court erred by not permitting Hess to withdraw his no contest plea on the ground that he did not understand the nature of the charge; and (2) whether the trial court erroneously concluded that Hess was not denied effective assistance of trial counsel. We affirm.

I. BACKGROUND.

The State filed a criminal complaint alleging the following facts. Hess fought with Jesse Jarvey and other individuals in a Milwaukee tavern. The owner ejected all of the participants from the tavern. While walking away from the tavern, Jarvey encountered Hess. Hess and Jarvey then fought again on the sidewalk and Hess stabbed Jarvey twice in the back. Hess was arrested and charged with first-degree recklessly endangering safety while armed with a dangerous weapon.

After waiving his preliminary hearing, Hess pleaded no contest to first-degree recklessly endangering safety and, in response to the State's motion, the trial court dismissed the penalty enhancer. The trial court convicted Hess of the charged offense and sentenced him to five years in prison. He later filed a motion seeking postconviction relief, alleging that he had entered his plea without a full understanding of the charge against him, and that he had received ineffective assistance of trial counsel. After an evidentiary hearing, the trial court denied Hess's motion.

[1] On April 18, 1995, the trial court ordered the judgment of conviction to be amended to reflect a conviction contrary to § 941.30(1), STATS. The original judgment of conviction erroneously stated § 940.30(1), STATS.

II. ANALYSIS.

A. Plea voluntariness.

Hess argues that his no contest plea was involuntary because he did not understand the nature and the elements of the charge to which he pleaded.

1. Standard of Review

Defendants are entitled to withdraw their pleas as a matter of constitutional right if they demonstrate that they did not understand the elements of the crime to which they pled. ***State v. Garcia***, 192 Wis.2d 845, 864, 532 N.W.2d 111, 118 (1995). Defendants have the initial burden to make a prima facie showing that the trial court failed to follow the proper procedures when accepting their plea. ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986).[2] If defendants meet their burden and allege that they did not understand the elements of the offense to which they pled, the burden shifts to the State to show by clear and convincing evidence that they entered their pleas knowingly and voluntarily despite the procedural flaw. ***Id***.

Whether a plea was voluntarily and intelligently entered is a question of constitutional fact which this court reviews *de novo*. ***Id***. at 283, 389 N.W.2d at 30. We will not upset a trial court's findings of facts unless they are clearly erroneous. ***Id***. at 283-84, 389 N.W.2d at 30. If a trial court fails to make an express finding of fact, we are bound to look for evidence in the record to

[2] The procedures which a trial court should follow when accepting a no contest plea are stated at § 971.08(1), STATS., and are discussed in detail in ***State v. Bangert***, 131 Wis.2d 246, 256-72, 389 N.W.2d 12, 18-25 (1986).

support the ruling. ***State v. Mohr***, 201 Wis.2d 693, 701-02, 549 N.W.2d 497, 500 (Ct. App. 1996).

2. Analysis

Hess has met his initial burden of proof. The trial court failed to refer to the elements of the crime during the plea colloquy. Instead, the trial court told Hess that "the state would have to prove you guilty beyond a reasonable doubt." Nothing else in the record compensates for this error by the trial court. Although the trial court had several options under ***Bangert***, it failed to utilize any of them properly. *See* ***Bangert***, 131 Wis.2d at 268, 389 N.W.2d at 23-24. Therefore, Hess has made a prima facie showing that the trial court did not follow the proper procedures.

The State, however, also has met its burden. Hess's trial counsel testified at the postconviction evidentiary hearing:

> [I] went through what the charging section in the complaint actually said and then just *explained to him [Hess] what the elements were of the offense that the State would have to prove* … [I] did have a copy of the jury instructions in my file and *I did read the elements from the jury instruction form.*

(Emphasis added.) Although the trial court did not make a specific finding of this fact, we conclude that Hess's trial counsel's testimony supports the trial court's ultimate ruling. *See* ***Mohr***, 201 Wis.2d at 701-02, 549 N.W.2d at 500. Therefore, we conclude that the State did show by clear and convincing evidence that Hess, despite the procedural defect, had the constitutionally required level of understanding of the offense to which he pled.

B. Ineffective assistance of counsel.

Hess next argues that his counsel was ineffective for failing to adequately advise him and explain the interplay between the elements of the charged offense and a self-defense theory.

1. Standard of Review

Hess may not succeed in an ineffective assistance of counsel claim unless he has satisfied the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). Hess must show that his trial counsel's performance was both deficient and prejudicial. ***Id***. at 687. If Hess fails to show one prong, this court need not address the other prong. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

To show that counsel's performance was deficient, Hess must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Because of the difficulties involved in making a post hoc evaluation, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id***. at 690.

"In order to show prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (citation omitted). "The ***Strickland*** test is not an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court

has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis.2d 259, 277, 558 N.W.2d 379, 387 (1997) (citations omitted).

In reviewing the trial court's decision, we accept its findings of fact unless they are clearly erroneous while reviewing "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990) (citation omitted).

2. Analysis

Hess alleged in his postconviction motion that his trial counsel provided ineffective assistance of counsel by misinforming him of what the State would have to prove at trial. In his memorandum in support of his postconviction motion, Hess's appellate counsel argued that Hess "most likely would not have entered his plea" if his trial counsel had not "equated a failure of self-defense with the State's proof of recklessness." A showing that a defendant most likely would not have entered his plea, however, does not establish prejudice within the meaning of ***Strickland***. On the contrary, where the alleged error of counsel is the failure to properly explain an affirmative defense, this court must look to whether the affirmative defense likely would have succeeded at trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Although Hess focused in his postconviction briefs on the assertion that he "most likely would not have entered his plea," his appellate arguments are based on the belief that had his trial counsel acted differently, he would have likely succeeded at trial. Hess essentially argues that a jury could simultaneously find that he had used an excessive degree of force in self-defense, but also that he

had not acted "recklessly" under circumstances which show utter disregard for human life. While such a jury finding was possible, other facts show that Hess's chance of success at trial was poor.

First, Hess's counsel testified that he had discussed a police report with Hess that stated that, following the bar fight, Hess's friend's girlfriend observed Hess "ranting and raving he was going to get this guy [Jarvey]." Hess's counsel also testified that he told Hess that he "thought that was going to be very damning testimony." This testimony, combined with the fact that the victim in the case had been stabbed twice in the back, made the defendant's chances of success on any theory, including one based on the highly legalistic "interplay" between "recklessness," "intent based crimes" and "self-defense" very slim. Therefore, we agree with the trial court's conclusion that Hess was not prejudiced by his counsel's advice within the meaning of ***Strickland***.

Having examined and rejected Hess's arguments as to prejudice, this court need not address Hess's arguments as to deficiency. ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76.

By the Court.—Judgment and order affirmed.

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