COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP2758-CR
2009AP386-CR

Cir. Ct. No. 2004CF43

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFERY L. MOSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. In these consolidated appeals, Jeffery L. Mosley appeals from a judgment convicting him of delivering cocaine as party to the crime and from a postconviction order denying his motion to withdraw his guilty plea to that offense. We agree with the circuit court that no manifest injustice

compelled plea withdrawal because Mosley understood party to the crime liability even though the circuit court did not address such liability during the plea colloquy.

¶2 In 2005, a jury convicted Mosley of drug charges. Postconviction, the circuit court vacated the judgment of conviction. Thereafter, Mosley agreed to plead guilty to delivering cocaine as party to the crime. Mosley's appointed appellate counsel commenced a WIS. STAT. RULE 809.32 (2007-08)[1] no-merit appeal. The record on appeal revealed an arguable issue relating to the entry of Mosley's plea because the circuit court did not address party to the crime liability during the plea colloquy. Therefore, Mosley sought plea withdrawal in the circuit court. The circuit court denied plea withdrawal, and Mosley commenced these appeals.

¶3 Whether a plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact. ***State v. Hoppe***, 2009 WI 41, ¶61, 317 Wis. 2d 161, 765 N.W.2d 794. We uphold the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. ***Id.*** However, we independently determine whether those facts demonstrate that the defendant's plea was knowingly, intelligently and voluntarily entered. ***Id.***

¶4 A defendant is entitled to withdraw a guilty plea to avoid a manifest injustice. ***Id.***, ¶60. A manifest injustice exists if the guilty plea was not made knowingly, intelligently, and voluntarily. ***Id.*** A circuit court must establish during the plea colloquy that the defendant understands party to the crime liability as part

[1] All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of establishing that the defendant understands the nature of the charge crime. ***State v. Howell***, 2007 WI 75, ¶37, 301 Wis. 2d 350, 734 N.W.2d 48.[2]

¶5 It is undisputed that the circuit court failed to confirm during the plea colloquy that Mosley understood party to the crime liability for the count to which Mosley agreed to plead guilty, delivering cocaine as party to the crime. In addition, the plea questionnaire Mosley signed did not explain party to the crime liability.

¶6 Where the defect in the plea colloquy is apparent from the transcript and the defendant alleges that he or she did not understand information that should have been provided at the plea colloquy, ***Howell***, 301 Wis. 2d 350, ¶27, the burden shifts to the State to show that the plea was knowing, voluntary and intelligent, ***id.***, ¶29. To meet that burden, the State may refer to the totality of the record, including any record made postconviction on defendant's claim that the plea was not properly entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986).

¶7 Mosley testified at the postconviction motion hearing that he did not know what "party to the crime" meant at the time he entered his plea, and his trial counsel did not discuss the criminal complaint with him or explain party to the crime liability before the plea hearing. Mosley testified that he pled guilty on trial counsel's recommendation. Mosley admitted that during the 2005 jury trial, evidence was presented that he helped set up a cocaine sale, the facts supporting the charge of delivering cocaine as party to the crime. Mosley testified that he did

[2] A person is party to the commission of a crime if he or she intentionally aids and abets the commission of the crime. WIS. STAT. § 939.05(2)(b) (2005-06).

not recall the party to the crime jury instructions. Mosley was questioned about the allegations in the complaint: that he assisted someone in setting up a drug transaction (as opposed to the counts in which he was charged with directly providing the drugs). When asked, "[a]nd you understood what that meant," Mosley replied, "that I gave something to sell that was drugs." Mosley then asserted his innocence of that offense.[3]

¶8 Trial counsel testified that she reviewed the elements of the crime with Mosley, and that it is her habit to discuss the elements of the crimes alleged in the information. She later testified that she could not remember if she discussed the elements with Mosley. Counsel conceded that although she reviewed the information with Mosley, the information did not define party to the crime liability. However, counsel reiterated that it was her habit to describe party to the crime liability when it is charged.

¶9 The circuit court questioned Mosley and confirmed that he was also tried in 1994 for delivering cocaine base as party to the crime. Mosley could not remember any details of that trial, although he conceded that he had a prior drug conviction as party to the crime. Mosley acknowledged that he understood that he could be convicted of a crime even if he did not directly commit the crime. The court reviewed numerous instances in the trial transcripts where party to the crime liability was explained, including in the jury instructions, but Mosley continued to insist that he did not recall any of those instances.

[3] The complaint alleged that Mosley provided cocaine to his girlfriend who then delivered it for sale to an undercover detective.

¶10 In ruling on Mosley's motion to withdraw his guilty plea, the circuit court conceded that it did not address party to the crime liability at the time it took Mosley's plea. Even though the court erred, the court concluded that Mosley's plea was knowingly, voluntarily and intelligently entered. The court found that Mosley first heard the definition of party to the crime liability as part of his 1994 jury trial. Given the charges against him and the prison time to which he was exposed, it was not credible to suggest that Mosley was not paying attention during the 1994 trial. Mosley again heard the definition of party to the crime liability during his 2005 jury trial in this case. Because Mosley was convicted at that trial, Mosley was aware that a person could be convicted based upon party to the crime liability. The court found that Mosley did not claim a lack of understanding regarding party to the crime liability at the time of his WIS. STAT. RULE 809.32 no-merit appeal. The court found not credible Mosley's claims that he would not have pled guilty to party to the crime liability and derided Mosley's overall credibility given his history of criminal conduct.

¶11 Mosley's credibility was a matter for the circuit court to evaluate. *See* ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). The court did not find credible Mosley's claims that he had never heard and understood a description of party to the crime liability. The court's findings are not clearly erroneous. *See* ***State v. Lackershire***, 2007 WI 74, ¶24, 301 Wis. 2d 418, 734 N.W.2d 23.

¶12 Looking to the totality of the record, ***Bangert***, 131 Wis. 2d at 275, we conclude that Mosley's guilty plea was voluntarily, intelligently and knowingly entered. At the postconviction motion hearing, Mosley described the concept of party to the crime liability in his own words. He acknowledged that he was charged with party to the crime of delivering cocaine because he "gave something to sell that

was drugs." Mosley's trial defense was that he did not provide his girlfriend with cocaine to sell to an undercover detective, i.e., he denied providing drugs to sell, the basis for party to the crime liability. In light of the circuit court's findings, including the trial defense and the jury instructions describing party to the crime liability, we conclude that Mosley understood party to the crime liability at the time he pled guilty and he entered a knowing, intelligent and voluntary plea.

By the Court.—Judgment and order affirmed.

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