COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0693-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN C. WIZNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Steven C. Wizner appeals from a judgment of conviction of manufacturing of marijuana. The sole issue is whether prior to sentencing he should have been allowed to withdraw his no contest plea because he lacked an understanding of the elements of the offense and the constitutional rights he was waiving. We affirm the judgment.

A motion to withdraw a plea prior to sentencing is addressed to the discretion of the trial court. *See* ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). We review the circuit court's resolution of the motion for an erroneous exercise of its discretion. *See* ***id.*** A defendant has the burden to show by a preponderance of the evidence that there is a "fair and just reason" for withdrawal of the plea. *See* ***id.*** at 861-62, 532 N.W.2d at 117.

"A plea of no contest that is not voluntarily, knowingly, and intelligently entered violates fundamental due process. A plea may be involuntary either because the defendant does not have a complete understanding of the charge or because he or she does not understand the nature of the constitutional rights he or she is waiving." ***State v. Van Camp***, 213 Wis.2d 131, 139-40, 569 N.W.2d 577, 582 (1997) (citations omitted). Whether a plea is voluntarily, knowingly and intelligently entered is a question of constitutional fact which we address independent of the conclusion of the trial court. *See* ***id.*** at 140, 569 N.W.2d at 582. The trial court's findings of evidentiary or historical facts will not be disturbed unless they are clearly erroneous. *See* ***id.***

Wizner argues that the trial court did not advise him and he did not understand the elements of the offense when he entered the plea. When faced with such a claim, we employ a two-step process. We first determine if the defendant has made a prima facie showing that his plea was accepted without the trial court's conformance with § 971.08, STATS., which requires the court to address the defendant personally to ascertain his or her understanding of the nature of the charge. *See* ***Van Camp***, 213 Wis.2d at 141, 569 N.W.2d at 583. Only if the defendant satisfies this threshold is the additional inquiry of whether the record establishes a valid plea necessary.

Wizner points out that the term "grow" was used to describe the elements of the offense to him. He suggests that he lacked an understanding of the charge because the statutory definition of "manufacture" does not include "growing."

The term manufacture includes "production." *See* § 961.01(13), STATS. Production means the "planting, cultivating, growing or harvesting of a plant" from which marijuana is derived. *See* § 961.01(20). Thus, manufacture includes the growing of plants. *See* ***State v. Maul***, 151 Wis.2d 349, 351, 444 N.W.2d 430, 431-32 (Ct. App. 1989). Explaining the elements of the crime to include growing plants was adequate.

The trial court found from Wizner's testimony that he did not understand the elements of the offense incredible. At the plea hearing, Wizner's attorney represented to the court that Wizner was active in his defense and that the two had spent hours going over the elements of the offense.[1] The finding that Wizner's claim of misunderstanding was incredible is not clearly erroneous. Therefore, no fair and just reason exists to allow withdrawal of the plea. *See* ***Garcia***, 192 Wis.2d at 863, 532 N.W.2d at 118.

Wizner also argues that his conduct did not fall within the definition of manufacturing because he did not plant, care for or cultivate the marijuana

[1] Wizner's claim on appeal that the definitions of manufacturing and production are "far to much linguistic traveling for a man with an 8th grade education" is barred by judicial estoppel. Wizner went to great lengths to clarify for the trial court that he possessed sufficient reading, writing, and comprehension skills to enter a valid plea. A position on appeal which is inconsistent with that taken at trial is subject to judicial estoppel. *See* ***State v. Michels***, 141 Wis.2d 81, 97-98, 414 N.W.2d 311, 317 (Ct. App. 1987).

plants found in his yard. We read this claim to be that as a matter of law his conduct did not constitute a crime.

The complaint, which was used as a factual basis for the plea, indicated that Wizner had received the marijuana plants in paper cups and transferred the plants to the ground. After that point, it mattered little if Wizner had cared for the plants or they just naturally grew to be the high quality marijuana plants described in the complaint. Wizner could not maintain that his crime was one of omission rather than commission. A factual basis exists for the plea. No fair and just reason exists to permit Wizner to withdraw his plea based on a misunderstanding of the elements of the offense.

Wizner's other claim is that the trial court failed to advise him about the constitutional rights he was waiving. The State argues that Wizner raises this issue for the first time on appeal. We are not obligated to address a ground for plea withdrawal which is advanced for the first time on appeal. *See* ***State v. Koerner***, 32 Wis.2d 60, 64, 145 N.W.2d 157, 159 (1966) ("This court has consistently held that a review of a trial court's discretion in refusing to allow the withdrawal of a plea would not proceed beyond those grounds actually presented for the trial court's consideration.").

Nonetheless we are able to conclude from the record, that even if the trial court failed to adequately address the constitutional rights Wizner was

waiving, Wizner entered a valid plea.[2] At the plea hearing, the trial court first examined Wizner about the four page "Request to Enter Plea and Waiver of Rights" form Wizner had signed before the hearing. That form listed the constitutional rights that Wizner was giving up by entry of his no contest plea. Wizner acknowledged to the court that he understood the form a "hundred percent." When the court realized that Wizner had no previous offenses and therefore no experience with the criminal justice system, it indicated that it would "go through this even a little more closely." The trial court asked the defense attorney to explain how the waiver of rights form had been reviewed with Wizner. Wizner's attorney remarked that "we have gone over his rights extensively." The trial court explained the jury trial process and how Wizner could be found not guilty if twelve citizen jurors could not agree on a verdict. Wizner acknowledged that he was giving up the right to a jury trial.

Not only did the trial court touch upon Wizner's right to a jury trial, it explored Wizner's understanding of his constitutional rights as exhibited by the execution of the waiver of rights form and the discussions he had with his attorney. The court may look to the waiver of rights form to determine if his plea was knowingly and intelligently made. *See* ***Garcia***, 192 Wis.2d at 866, 532 N.W.2d at 119. That form, coupled with Wizner's confident assertion at the plea hearing that he understood everything on it, including the explication of his constitutional rights, leads to the conclusion that Wizner's plea was valid.

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[2] Should the defendant make a prima facie case that the trial court's colloquy was inadequate and that he or she did not know or understand the information which was not provided, the burden shifts to the State to demonstrate by clear and convincing evidence that the defendant's plea was voluntarily, knowingly and intelligently entered. *See* ***State v. Van Camp***, 213 Wis.2d 131, 145, 569 N.W.2d 577, 584 (1997). The entire record may be utilized to demonstrate that the defendant entered a valid plea. *See* ***State v. Garcia***, 192 Wis.2d 845, 865-66, 532 N.W.2d 111, 119 (1995).

By the Court.—Judgment affirmed.

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