COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP165 **Cir. Ct. No. 1994CF940899**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD MCEUENS, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: Jeffrey A. Wagner, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Donald McEuens, Jr., appeals from an order denying his postconviction motion for plea withdrawal.[1] The issue is whether McEuens was entitled to an evidentiary hearing on his plea withdrawal motion, pursuant to which he claimed that he was not adequately informed of: (1) the elements of the offense to which he pled guilty; (2) the applicability of self-defense; and (3) the consequential forfeiture of his right to a unanimous twelve-person jury to determine his guilt. We conclude that the trial court did not err by summarily denying his plea withdrawal motion because McEuens had not made a *prima facie* showing that his plea colloquy was inadequate; moreover, his claims were conclusively belied by the record. Therefore, we affirm.

¶2 In 1994, McEuens was involved in the shooting death of a man from whom he was buying cocaine. The victim was shot four times; McEuens admitted to firing the first and last of the four shots: the former to the chest, the latter to the forehead. McEuens was charged with two counts of first-degree recklessly endangering safety while armed, second-degree intentional homicide while armed, armed burglary, possession of a firearm as a felon, and, in several instances, as a habitual criminal. Incident to a plea bargain, McEuens pled guilty to one count of second-degree intentional homicide while armed with a dangerous weapon, in violation of WIS. STAT. §§ 940.05(1)(b) and 939.63 (1993-94), in exchange for the State's dismissal and reading-in of the remaining charges, and a recommendation pursuant to which the prosecutor was free to argue the duration of the sentence, but agreed to propose that it run concurrently to McEuens's current sentence. The prosecutor recommended a thirty-five-year sentence to run concurrent to the

[1] McEuens's postconviction motion included a sentencing challenge, which the trial court also rejected. McEuens does not pursue his sentencing challenge on appeal.

sentence McEuens was currently serving. Defense counsel recommended a concurrent sentence not to exceed twenty-five years. The trial court imposed a thirty-year concurrent sentence. McEuens did not appeal from the judgment of conviction.

¶3 In 2007, thirteen years later, McEuens filed a postconviction motion, seeking plea withdrawal pursuant to WIS. STAT. § 974.06 (2005-06).[2] McEuens alleged that: (1) the trial court failed to adequately explain the elements of the offense to him; (2) its explanation of self-defense was "inadequate and confusing"; and (3) the trial court failed to explain that as a result of pleading guilty, McEuens was forfeiting his right to a unanimous verdict by a twelve-person jury. The trial court summarily denied the motion as conclusively belied by the record, citing the transcript pages from the guilty plea colloquy, and referring to the guilty plea questionnaire and waiver of rights form ("plea questionnaire") McEuens signed. We affirm because the transcript of the plea hearing and the plea questionnaire conclusively belie McEuens's claims.

¶4 McEuens challenges the adequacy of the trial court's explanation preceding his guilty plea, claiming that his lack of understanding in the three identified respects rendered his guilty plea invalid.[3] He essentially claims that the trial court failed to comply with the requisites of WIS. STAT. § 971.08 (1993-94)

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] McEuens alleged that he did not understand the elements of the offense, the applicability of self-defense, and his consequent forfeiture of his right to a unanimous verdict by a twelve-person jury.

and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), in these three respects.

¶5 In a claim for plea withdrawal based on an inadequate plea colloquy,

> the defendant [must] make a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of sec. 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Bangert, 131 Wis. 2d at 274 (citations omitted). The ***Bangert*** analysis was recently applied in ***State v. Howell***, 2007 WI 75, ¶7, 301 Wis. 2d 350, 734 N.W.2d 48, where the issue was whether the defendant was entitled to an evidentiary hearing on his plea withdrawal motion in which he alleged that the plea colloquy was defective. *See* ***id.*** We review the trial court's summary denial of McEuens's plea withdrawal motion as a question of law. *See* ***id.***, ¶¶30-31.

¶6 We examine the plea hearing transcript and the plea questionnaire to determine the adequacy of the plea colloquy in the three respects McEuens claims a lack of understanding: the elements of the offense, the applicability of self-defense, and the requirement of a unanimous verdict. The trial court addressed McEuens to confirm that he understood the offense to which he was pleading guilty, the ramifications of his guilty plea, and to avoid any subsequent claimed misunderstanding of his guilty plea or its consequences. During the plea colloquy, the trial court engaged McEuens personally, his defense counsel and the

prosecutor, all of whom were included in the extensive discussion of McEuens's projected guilty plea.

¶7 At the outset of the plea colloquy, defense counsel explained why McEuens decided to plead guilty, forgoing a trial on self-defense. Defense counsel assured the trial court:

> I can inform the Court that Mr. McEuens and I've had lengthy discussions about the meaning of second degree intentional homicide and how imperfect self-defense plays into that crime. Mr. McEuens and I have reviewed the factual basis for his plea and it is our theory or factual basis for the plea that there was a gap in time before the last shot that would have made a person—a reasonable person to believe that he was no longer [in] danger of death or great bodily harm. There was a period of time where Mr. McEuens did believe he was in danger, but he admits that before the last shot, which very easily could have been the fatal shot, that a reasonable person would not have believed that he was still in danger.
>
> Nevertheless, Mr. McEuens fired that last shot and that's the factual basis for the plea.

¶8 The trial court explained to McEuens:

> THE COURT: If you plead guilty, you give up your right to have a jury trial, to have a jury make the decision about whether you are guilty or not….
>
> [I]ntent to kill requires the state either to prove that you had the purpose to take his life, that you had the purpose to cause his death, or that you were aware that your conduct was practically certain to cause the death of another human being. The state has to prove either one of those things in order to prove intent to kill.
>
> Now, those are the two elements the state has to prove before you could be found guilty. You're also entitled to self-defense…. So by pleading guilty, you are admitting those elements and you are admitting that you were not privileged to act in self-defense. And if you do not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm, then you were not privileged to act in self-defense. The state has to

> prove beyond a reasonable doubt to the jurors that you did not have that reasonable belief or that the belief wasn't reasonable. Do you think you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And again before the jurors could find you guilty, all twelve of them would have to agree that each of the two elements of second degree intentional homicide had been proven and that you were not privileged to act in self-defense. If you plead guilty to this charge, I will find you guilty and we will set a sentencing date.

The trial court explained the elements of the offense to McEuens, and explained that if he went to trial, as opposed to pleading guilty, all twelve jurors must unanimously find him guilty of the charged offenses to convict him.

¶9 We do not repeat the trial court's explanation of self-defense because it is better illustrated by McEuens's own explanation to the trial court on why he shot the victim.

> Initially when the fight started, I thought that – I felt threatened because of [the victim's] size and he had attacked me and I recall firing the first and last shot at [the victim]. But I do feel that within a reasonable period of time, that after the first and the third shot was fired, that I had the opportunity to reassess and re-evaluate the whole circumstance and I didn't [before firing the fourth shot.[4]]

The prosecutor then questioned McEuens, who was under oath, to further develop the factual basis for his guilty plea. After McEuens's testimony further established the inapplicability of self-defense, the trial court continued:

[4] McEuens insists that the trial court failed to inform him "[t]hat a reasonable person in the circumstances of the defendant would not have believed he was in danger of imminent death or great bodily harm." Self-defense was explained repeatedly and in different ways to emphasize precisely what it is, and its potential applicability to the factual basis established for McEuens's projected guilty plea. McEuens himself admitted personally and by defense counsel why he elected to plead guilty rather than to pursue self-defense at a trial.

[THE COURT]: Mr. McEuens, I'm not trying to affect your decision in any way but I'm just going to ask you a few more questions before I decide what to do here. And I believe, at least in many cases including this kind of situation, the decision about whether to proceed to trial on a self-defense theory is uniquely up to the defendant. What I want to be sure is you understand what your choices are here and that you understand what you're doing. I get a lot of motions after pleas of people who want to withdraw their pleas and change their mind later on and you don't … necessarily have the right to do that. I want to be sure that you understand that and you understand the choice that you're making here today.

You have the right to have a jury decide whether or not what you did here was reasonable. And the state has to prove beyond a reasonable doubt that you did not reasonably believe that the force you used was necessary to prevent imminent death or great bodily harm to yourself. If you plead guilty, you give up your right to have a jury decide that. Do you understand that?

[THE DEFENDANT]: Yes.

[THE COURT]: If you plead guilty and if I accept this plea, it's too late for you to simply change your mind later on. There are some situations in which the law might allow someone to withdraw a guilty plea. It does happen. But you don't have a right to simply change your mind. You cannot show up at the time of sentencing and say "I believe now that I was fully acting in self-defense. I want my jury trial now." Do you understand that?

[THE DEFENDANT]: Yes, I do.

[THE COURT]: You can't wait and see what your sentence is and then decide you [would] rather have a jury trial. Do you understand that?

[THE DEFENDANT]: Yes.

[THE COURT]: Do you have any questions about anything that I have said here today?

[THE DEFENDANT]: No.

[THE COURT]: Do you feel that you've had enough time to talk to [your defense counsel] about what your choices are and about what you are charged with?

> [THE DEFENDANT]: Yes. I feel I had enough time.
>
> [THE COURT]: Do you have any complaints about the help that he has given you on this case?
>
> [THE DEFENDANT]: No, I don't.

¶10 A completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent, and voluntary plea. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). McEuens read the plea questionnaire and had it read to him by his counsel who was satisfied that McEuens understood it; McEuens indicated, in writing and orally to the trial court, that he understood the plea questionnaire, which he signed, confirming that he "underst[oo]d the elements of the offense and their relationship to the facts in this case and how the evidence establishes my guilt. I understand that by pleading guilty I will be giving up any possible defenses, including but not limited to self-defense…." By signing the plea questionnaire, McEuens also affirms that "I will be giving up my right to have my case decided by 12 people sitting as a jury; I understand that all 12 of those people would have to agree in order to reach a verdict."

¶11 The trial court complied with the requisites of WIS. STAT. § 971.08 (1993-94) and ***Bangert***. The transcript of the guilty plea hearing and the plea questionnaire conclusively belie McEuens's allegations that he did not understand the elements of the offense, the applicability of self-defense, or that by pleading guilty he would be forfeiting his right to a unanimous verdict by a twelve-person jury. Consequently, an evidentiary hearing is not warranted to further consider McEuens's allegations because they are conclusively refuted by a methodical and extensive plea colloquy, and by the remainder of the record. *See* ***Howell***, 301 Wis. 2d 350, ¶77.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).