COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0710-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OTIS J. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Otis J. Martin appeals from his conviction on three counts of second-degree sexual assault, one count of second-degree recklessly endangering safety, and one count of battery, and from the order denying him postconviction relief. He claims he was entitled to a hearing on his motion to

withdraw his no contest pleas. Because we agree with the trial court that Martin failed to allege facts sufficient to warrant a hearing, we affirm.

BACKGROUND

A complaint filed on January 8, 1997, charged Martin with four counts of misdemeanor battery, three counts of felony sexual assault, one count of felony false imprisonment, one count of felony reckless endangerment while armed, and two counts of felony bail jumping, based upon Martin's treatment of his girlfriend[1] during several episodes of domestic violence. The State dismissed and read in the false imprisonment and bail jumping charges, three of the battery counts, and three counts from a subsequent complaint of solicitation to intimidate a witness, in exchange for Martin's plea of no contest on the remaining charges.

Martin signed a plea questionnaire which indicated that he wished to enter pleas to the charges of "battery, reckless endanger, sex assault," and that he understood that the court would be free to sentence him to prison for "9 mos, 5 yrs, 20 yrs." At the plea hearing, the court clarified that Martin would be pleading to three counts of second-degree sexual assault, in addition to the battery and reckless endangerment charges, and that the court would be free to sentence him to twenty years on *each* of the sexual assault counts. While Martin acknowledged at the plea hearing that he was pleading guilty to each of the five charges on which he was convicted, the presentence investigation report related that, at some point after the plea, but before sentencing, Martin had stated, "A lot of those charges aren't true. Because I can't get out of them, I pled to three of them."

[1] Although Martin was married, he was apparently living with the victim.

After Martin was sentenced, he filed a motion to withdraw his plea on the grounds that his plea had been unknowingly given. The trial court found that the plea colloquy was sufficient to show that the plea had been knowingly given, and denied the motion without taking additional evidence. Martin appeals.

STANDARD OF REVIEW

We will review the circuit court's decision not to hold an evidentiary hearing *de novo*, independently determining whether the facts alleged by Martin could establish the denial of a constitutional right sufficient to warrant the withdrawal of his plea. *See* ***State v. Bentley***, 201 Wis.2d 303, 308, 548 N.W.2d 50, 52-53 (1996); ***State v. Van Camp***, 213 Wis.2d 131, 140, 569 N.W.2d 577, 582 (1997).

DISCUSSION

A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Krieger***, 163 Wis.2d 241, 250-51, 471 N.W.2d 599, 602 (Ct. App. 1991). A plea which is not knowingly, voluntarily, and intelligently entered violates due process; and therefore, it constitutes a manifest injustice. ***Id.***; ***Van Camp***, 213 Wis.2d at 139, 569 N.W.2d at 582. "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." ***Van Camp*** at 139-140, 569 N.W.2d at 582.

Before accepting a plea, the trial court has an affirmative duty to examine the record and question the defendant and/or counsel in open court:

> (1) To determine the extent of the defendant's education and general comprehension;
>
> (2) To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries;
>
> (3) To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty;
>
> (4) To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused;
>
> (5) To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him; and
>
> (6) To personally ascertain whether a factual basis exists to support the plea.

State v. Bangert, 131 Wis.2d 246, 261-62, 266, 389 N.W.2d 12, 21, 23 (1986) (citations omitted); § 971.08, STATS.[2]

A defendant must be given an evidentiary hearing on a motion to withdraw a plea when he alleges facts which, if true, would be sufficient to entitle him to relief. ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53. No hearing is required when a defendant presents only conclusionary allegations, or the record conclusively demonstrates that he is not entitled to relief. ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972).

Here, Martin alleged that he had not been given an opportunity to review the plea questionnaire or discuss it with counsel; that he did not understand the details of the plea (specifically, that it involved five rather than three charges); that he did not understand the nature of the constitutional rights which he was

[2] Because Martin was represented by counsel, and makes no claim that his plea was involuntary or unsupported by the facts adduced at the preliminary hearing, only the first two of these six duties are at issue on this appeal.

waiving due to borderline mental retardation; and that the trial court failed to examine the defendant regarding his ability to understand the plea proceedings and failed to ask counsel whether he had discussed the plea with his client and believed that he understood it. However, our review of the record satisfies us that the trial court properly determined that the extent of the defendant's education and general comprehension and his understanding of the nature and potential punishments of the offenses charged were sufficient to establish that his plea was knowingly given.

The record shows that the circuit court specifically asked Martin whether he believed that he had had sufficient time to confer with his attorney and whether he had gone through each and every question on the plea questionnaire with counsel prior to signing it. Martin answered each inquiry in the affirmative.

The circuit court went through the elements of all five counts in open court. The court made a special effort to factually differentiate the three sexual assault charges based on the acts that occurred. When the circuit court sequentially asked Martin how he pleaded to each one of the charges, Martin replied "[n]o contest" five separate times.

Furthermore, although the circuit court did not personally question Martin as to his ability to understand the plea, the plea questionnaire which the court had before it indicated that Martin had a high school education and could read, write and understand English. In addition, the presentence investigation report (PSI) indicated that Martin had participated in football, baseball, basketball, art classes, and music in high school, and had held managerial positions at a car wash and an apartment complex. These activities all signify a level of intellectual function sufficient to understand the consequences of his plea, and support the PSI

author's characterization of Martin as "a fairly intelligent individual with some difficulty with reading and writing."

Martin argues in his reply brief that this court should not consider any information about his work history because the PSI was not before the circuit court when it accepted his plea. However, the PSI was before the circuit court when it ruled on the plea withdrawal motion, and we note that Martin himself relied upon the PSI to support his claim that he believed he had pleaded to three rather than five charges.

In short, Martin's allegations were insufficient to make a *prima facie* showing that his plea was unknowingly given in light of the measure taken by the circuit court. Because the record conclusively demonstrated that Martin was not entitled to relief, the trial court was not required to hold an evidentiary hearing before denying the plea withdrawal motion.

By the Court.—Judgment and order affirmed.

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