**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 6, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-2414-CR** **Cir. Ct. No. 01 CF 4359**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEFFREY D. BENSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Jeffrey D. Benson appeals from a judgment entered on his guilty pleas to operating a motor vehicle while fleeing from an officer, as an habitual criminal, and possession of five grams or fewer of cocaine with the intent

to deliver. *See* WIS. STAT. §§ 346.04(3), 939.62, and 961.41(1m)(cm)1 (1999–2000).[1] Benson alleges that the trial court erroneously exercised its discretion when it denied his pre-sentence motion to withdraw his guilty plea on the possession-of-cocaine charge because, he claims: (1) his plea was not knowingly, voluntarily, and intelligently entered; and (2) the trial court improperly based its decision on his post-plea request for a trial. We affirm.

I.

¶2 This case began when two police officers attempted to stop Jeffrey D. Benson's car for speeding. Instead of stopping, Benson sped away. The police caught Benson after he drove his car into a tree. They searched him and found eleven individually wrapped packages of cocaine, weighing a total of 1.43 grams, and a glass pipe with burn marks on both ends.

¶3 Benson pled guilty to both charges. At the plea hearing, the trial court asked Benson: "Mr. Benson, have you given this Court a plea that's free, voluntary and intelligent?" Benson told the court: "Yes, it's free and voluntary. I don't think it's intelligent, but it's free and voluntary." The trial court told Benson that its question was:

> more a commentary on whether or not you understand that that's what you're doing, than it is on whether or not this is a smart thing to do in terms of what the ramifications are. So I'm going to take that as a yes, that this is a free and voluntary and intelligent plea on your part.

Benson responded: "All right."

[1] All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

¶4 Before sentencing, Benson orally moved to withdraw his guilty plea to the possession-of-cocaine charge. He alleged that he never had the intent to deliver the cocaine because it "has always been [his] position that [the cocaine] was for his own personal use." Benson claimed that he entered a guilty plea, however, because he feared that the amount of cocaine in his possession would suggest to a jury that he intended to deliver it. The trial court asked Benson why he did not enter a no-contest plea. His attorney told the court that she had not explained what a no-contest plea was to Benson because she thought that the trial court did not accept no-contest pleas on drug charges. The trial court adjourned the case and held a hearing on the motion.

¶5 At the hearing, the trial court indicated that it would allow Benson to change his guilty plea to a no-contest plea. It told Benson, however, that it would not allow him to withdraw his plea if he wanted to go to trial. Benson told the trial court that he wanted a trial.

¶6 The trial court denied the motion. It reviewed the transcript from the plea hearing and found nothing in the plea colloquy "that would lead me to believe that you did not make the plea freely or voluntarily or intelligently, [and] that you did not understand what the nature of the charges were." It found that Benson wanted to withdraw his plea because he was unhappy with the plea bargain:

> There are signals that, as I think I still feel today, that you're not happy with it [the plea bargain], you know, because you recognize that there's some severe penalties associated with it and you'd rather not, that's pretty common in many defendants, you know, they -- when they get down to brass tacks and they see what their exposure is, it's very difficult for them to swallow and accept it….
>
> But that's not a basis, even under the lesser standard, as I understand it, of presentencing, for me to allow you to withdraw your plea.

II.

¶7 A defendant seeking to withdraw a guilty plea before sentencing must show a fair and just reason for allowing him or her to withdraw the plea. ***State v. Kivioja***, 225 Wis. 2d 271, 283, 592 N.W.2d 220, 227 (1999). The showing of a fair and just reason contemplates the "'mere showing of some adequate reason for defendant's change of heart.'" ***Id.***, 225 Wis. 2d at 284, 592 N.W.2d at 227 (quoted source omitted). Although the term "fair and just reason" has not been precisely defined, reasons that have been considered fair and just include: a genuine misunderstanding of the plea's consequences; haste and confusion in entering the plea; and coercion on the part of trial counsel. ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264, 266 (Ct. App. 1989).

¶8 The trial court is to apply this test liberally, although a defendant is not automatically entitled to withdrawal. ***Id.***, 152 Wis. 2d at 288, 448 N.W.2d at 266; ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163, 170 (1991). We will uphold a trial court's decision to deny plea withdrawal prior to sentencing unless the trial court erroneously exercised its discretion. ***State v. Bollig***, 2000 WI 6, ¶14, 232 Wis. 2d 561, 605 N.W.2d 199.

¶9 First, Benson appears to allege that the trial court erroneously exercised its discretion when it denied his motion for plea withdrawal because his guilty plea on the possession-of-cocaine charge was not knowingly, voluntarily, and intelligently entered.[2] To assure that a plea is knowingly, voluntarily, and

[2] The State argues that Benson waived his right to assert this claim on appeal because he did not argue it before the trial court. Benson claims that, although "the motion to withdraw his plea was somewhat inartfully articulated by trial counsel … the issue was implicit in [his] arguments to the trial court." We agree with Benson that his argument, that he did not have the intent to deliver the cocaine, was part of the larger issue of whether or not his plea was (continued)

intelligently entered, the trial court is obligated by WIS. STAT. § 971.08(1)(a) to ascertain whether a defendant understands the essential elements of the charges to which he or she is pleading, the potential punishment for those charges, and the constitutional rights being relinquished. ***State v. Bangert***, 131 Wis. 2d 246, 260–262, 389 N.W.2d 12, 20–21 (1986); ***Bollig***, 232 Wis. 2d 561, ¶15. The trial court can fulfill these requirements by: (1) engaging in a detailed colloquy with the defendant; (2) referring to some portion of the record or communication between the defendant and his or her lawyer that shows the defendant's knowledge of the nature of the charges and the rights he or she relinquishes; or (3) making references to a signed waiver-of-rights form. ***Bangert***, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987).

¶10 A defendant challenging the adequacy of a plea hearing must make two threshold allegations. ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. First, the defendant must show a *prima facie* violation of WIS. STAT. § 971.08(1)(a) or other mandatory procedures. ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. Second, the defendant must allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815, 818–819 (Ct. App. 1995). Whether a defendant makes a *prima facie* showing that a plea was entered knowingly, voluntarily, and intelligently is a question of "constitutional fact" that we will

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knowingly, voluntarily, and intelligently entered. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 505, 331 N.W.2d 320, 324 (1983) (we may review new arguments on an issue that has been raised before the trial court). Indeed, the trial court denied the motion because, it concluded, that there was nothing in the plea colloquy "that would lead me to believe that you did not make the plea freely or voluntarily or intelligently, [and] that you did not understand what the nature of the charges were."

review without deference to the trial court. ***Bangert***, 131 Wis. 2d at 283, 389 N.W.2d at 30. The trial court's findings of historical fact will not be upset unless they are clearly erroneous. ***Id.***, 131 Wis. 2d at 283–284, 389 N.W.2d at 30.

¶11 Benson claims that his plea was not knowingly, voluntarily, and intelligently entered because the trial court did not "[go] over" the elements of possession of cocaine with the intent to deliver. At the plea hearing, the trial court had the following colloquy with Benson regarding the elements of the charge:

> THE COURT: All right. As to count 2, possession with the intent to deliver a controlled substance, cocaine, the specific allegations in the Complaint are that on August 15th of this year, at 599 West Vine Street, City and County of Milwaukee, you knowingly possessed with the intent to deliver, five grams or less of cocaine, a controlled substance…. Do you understand what you're pleading guilty to in that count?
>
> THE DEFENDANT: Yes.

Benson alleges that the colloquy was "inadequate" because: (1) the trial court read the elements to him from the criminal complaint; (2) the terms "delivery" and "with intent to deliver" have specific legal definitions that were not explained to him; and (3) he told the trial court that his plea was not "intelligent." We disagree for several reasons.

¶12 First, a trial court may refer to a criminal complaint at a plea hearing to determine whether the defendant understands the elements of the charge. *See, e.g.*, ***Bangert***, 131 Wis. 2d at 268, 389 N.W.2d at 23 ("[W]hen a criminal complaint has been read to the defendant at a preliminary hearing, the trial judge may inquire whether the defendant understands the nature of the charge based on that reading.").

¶13 Second, the standard for determining whether the defendant understood the elements of the offense is not as stringent as Benson contends. A trial court is not required to "thoroughly … explain or define every element of the offense to the defendant." ***State v. Trochinski***, 2002 WI 56, ¶20, 253 Wis. 2d 38, 644 N.W.2d 891. "[A] valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements." ***Id.*** at ¶¶29, 2–3 (defendant knew and understood elements of offense even though meaning of "harmful to children" not explained to him at plea hearing).

¶14 Third, the record shows that Benson had "knowledge of the elements" of possession of cocaine with intent to deliver, despite his claim that his plea was not "intelligent." The possession of cocaine with the intent to deliver has four elements: (1) the defendant possessed a substance; (2) the substance was cocaine; (3) the defendant knew the substance was cocaine; and (4) the defendant intended to deliver the cocaine. WIS JI—CRIMINAL 6035. As we have seen, the trial court adequately explained the elements to Benson during the plea colloquy.

¶15 Moreover, the trial court asked Benson if he had reviewed the guilty-plea-questionnaire and waiver-of-rights form. Benson told the court that his attorney went over it with him. Finally, the trial court had the following colloquy with Benson's attorney:

> THE COURT: [D]id you go over the Guilty Plea Questionnaire and Waiver of Rights form with your client?
>
> [BENSON'S] ATTORNEY: I did, Your Honor. I went over with him twice, this morning, in addition I spoke with him last night regarding our options for today, and I've met with him two times in the institution…. I believe that I have explained fully the ramifications of his plea, the evidence that would be admitted at trial, and I gave him my professional advice as to what the result of that trial would be.

> ….
>
> THE COURT: Did you go over the -- as part of those discussions -- the facts in the Complaint and how those facts relate to the elements of the charge to which he is pleading guilty?
>
> [BENSON'S] ATTORNEY: Yes. Practically every time I met with him.

The plea colloquy and guilty-plea-questionnaire and waiver-of-rights form demonstrate that Benson knew and understood the elements of possession of cocaine with intent to deliver. The trial court's finding of fact that Benson's remark that his plea was not "intelligent" was a comment regarding the consequences of pleading guilty, not a comment on Benson's knowledge of the elements, is not clearly erroneous. Accordingly, Benson has not shown a *prima facie* violation of WIS. STAT. § 971.08(1)(a).

¶16 Benson also claims that the trial court erroneously exercised its discretion when it denied his motion to withdraw his plea because it took "into account [his] stated desire for a jury trial in the event that the plea is withdrawn." Again, we disagree.

¶17 Benson appears to rely upon the following portion of the trial court's statement from the hearing on the motion to withdraw his plea to support his argument:

> I think the defense has properly enunciated the standard of review presentencing for withdraw [sic] of the plea. I guess the only -- is it anticipated that much -- the purpose of withdrawing the plea, because oftentimes I'll get -- a defense attorney will say, Judge, we think it's a more appropriate no contest plea, and if you'd allow him to withdraw his guilty plea, we are prepared to have him plead no contest. Or, if this is, as I think I just heard you say, a case of I'm -- I clearly am not guilty of these offenses, and I want my jury trial.

> And the reason I ask that is because really the scope -- while I'm trying to talk about the fairness issue, which is the standard of review, also I have to use a certain amount of common sense here in applying that. And that means that if this is being withdrawn because he intends to now enter a no contest plea, and he really needs to have you explain that to him, which clearly you had not up front because of your understanding of my policies, that's not one thing that I could look at in that light.
>
> But if this is, no, I want to have a jury trial, it's a little -- the [plea] transcript does not give me an awful lot of wiggle room in terms of his -- they're demonstrating to me that somehow he was impaired or really clearly was not making a knowing, voluntary and intelligent plea, other than he's just changed his mind now. And that's the standard.

Benson does not consider the trial court's comments within their proper context. Before making the comments set out above, the trial court noted that Benson's trial counsel should have explained the meaning of a no-contest plea to Benson. Thus, the trial court was willing to allow Benson to enter a no-contest plea to correct Benson's attorney's error. Benson, however, told the court that he wanted a trial. A mere desire to have a trial is not an adequate reason for a defendant's change of heart. ***Canedy***, 161 Wis. 2d at 583, 469 N.W.2d at 170–171.[3]

[3] Benson also alleges that his motion for plea withdrawal should have been granted because it was "based upon more than mere reflection." He claims that his "position" that he never intended to deliver the cocaine "combined with the fact that the elements of the crime were not adequately explained to [him], permits the inference that [he] did not understand that if the case went to trial the State would have to prove, beyond a reasonable doubt, that he intended to deliver the cocaine." This argument is simply a rehash of his argument above. As noted, we concluded that Benson had knowledge of the elements of possession of cocaine with the intent to deliver. Accordingly, we decline to address this contention any further. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground"); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

Accordingly, the trial court properly found that Benson did not present a fair and just reason for plea withdrawal.

*By the Court.*—Judgment affirmed.

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