COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1781-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

IRVING WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

CURLEY, J. Irving Washington appeals from a judgment of conviction entered after he pleaded guilty to retail theft as a habitual criminal, contrary to §§ 943.50(1m) and (4)(a), and 939.62, STATS. Washington also appeals from an order denying his postconviction motion for plea withdrawal. Washington argues that he should be allowed to withdraw his plea on the grounds that: (1) his plea was not knowingly, intelligently and voluntarily entered and;

(2) he was denied the effective assistance of counsel. We disagree and affirm the trial court's judgment and order.

I. BACKGROUND.

After entering a guilty plea pursuant to a plea agreement, Washington was convicted of retail theft as a habitual criminal. At sentencing, pursuant to the plea agreement, the State recommended a one-year prison term, consecutive to the sentence Washington was then serving. After accepting Washington's guilty plea, the trial court sentenced Washington to a three-year prison term, consecutive to the sentence he was already serving. Washington then decided to file a postconviction motion for plea withdrawal. Washington's motion alleged that his plea was not entered knowingly, voluntarily and intelligently, and that he was denied the effective assistance of counsel. Following a ***Machner*** hearing,[1] the trial court denied Washington's motion. Washington now appeals.

II. ANALYSIS.

A. Plea withdrawal claims.

A defendant is entitled to withdraw his plea as a matter of constitutional right if he demonstrates that he did not understand the elements of the crime to which he pled. ***State v. Garcia***, 192 Wis.2d 845, 864, 532 N.W.2d 111, 118 (1995). Section 971.08(1)(a), STATS., requires a trial court, when accepting a guilty plea, to "[a]ddress 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, 268, 389

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

N.W.2d 12, 23 (1986), the Wisconsin Supreme Court outlined three methods by which a trial court may fulfill this obligation.

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, or from the applicable statute. Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing. Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing.

If a defendant makes a *prima facie* showing of a violation of § 971.08(1)(a), STATS., and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden then shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered. ***Bangert***, 131 Wis.2d at 275, 389 N.W.2d at 26. In meeting its burden, the State may utilize the entire record to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the plea colloquy failed to provide him. ***Id.*** For example, the "state may examine the defendant or defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea." ***Id.*** The court may also look to the guilty plea questionnaire form signed by the defendant to determine if his plea was voluntarily, knowingly and intelligently made. ***State v. Moederndorfer***, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct.App.1987).

In the instant case, the State concedes that the trial court violated § 971.08(1)(a), STATS., by failing to follow, in its plea colloquy, one of the three

methods outlined in ***Bangert***. Therefore, we conclude that Washington has met his *prima facie* burden of showing of a violation of § 971.08(1)(a). Because Washington has met his burden of proof, and has alleged that he did not in fact know or understand the information which should have been provided at the plea hearing, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered. ***Bangert***, 131 Wis.2d at 275, 389 N.W.2d at 26. A review of the entire record demonstrates that the State has met its burden of presenting clear and convincing evidence that Washington understood the constitutional rights that he was waiving by pleading guilty and that he understood the elements of the crime with which he was charged.

The State has produced a large volume of evidence that Washington's plea was entered knowingly, voluntarily and intelligently. At the postconviction motion hearing, Washington's trial counsel testified that he went though the guilty plea questionnaire and waiver of rights form with Washington line by line, and that after going through the questionnaire, Washington signed the front and back of the form. Washington's trial counsel also testified that he discussed each and every element of the crime of retail theft with Washington. Further, he testified that he discussed the fact that the elements of the crime of retail theft were consistent with Washington's prior convictions for retail theft,[2] and that he believed Washington understood that his conduct in the instant case did constitute retail theft. Additionally, although the trial court's colloquy was brief, the trial court did specifically ask Washington: (1) whether he had read and

[2] Washington apparently had thirty-two prior convictions at the time of sentence, ten of which were for retail theft.

signed the waiver of rights form; (2) whether his attorney had read and gone over the form with him, and had explained the rights he was waiving and the elements of the offense to which he was pleading; (3) whether he understood what rights he was waiving; (4) whether he understood the elements of the offense, and; (5) whether he understood the court was not bound by any plea negotiations. Washington answered affirmatively to all of these questions.

In response, Washington has presented as evidence that he did not enter his plea knowingly, voluntarily and intelligently, only his self-serving testimony at postconviction motion hearing. At the hearing, Washington testified that his lawyer never went over the guilty plea questionnaire with him, that he did not understand the constitutional rights he was waiving and that he did not understand the elements of the offense to which he was pleading. Credibility determinations, however, are left to the trial court. See ***State v. Owens***, 148 Wis.2d 922, 930-31, 436 N.W.2d 869, 872-73 (1989). In this case, the trial court plainly disbelieved Washington's testimony, as it had a right to do as the finder of fact. Therefore, given all of the evidence presented by the State, and Washington's meager response, we conclude that the State has met its burden of proving by clear and convincing evidence that Washington understood the constitutional rights that he was waiving by pleading guilty and that he understood the elements of the crime with which he was charged.

B. Ineffective assistance of counsel claims.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington,*** 466 U.S. 668, 690 (1984); ***Bentley***, 201 Wis.2d at 311-12, 548 N.W.2d at 54. To prove deficient performance, a defendant must

show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id***. We will "strongly presume" counsel to have rendered adequate assistance. ***Id***.

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. However, if this court concludes that counsel's performance was not deficient, we need not address the prejudice prong. See ***id***. at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

We conclude that Washington has failed to establish that his counsel acted deficiently. Although Washington claims that his counsel was deficient for failing to go over the guilty plea questionnaire with him, and for failing to ensure that he understood the rights he was waiving, and the elements of the offense to which he pled, his claims are based wholly on his own self-serving testimony. It is clear that, although the trial court failed to make an explicit finding of fact on the issue, it implicitly made a factual finding that Washington's testimony was incredible. *See* ***Schneller v. St. Mary's Hospital Medical Ctr***., 162 Wis.2d 296, 311-12, 470 N.W.2d 873, 879 (1991) (a trial court's finding of fact may be implicit from its ruling). This implicit finding of fact is not clearly erroneous, and therefore, must be upheld. Consequently, because Washington has failed to prove deficiency, we need not consider the prejudice prong, and his ineffectiveness claim fails.

By the Court.—Judgment and order affirmed.

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