

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal Nos. 02-1594-CR
02-2465-CR**

Cir. Ct. No. 01-CT-457

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES A. SYBERS,

DEFENDANT-APPELLANT.

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

¶1 VERGERONT, P.J.¹ James Sybers appeals the judgment of conviction for driving while intoxicated (OWI) in violation of WIS. STAT. § 346.63(1)(a) second offense, and the order denying his motion for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

postconviction relief. He contends his plea of guilty to the charge was not entered knowingly, voluntarily, and intelligently. He also contends his trial counsel did not provide effective assistance of counsel because counsel failed to inform him of a viable defense to the allegation that he refused to submit to a chemical test under Wisconsin's Applied Consent Statute and pressured him into pleading guilty. We conclude that there is no merit to these arguments and we affirm.

BACKGROUND

¶2 Sybers was arrested for OWI on January 31, 2001, after a clerk at a PDQ store and gas station called the police because, based on the clerk's observations of Sybers, the clerk did not think Sybers should be driving. According to the report of the arresting officer, at the police station the officer read the Informing the Accused form to Sybers, and Sybers stated that he was not answering anything until he spoke to a lawyer. When the officer informed him that it would be considered a refusal if he did not answer whether he would consent to a chemical test, Sybers stated that it would be a refusal. Sybers was given the opportunity to provide a breath sample for the Intoxilyzer test but did not provide a sufficient breath sample and the officer therefore marked that he had refused to submit to a chemical test. Sybers was given a notice of intent to revoke operating privileges based on that refusal.

¶3 Sybers requested a hearing on the refusal pursuant to WIS. STAT. § 343.305(9). One of the issues that may be raised at such a hearing is whether there was probable cause to believe the person was operating a motor vehicle while intoxicated. Section 343.305(9)(a)5a.

¶4 On July 9, 2001, Sybers appeared with counsel and entered a plea to OWI, second offense, as part of a plea agreement. Pursuant to that agreement, the

State moved to dismiss the refusal allegation and to recommend a sentence of fifteen days in Dane County Jail, \$800 fine plus court costs, sixteen-month revocation of Sybers's operating privileges, and mandatory alcohol assessment. After the terms of the plea agreement were stated, the court asked Sybers if he understood it. He said yes. When the court asked if he was in agreement with that, Sybers answered "I don't have much choice." His attorney then stated:

DEFENSE COUNSEL: For the record, if I can interrupt, I think Mr. Sybers believes in his own mind that he was not driving under the influence. However, because there was a refusal, he would face a two year revocation and the equivalent of an OWI conviction on his record. Even if he were to proceed to trial and win, he'd have the equivalent of an OWI conviction and a longer revocation, so I know he's not happy with this disposition in this particular case, but I think he's making a rational choice, and he should understand that what he's doing is waiving his rights to have the State prove him guilty beyond a reasonable doubt, and he'd have all the rights at trial. Whether or not he feels that he's guilty or not, I think it's a rational decision because I think that the facts are pretty much undisputed in terms of whether he – a refusal occurred, so that's sort of the status of where we're at. I normally wouldn't go into that kind of colloquy at a plea hearing.

The court read the charge in the complaint and explained the penalties and asked how Sybers pleaded to the charge. Sybers answered "I guess I have to plead guilty." The following colloquy ensued:

THE COURT: Did you sign this plea questionnaire?

MR. SYBERS: I didn't sign it, but I guess—

DEFENSE COUNSEL: Oh, I'm sorry.

THE COURT: Sorry. I didn't even look before I asked you.

DEFENSE COUNSEL: Apparently I didn't either.

MR. SYBERS: Well, I don't really want to but—

THE COURT: You should read that statement prior to signing it.

MR. SYBERS: Well, I hate to lie but—

DEFENSE COUNSEL: Well, that specific sentence says you're telling the truth.

MR. SYBERS: Telling the truth.

DEFENSE COUNSEL: You've answered the questions that you understand you're waiving.

MR. SYBERS: I am waiving my rights. Okay.

DEFENSE COUNSEL: That's true, correct?

(Defendant signs form.)

THE COURT: All right. Now, I'll ask you again have you signed this plea questionnaire?

MR. SYBERS: Yes, I have.

THE COURT: Prior to signing it have you gone through it with your attorney, ...?

MR. SYBERS: Yes.

THE COURT: Has he explained to you and do you understand the constitutional rights which are listed on this document, the fact that you have those rights, but by entering a plea of guilty you're giving them up?

MR. SYBERS: I gave up all my rights.

THE COURT: Above that on the form are five boxes that are checked. Have you checked those accurately?

MR. SYBERS: On the side here?

THE COURT: Yes.

MR. SYBERS: Yes, those are checked.

THE COURT: All right. On the back where you've signed it, it does state that you have reviewed and understand this plea questionnaire document. Is that true?

MR. SYBERS: Based with the things that I have to go through one way or the other, it's best for me I guess.

THE COURT: All right. But you do understand all of the contents of this form?

MR. SYBERS: Yes, I understand it.

....

THE COURT: Okay. Have you discussed the facts of your case, the elements of this offense, and the consequences of your plea with your attorney?

MR. SYBERS: Yes, I have.

THE COURT: [Counsel], have you had enough time to discuss those same factors with Mr. Sybers?

DEFENSE COUNSEL: Yes.

THE COURT: Do you believe that he is entering this plea knowingly and voluntarily?

DEFENSE COUNSEL: Yes, unhappily but knowingly and voluntarily.

THE COURT: All right. I am going to make that finding as well.

The court then accepted the plea, found Sybers guilty as alleged in the complaint, and imposed the recommended sentence. The court gave Sybers the opportunity to speak. Sybers did speak at length on the circumstances of the evening on which he was arrested, his need to care for his mother, and his involvement in treatment for alcohol abuse.

¶5 Subsequently, Sybers moved to withdraw his plea on the ground that it was not knowingly, voluntarily, and intelligently entered and that he was denied effective assistance of counsel. At the *Machner* hearing,² Sybers did not testify, but his trial counsel did. Based on counsel's testimony, the court made the

² *State v. Machner*, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

following findings. Counsel had received the police reports and reviewed them prior to the date of the plea. He had two face-to-face conferences with Sybers, as well as six telephone calls that were documented. He had discussed available defenses with Sybers, including the defense of no probable cause to arrest for OWI, and a challenge to the refusal based on lack of probable cause. Counsel exercised his discretion and reasoning in analyzing the likely outcome of the issue of probable cause; counsel's opinion was that he simply could not win the refusal hearing and counsel made the reasons for that clear to Sybers.

¶6 The court reviewed the record from the plea hearing, and based on the record and the testimony of counsel at the *Machner* hearing determined that, although Sybers had reluctantly entered a guilty plea, he did so on the advice of counsel and knowingly, voluntarily, and intelligently. The court also concluded that trial counsel had rendered competent and effective assistance to Sybers.

DISCUSSION

¶7 After sentencing a defendant who seeks to withdraw a guilty plea must establish by clear and convincing evidence that withdrawal of the plea is necessary to correct "a manifest injustice." *State v. Harrell*, 182 Wis. 2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). A plea that is not knowingly, voluntarily, or intelligently entered is a manifest injustice. *Id.* We affirm a trial court's decision regarding the withdrawal of a guilty plea if the trial court properly exercised its discretion, that is, applied the correct law to the relevant facts of record and reached a reasonable result. *Id.*

¶8 When a defendant seeks to withdraw a plea on the ground that it was not knowingly, voluntarily, and intelligently entered, the defendant must first make a showing of a prima facie violation of the trial court's duties under WIS.

STAT. § 971.08(1)(a) or other mandatory duties, and must allege that he or she in fact did not know or understand the information that should have been provided at the hearing. *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). The burden then shifts to the State to show by clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered. *Id.* at 274-75. The State may utilize the entire record to demonstrate that the totality of the circumstances show that he knew and understood his constitutional rights, and the plea was knowingly, voluntarily, and intelligently entered. *Id.*

¶9 Sybers argues that the trial court did not fulfill its duties under WIS. STAT. § 971.08(1)(a) because it did not determine that the plea was voluntarily made. Sybers bases this argument on his comments showing that he was reluctant to plead guilty. We agree with the trial court that the transcript of the plea hearing shows that the trial court did engage in the required colloquy and that Sybers's answers to the court's questions did indicate that, although he was not happy with pleading guilty, he was choosing to do so because he decided it was best for him. We therefore conclude that Sybers has not met the threshold requirement of showing a prima facie violation of the trial court's duties under § 971.08(1)(a) or other mandatory duties.

¶10 A manifest injustice warranting a plea withdrawal also occurs when a defendant does not receive effective assistance of counsel in the decision whether to enter a guilty plea. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (Ct. App. 1995). To prevail on a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that it was prejudicial, meaning that there was a reasonable probability, that but for counsel's errors, the defendant would not have pleaded guilty and would

have insisted on going to trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1985); *Bentley*, 201 Wis. 2d 311.

¶11 Sybers contends his trial counsel was ineffective for two reasons: (1) he failed to inform him that he had a viable defense to the refusal charge, that is, that there was no probable cause to arrest; and (2) counsel pressured him to plead guilty.

¶12 We conclude the trial court correctly determined that trial counsel's performance was not deficient. The trial court accepted trial counsel's testimony on why he advised Sybers that he would not succeed at a refusal hearing, and, therefore, why it would not make sense to challenge the OWI. Trial counsel testified that he discussed with Sybers the fact that a determination of refusal would be the equivalent of an OWI in terms of counting as a prior offense; he told Sybers that he would not be able to win at the refusal hearing, and therefore being acquitted on the OWI charge would be irrelevant. Counsel understood it was more difficult to prevail in challenging probable cause at a refusal hearing than in a trial on OWI because of the difference in the burden of proof. Nonetheless, he testified, while there was perhaps some chance of prevailing on the probable cause OWI trial, it was not a very good chance, and, in any event, he considered the two proceedings together. The trial court's factual findings on what trial counsel did and why are supported by the record.

¶13 We do not agree with Sybers that trial counsel's analysis of the probable cause issue at a refusal hearing was deficient. At a refusal hearing the State prevails in a challenge to probable cause if it presents evidence that the officer's account is plausible; the court does not weigh the evidence for and

against probable cause or determine the credibility of witnesses. *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994).

¶14 Here it was reasonable for trial counsel to conclude based on the police report that the officer would testify to the following. The officer detected a strong odor of intoxicants on Sybers's breath and his speech was slurred. Sybers confirmed that he had driven there and had been drinking. Sybers was unsteady on his feet when he stepped out of the truck to the point where another officer held his arms to keep him steady. He had trouble finding his driver's license when he opened his wallet even though it was right on top of the other cards. The clerk informed the officer that he had observed Sybers's vehicle strike the curb on the right side of the road adjacent to the PDQ store, and also that he had observed Sybers spending approximately ten minutes attempting to get his truck's gas tank even with the gas pump. The clerk also informed the officer that when Sybers got out of his truck, he stumbled to the front door of the store, and the clerk could smell a strong odor of intoxicants on his breath; Sybers told the clerk that something had happened and someone was inside the truck, but the clerk did not observe anyone inside the truck. Sybers did not follow the directions with respect to the Horizontal Gaze Nystagmus test. He did not do well on the walk-and-turn, the heel-and-toe, or the one-leg stand tests, and in reciting the alphabet he stopped and started and did not complete reciting all the letters he was told to recite.

¶15 Based on this report, it was a reasonable professional judgment that a court would consider the officer's account plausible at a refusal hearing and would find a refusal. Sybers's contentions that trial counsel should have considered evidence that Sybers was sixty-six years old and also had knee problems does not persuade us otherwise, given the standard at a refusal hearing.

¶16 We also reject Sybers’s contention that trial counsel was ineffective because he pressured Sybers to plead guilty and overrode his protestations to doing so. Based on the record of the plea hearing and trial counsel’s testimony at the *Machner* hearing, the trial court found that Sybers had entered the plea of his own free will. The record supports this finding. Counsel acknowledged that he did push Sybers in the direction of entering a plea because of the value he placed on his own judgment. Trial counsel acted reasonably in attempting to persuade Sybers that his evaluation of the chances of success on the refusal hearing, on the OWI, and the reasons for considering them together were sound, and there is nothing in the record to indicate that he acted inappropriately or unreasonably in doing that.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

