COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 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.	**02-2169-CR**	**Cir. Ct. Nos. 99-CF-127**
	02-2170-CR	**00-CT-70**
	02-2171-CR	**00-CT-53**
	02-2172-CR	**00-CF-44**
	02-2173-CR	**00-CT-30**
	02-2174-CR	**00-CF-28**
	02-2175-CR	**99-CM-595**
	02-2176-CR	**99-CM-335**
	02-2177-CR	**99-CM-334**
	02-2178-CR	**99-CM-333**
	02-2179-CR	**99-CM-332**
	02-2180-CR	**99-CM-331**
	02-2181-CR	**99-CF-286**
	02-2182-CR	**99-CM-283**
	02-2183-CR	**99-CM-282**
	02-2184-CR	**99-CM-281**
	02-2185-CR	**99-CM-280**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDOLPH S. MILLER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waupaca County: JOHN P. HOFFMAN, Judge. *Affirmed*.

¶1 DEININGER, P.J.[1] Randolph Miller appeals twelve judgments convicting him of thirteen misdemeanors. He also appeals an order denying his postconviction motion to withdraw his no contest pleas to the offenses. Miller claims his pleas were not knowing and voluntary, that his trial counsel was ineffective for not terminating the plea negotiations and hearing, and that some of the charges to which he pled lacked a factual basis. We reject Miller's claims and affirm the appealed judgments and order.

BACKGROUND

¶2 Miller pled no contest to three counts of misdemeanor bail jumping, four counts of disorderly conduct, two counts of obstructing an officer, one count of unlawful use of a phone, one count of misdemeanor issuance of worthless check, and two counts of operating a motor vehicle under the influence of intoxicants (OMVWI). As a part of Miller's plea bargain with the State, two offenses originally charged as felonies were amended to misdemeanors and sixteen additional charges, including several felonies, were dismissed and read-in.

¶3 The State had charged Miller with these twenty-nine offenses over a period of approximately three years. Many had resulted from incidents involving Miller and his now ex-wife. Miller retained private counsel to represent him on some of the charges; he had court-appointed counsel representing him on some

[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.

others; and he was proceeding pro se on the remainder. On a morning that Miller was to appear for a pretrial conference, Miller, his two attorneys, and the prosecutor met to attempt to reach a comprehensive plea agreement. There was some confusion about which charges Miller intended to discuss that day. Eventually, however, Miller's private attorney withdrew, leaving Miller and his court-appointed counsel to attempt to reach a "global" plea agreement on all of the charges.

¶4 The court-appointed counsel testified at a postconviction hearing that, as of the morning in question, he had not examined the files for the charges on which he had not been appointed to represent Miller. During negotiations, Miller took the position that he did not want any felony convictions and did not want to plead to any charges that primarily involved his ex-wife. The prosecutor offered to dismiss or amend the several felony charges and to dismiss some misdemeanors in exchange for Miller's no contest pleas to at least ten misdemeanors plus the two OMVWI charges. The negotiations evolved into a trading process whereby the prosecutor and court-appointed counsel exchanged dismissal of one charge for Miller's no contest plea to another. As a part of the bargain struck, Miller agreed to enter no contest pleas to two charges that the court had earlier dismissed for insufficient complaints.

¶5 After approximately thirty minutes of off-record discussion, the negotiations continued into the courtroom at the plea hearing. Miller did not fill out a plea questionnaire and the trial court conducted an extensive colloquy. The court ascertained from Miller that he had three college degrees and that he was sober and able to understand the proceedings. The court asked Miller for his plea on each specific charge, repeatedly asking Miller if he understood the exact charge to which he was pleading. Each time Miller pled no contest to a charge, he

affirmed that he understood the exact charge to which he was pleading. Miller, responding to a court inquiry, also said that no one had threatened or coerced him into making his pleas.

¶6 The trial court informed Miller of the constitutional rights he was waiving by pleading no contest, and Miller responded that he understood the rights he was giving up. The court also read Miller the elements of each crime and the maximum sentence for each, as well as informing him of the total maximum sentence he was facing for all of the crimes to which he was pleading. Miller said that he understood the elements of each crime, and he personally corrected the trial court's initial statement of the total maximum sentence at stake before stating he understood the correct figure. The trial court informed Miller several times that it was not bound by the lawyers' sentencing recommendations and could impose the maximum sentences. Each time, Miller indicated his understanding.

¶7 Finally, the trial court determined there was a factual basis for all of the charges;[2] concluded that Miller understood the charges and was pleading knowingly, voluntarily and intelligently; and accepted Miller's no contest pleas. After sentencing, Miller moved to withdraw his pleas claiming that he did not make the pleas knowingly, voluntarily and intelligently, and that his counsel was ineffective at the plea hearing.

[2] The court declined to accept Miller's pleas or to reinstate the two previously dismissed charges until the prosecution amended the insufficient complaints. Miller subsequently submitted affidavits that provided a factual basis for these two charges. At the sentencing hearing, after reviewing these affidavits, the court conducted another complete colloquy, determined there was now a factual basis for the final two charges and accepted Miller's no contest pleas on these charges.

¶8 Miller testified at the postconviction hearing that the plea negotiations were so rushed and confusing that he did not know which specific charges he was pleading to. He also claimed to have pled to charges involving his wife which he had specifically wanted to avoid. Finally, Miller testified that throughout the plea hearing he had insisted to his court-appointed counsel that the pleas were not what he had agreed to before the hearing began.

¶9 Miller's court-appointed counsel testified that, going into the plea hearing, he and Miller had only a general outline of the plea agreement. Counsel also testified he was under the impression that Miller was not pleading to any offenses involving his wife. He explained that avoiding a felony conviction was his client's chief goal, and that "we selected what we felt were the ten most innocuous or ten less serious … cases of those cases that were available to us." Counsel acknowledged that there were times during the plea hearing when it would have been a reasonable decision to stop the proceedings, but he qualified his response by testifying that it was also "legitimate" to proceed with the plea hearing and that at no time during the plea hearing did Miller say to him "[t]hat isn't what I expect."

¶10 The trial court concluded that its plea colloquy was adequate; that Miller's pleas were made knowingly, voluntarily and intelligently; and that Miller

did not receive ineffective assistance of counsel at the plea hearing.[3] Accordingly, the trial court denied Miller's motion to withdraw his pleas.

ANALYSIS

¶11 Miller argues the trial court erred in denying his motion to withdraw his pleas. To be permitted to withdraw his no contest pleas after sentencing, Miller must show by clear and convincing evidence that the failure to allow withdrawal would result in manifest injustice. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. This standard requires Miller to show a "'serious flaw in the fundamental integrity of the plea.'" ***Id***. (quoting ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995)). If Miller can establish that his pleas were "'involuntary, or … entered without knowledge of the charge[s],'" a manifest injustice occurred and he should be allowed to withdraw them. ***Trochinski,*** 253 Wis. 2d 38, ¶15 (quoting ***State v. Reppin,*** 35 Wis. 2d 377, 385, 151 N.W.2d 9 (1967)).

¶12 In order to establish that his pleas were not knowingly, voluntarily and intelligently made, Miller must first make a prima facie showing that the trial court violated the procedures mandated by WIS. STAT. § 971.08 and ***State v. Bangert***. 131 Wis. 2d 246, 389 N.W.2d 12 (1986).[4] If the prima facie showing is

[3] The court summarized its conclusions as follows: "I'm not convinced that under these circumstances that there was ineffective assistance of counsel, either that the defendant's counsel was deficient or that there was probable prejudice. But even if it was ineffective [sic], I'm not convinced that there was prejudice because the defendant, I'm satisfied, was entering his pleas fully informed of what the state's recommendation was going to be and what their understanding of the plea agreement was."

[4] Miller must also allege that he did not know or understand the information the trial court should have provided under WIS. STAT. § 971.08 and ***Bangert*** 131 Wis. 2d 246. 389 N.W.2d 12 (1986). *See* ***State v. Brandt***, 226 Wis. 2d 610, 618 n.5, 594 N.W.2d 759 (1999). Miller did so in his postconviction motion.

made, the burden shifts to the State to show, based on the record as a whole, that Miller's pleas were in fact knowingly, voluntarily and intelligently made. ***Bangert,*** 131 Wis. 2d at 273.

¶13 We conclude that Miller's request to withdraw his pleas founders on the threshold requirement to show a defective plea colloquy. Whether Miller has made a prima facie showing that the plea colloquy was inadequate under WIS. STAT. § 971.08 and ***Bangert*** is a question of law we decide de novo. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). Our review of the transcripts of the plea and sentencing hearings convinces us that the trial court conducted exemplary colloquies, complying in all respects with § 971.08(1) and the dictates of ***Bangert***. Accordingly, we need look no further than the plea proceedings to affirm the denial of his request to withdraw his pleas. *See* ***State v. Brandt,*** 226 Wis. 2d 610, 620-22, 594 N.W.2d 759 (1999).

¶14 Miller contends, however, that the rushed and confusing nature of the plea negotiations which preceded the plea hearing (and to some degree spilled over into the hearing itself) demonstrates that Miller did not make his pleas knowingly, voluntarily and intelligently. He asks us to examine the record "*in toto*" and determine that the "synergistic effect of both rushed and muddied plea negotiations and unprepared counsel conspired to deprive Miller of a plea which was truly voluntary and intelligent." Rushed and confusing plea negotiations, however, do not alter the fact that the court's colloquy satisfied the statutory and ***Bangert*** requirements. As with the defective plea questionnaire in ***Brandt***, the trial court's compliance with the requirements for a proper plea colloquy rendered what went before irrelevant. *See* ***Brandt***, 226 Wis. 2d at 622. Miller concedes that "the court's colloquy with Miller makes it difficult, under the applicable legal standard, to … justify relieving Miller from the effect of the entry of his pleas."

We agree and note that it is not merely difficult but impossible to do so in this case.

¶15 As evidence that his pleas were not knowing and voluntary, Miller also points to the fact that some of his convictions involve conduct relating to interactions with his ex-wife, which both he and his trial counsel testified was contrary to one of their goals during plea negotiations. We note, however, that during its plea colloquies, the court gave the dates and locations, and in some instances more extensive details, of each charge and repeatedly asked Miller if he understood the exact charges to which he was pleading. Miller always stated that he understood. Moreover, following a brief off-record conversation among Miller, his attorney, and the prosecutor during the plea hearing, the parties stipulated to the deletion of domestic violence allegations from several counts. The initial inclusion of the domestic violence allegations, even though they were ultimately deleted from the charges, was a clear indication that some of the charges to which Miller pled involved his ex-wife.[5]

¶16 Finally, Miller contends that he did not make his plea knowingly because he did not fully understand the sentence the district attorney would recommend as part of the plea agreement. Again, however, even if true, this assertion does not demonstrate that the trial court conducted an inadequate

[5] We also note that at the sentencing hearing, while conducting a second colloquy before accepting Miller's plea to the two dismissed and reinstated charges, the Court specifically informed Miller that a bail-jumping charge involved his ex-wife:

> THE COURT: Do you understand that relates to your going upon the premises of Iola Pines where Frankie Miller [Miller's ex-wife] lived?
>
> MR. MILLER: Yes, Your Honor.

colloquy under WIS. STAT. § 971.08 or ***Bangert***. The trial court informed Miller of the maximum punishments for each charge to which he pled, and it repeatedly noted that it was not bound by any sentencing recommendations the attorneys might make. Miller specifically disavows a claim that the prosecutor breached the plea agreement, maintaining only that "this case still has that flavor." We do not, however, grant relief from a plea on the basis of a case's "flavor."[6]

¶17 Next, Miller claims that he should be allowed to withdraw his pleas because he received ineffective assistance of counsel at the plea hearing. In order to prevail on his claim, Miller must show both that the performance of his counsel was deficient and that it prejudiced him. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Pote,*** 2003 WI App 31, ¶13, 260 Wis. 2d 426, 659 N.W.2d 82. We will not reverse the trial court's factual findings regarding counsel's actions unless those findings are clearly erroneous. ***Pote***, 260 Wis. 2d 426, ¶13. However, whether trial counsel's performance was deficient and whether that conduct prejudiced the defendant are questions of law that we review de novo. *See* ***id***., ¶14. If we determine that the defendant has failed to show either component of the test, deficiency or prejudice, we need not address the other. *See* ***Strickland,*** 466 U.S. at 697.

¶18 We first address whether counsel's performance was outside professional norms and thus deficient. In order to establish deficient performance, Miller must show that the errors committed by counsel were "so serious that

[6] Notwithstanding Miller's references to the "synergistic effects" of certain events and the case's "flavor," he makes no request that we exercise our authority under WIS. STAT. § 752.35 to grant discretionary reversal on the grounds "that it is probable that justice has for any reason miscarried." We therefore do not address whether relief might be warranted under that standard.

counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***. at 687. There is a strong presumption that counsel acted "reasonably within professional norms." ***State v. Johnson,*** 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts as they existed at the time of the conduct and determine whether the omissions fell outside the range of professionally competent representation. ***Pote***, 260 Wis. 2d 426, ¶15 (citing ***Strickland***, 466 U.S. at 690).

¶19 It is Miller's burden to identify the acts or omissions of counsel alleged to not meet the standard of reasonable professional judgment. *See* ***State v. Pitsch,*** 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We must then determine whether the identified acts or omissions were outside the range of professionally competent assistance, in light of all of the circumstances. ***Id***. at 637. In making this determination, we are to make "every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland,*** 466 U.S. at 669.

¶20 Miller points to several alleged deficiencies in his counsel's performance. He claims that counsel failed to consult with him to ensure that he understood all aspects of the plea agreement; failed to fill out a plea questionnaire on each charge; and failed to stop the plea hearing when it became evident that the prosecutor would not cap his recommendation for concurrent jail time at the OMVWI guideline sentence.

¶21 As we have noted, Miller initially had two attorneys, each handling some of the various charges he was facing, and he was unrepresented as to the

remaining charges. His privately retained attorney did not participate in the final plea negotiations and withdrew before the entry of pleas to any charges. Miller's court-appointed counsel assumed representation for all pending cases at the plea hearing.[7] Counsel understood that Miller would be entering into a "global" plea agreement, settling all of his cases at one time.

¶22 Miller's counsel testified that Miller's primary goal was to avoid a felony conviction, with other concerns being to avoid other convictions that might impact his employment and any that involved his ex-wife. The prosecutor was apparently most interested in obtaining a certain number of misdemeanor convictions but had no strong feelings as to which those should be. Counsel testified that he understood that some of the charges to which Miller agreed to plead may have been successfully defended at trial, but others, including one or more felonies, would be difficult to successfully defend. Thus, in a process described by the prosecutor as "horse trading," the parties arrived at a list of misdemeanors to which Miller would plead in exchange for dismissal of all other charges and a State recommendation that all jail time be ordered concurrent with the mandatory jail sentences Miller would receive on his two OMVWI convictions.

[7] Before withdrawing, Miller's private counsel told the court, "Judge, he's not proceeding without representation because everything is going to be resolved in a global settlement, and [court-appointed counsel] and Mr. Miller have both assured me that … he will be represented on everything because everything then becomes consolidated in one settlement." The court asked Miller's court-appointed counsel if he would be representing Miller "on all the cases," and counsel replied that he was, explaining that "I would have to be involved … [on] files where I have been court appointed … [s]o since I would have to be here anyway, it won't affect the number of hours I bill, the fact that there are more files."

¶23 The record does not support Miller's claim that counsel did not adequately communicate the nature of the plea agreement to him. At the time his court-appointed counsel assumed representation of Miller on all charges, Miller had elected to attempt to work out an agreement with the prosecutor to resolve all pending cases. Miller communicated and discussed with his attorney what he hoped to accomplish in a "global" plea agreement. As we have discussed, Miller demonstrated his understanding of the plea agreement on more than one occasion during the plea hearing. For instance, he clearly understood his total exposure on the charges, at one point even correcting the trial court on the maximum length of time he could potentially be incarcerated. At another point in the plea hearing, Miller asked for a case number, and after it was provided, stated that it clarified the matter for him. Finally, we note that, at the end of the plea colloquy, the court asked Miller if he had "had enough time to thoroughly discuss these charges and the effects of your pleas" with his attorney and whether he was satisfied with the representation he received. Miller replied "yes" to both questions.

¶24 Counsel is required to abide by Miller's decisions concerning the objectives of representation. ***State v. Divanovic***, 200 Wis. 2d 210, 224, 546 N.W.2d 501 (Ct. App. 1996) (citing WIS. STAT. SCR 20:1.2). The reasonableness of counsel's actions may be determined or influenced by the defendant's own statements and actions. ***Strickland***, 466 U.S. at 691. We are satisfied that in negotiating and consummating the plea agreement, counsel properly consulted with Miller, abided by Miller's informed decisions, and acted reasonably within professional norms.

¶25 There is no dispute that Miller and his counsel did not complete a plea questionnaire for each charge prior to the plea hearing. We nonetheless reject Miller's assertion that this fact demonstrates the deficiency of his counsel's

performance. There is no legal requirement that a plea questionnaire be filled out before the trial court accepts a plea. *See* ***Brandt***, 226 Wis. 2d at 621. We again point to the thoroughness of the plea colloquy and Miller's responses and comments during the plea hearing as an indication that he knew precisely what he was doing when he entered his pleas. The only purpose a plea questionnaire might have served would have been to permit the court to shorten its colloquy with Miller. Just as the absence of a correctly completed questionnaire does not undermine a proper plea colloquy, neither does it show that counsel performed deficiently with respect to the plea proceedings.

¶26 Miller's final claim of deficient performance is that counsel should have stopped the plea hearing once it became clear the prosecutor would not cap his jail recommendation at the OMVWI guideline sentence. The trial court, however, found that even if the parameters regarding the prosecutor's sentencing recommendation were "a fluid situation" at the beginning of the plea hearing, the uncertainty was removed during that hearing:

> I think the best record of what that plea agreement is is quite frankly what was expressed by [the prosecutor] on the record [citing transcript pages], and I will find that … that's what the request was. [Defense counsel] was aware of it before that being expressed on the record. He had shared that, and I would find that's the more credible evidence. If Mr. Miller didn't wish to proceed, I think that he did not have to enter his pleas, but I think he basically accepted that plea agreement by entering his pleas.

¶27 The court's finding in this regard is not clearly erroneous. As the trial court noted, counsel testified at the postconviction hearing that he thought Miller understood the sentencing agreement and that they were disappointed not to get the sentencing limitation they had sought. He testified that he was not surprised when the prosecutor stated the agreement on the record, and that he and

Miller had discussed it before that time. Miller acknowledged that he had discussed the agreement on sentencing with counsel before the prosecutor made his statement on the record. We are thus satisfied that counsel did not perform outside of professional norms in continuing with a plea hearing on the basis of a plea agreement that counsel had discussed with Miller, and that he believed Miller understood and had agreed to.

¶28 Because we conclude that counsel's performance was not deficient, we do not address whether the defendant was prejudiced by counsel's conduct.

¶29 Miller's final claim of error is that the trial court did not establish that a factual basis existed for all of the charges to which he pled. Before accepting a plea of guilty or no contest, a trial court must satisfy itself that the defendant in fact committed the crime charged. *See* ***State v. Johnson***, 207 Wis. 2d 239, 244, 558, N.W.2d 375 (1997); WIS. STAT. § 971.08(1)(b). The failure to ascertain that a defendant in fact committed the crime charged constitutes a manifest injustice, which is a sufficient ground for the withdrawal of a plea. ***Johnson***, 207 Wis. 2d at 244.

¶30 Miller does not identify the charges for which he believes no adequate factual basis existed. He simply makes a vague claim that there was not an adequate factual basis established at the plea hearing, and he then blends this argument with a repeat of his claims regarding his lack of understanding of the charges. The court specifically found that a factual basis had been established for each of the charges, and in fact delayed making this finding on two charges until further documentation was provided prior to the sentencing hearing. Miller neither tells us why the court's determination was in error nor directs us to any part of the record that would so indicate. We may decline to address issues that

are inadequately briefed and elect to do so here. *See* ***State v. Pettit,*** 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

CONCLUSION

¶31 For the reasons discussed above, we affirm the appealed judgments and order.

By the Court.—Judgments and order affirmed.

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