COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP498-CR **Cir. Ct. No. 2007CF1566**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO J. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Antonio Jones appeals from a judgment of conviction, entered upon his guilty plea, of one count of first-degree reckless homicide while armed. Jones also appeals an order denying his motion to withdraw his plea. Jones asserts his plea was not knowing, intelligent, and

voluntary because he did not understand the elements of the charge against him. We conclude the record appropriately demonstrates Jones' understanding, and we affirm the judgment and order.

BACKGROUND

¶2 On March 21, 2007, then-sixteen-year-old Jones skipped school to hang out with friends and smoke marijuana. He then got the idea to commit a robbery so he could have money to buy clothes. With a gun, he attempted to rob Scott Huggins, a random person he encountered at a gas station. When Huggins attempted to get the gun away from Jones, Jones shot him twice. A wound to the abdomen was non-lethal but a shot to the back pierced Huggins' aorta, causing him to bleed to death.

¶3 Jones was charged as an adult with first-degree intentional homicide while armed and attempted armed robbery. Jones challenged the constitutionality of the statute giving the adult court original jurisdiction, and sought a reverse waiver into juvenile court. When those motions were both denied, Jones decided to enter a plea to avoid a life sentence. In exchange for a guilty plea, the State agreed to amend the homicide charge to first-degree reckless homicide while armed and to dismiss the attempted armed robbery charge. The State also agreed to make a sentencing recommendation of thirty-five years' initial confinement and fifteen years' extended supervision.[1] Following a plea colloquy, the court

[1] The total possible exposure was sixty-five years' imprisonment: sixty years for the Class B felony conviction and an additional five years for the "while armed" penalty enhancer. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b), and 939.63(1)(b) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

accepted the plea and found Jones guilty, sentencing him to the term the State recommended.

¶4 Jones then filed a postconviction motion to withdraw his plea. He argued he did not understand what the plea agreement called for, asserting various sentencing recommendations had been presented to him. Jones also sought to withdraw his plea based on his allegation that the circuit court failed to fully explain all the elements of first-degree reckless homicide to him. Following an evidentiary hearing at which Jones and trial counsel testified, the circuit court denied the motion. Jones appeals.

DISCUSSION

¶5 "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). Showing that a plea was not knowing, intelligent, or voluntary fulfills this burden. ***Id.*** Whether a plea is knowing, intelligent, and voluntary presents a question of constitutional fact. ***Id.***, ¶19. "We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts" show that the plea was knowing, intelligent, and voluntary. ***Id.***

¶6 On appeal, Jones complains only that he did not understand the elements of the charge against him. He asserts this lack of understanding comes from (1) the court's failure to explain the elements and (2) Jones' partial fetal alcohol syndrome. That is, Jones alleges there was an error in the plea colloquy, and there was a factor extrinsic to the colloquy that affected his understanding of the plea.

¶7 A defendant alleging a defect in the plea colloquy invokes ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and its progeny; a defendant alleging that extrinsic factors rendered the plea invalid implicates ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant may raise both ***Bangert*** and ***Nelson/Bentley*** claims in the same motion. ***Id.***, ¶73.

¶8 The two lines of cases have different standards for whether an evidentiary hearing will be granted. The State appears to argue that Jones failed to show he was entitled to a hearing in the first place. Although we agree with the State, we will assume without deciding that the court properly decided to hold an evidentiary hearing on Jones' plea withdrawal motion.

¶9 Under ***Bangert***, once a defendant is granted an evidentiary hearing, the burden shifts to the State to prove, by clear and convincing evidence, that the plea was knowing, intelligent, and voluntary despite defects in the colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶44, 317 Wis. 2d 161, 765 N.W.2d 794. The State may rely on the entire record, not just the plea hearing record. ***Id.***, ¶47.

¶10 The alleged defect in the plea colloquy was the circuit court's failure to advise Jones of all elements of first-degree reckless homicide. *See* WIS. STAT. § 971.08(1)(a). There are multiple ways in which the circuit court can advise a defendant of the elements, including summarizing the crime by reading from the applicable jury instructions or statute. *See* ***Brown***, 293 Wis. 2d 594, ¶46; ***Bangert***, 131 Wis. 2d at 268. Here, the circuit court did inquire whether Jones understood:

> that in order to be convicted of this offense, the state would have to prove each and every element of the offense and that is by evidence that is beyond a reasonable doubt. With

> respect to the amended charge of first-degree reckless homicide while armed, the state would have to prove that … while using a dangerous weapon, you did recklessly cause the death of Scott Huggins, another human being, under circumstances which showed utter disregard for human life, and you did this contrary to Wisconsin Statutes Section 940.02(1) and 939.63.

That is, the court set out the elements as listed in the statute. Jones asserts that this approach was deficient, in part because it does not discuss or explain the element of "criminally reckless conduct," which was detailed in the jury instructions. *See* WIS JI—CRIMINAL 1020.

¶11 However, at the evidentiary hearing, defense counsel testified it was her practice to discuss with her clients the jury instructions for an original charge as well as the instruction of any amended or reduced charge the State was offering in a plea agreement. Counsel testified she was "sure I did" go over those instructions with Jones, and that he had no questions of her. She also testified she would have discussed the elements of first-degree reckless homicide with Jones more than once. Jones acknowledged viewing the jury instructions prior to the plea hearing, although he did not recall going over them. At the plea hearing, Jones confirmed he understood the elements of his crime and that he had sufficient time to discuss the case with his attorney. Also at the plea hearing, counsel had advised the court that she was satisfied Jones understood the elements and the plea. Ultimately, the circuit court concluded, based on its review of the colloquy and the evidentiary hearing, that Jones understood the elements and his plea was knowing, intelligent, and voluntary. We agree with this conclusion.

¶12 Jones also contends that his partial fetal alcohol syndrome prevented him from understanding the plea, and better care should have been taken to ensure his comprehension in light of this condition. He contends that he was fidgety and

not listening at the colloquy, instead giving only robotic answers, undermining the validity of his plea.

¶13 Such an allegation invokes the ***Nelson/Bentley*** line of cases. At an evidentiary hearing on a ***Nelson/Bentley*** motion, the defendant has the burden of showing, by clear and convincing evidence, that refusal to permit plea withdrawal would result in a manifest injustice. ***Hoppe***, 317 Wis. 2d 161, ¶60. As noted, an unknowing plea is a manifest injustice.

¶14 Jones' answers to the court's questioning in the plea colloquy reveal he was doing more than giving robotic answers while not listening: he had to be paying enough attention to know when to shift his answers from "yes," to the question that he understood the plea, to "no," he had not been made any promises other than the plea agreement, back to "yes," the criminal complaint provided a factual basis for the plea. The circuit court found that he was "responding to the questions that were put forth to him[.]" Further, Jones' partial fetal alcohol syndrome was reported to impact his impulse control, not his ability to comprehend. Indeed, Jones admitted he took the plea to avoid a potential life sentence if convicted of first-degree intentional homicide—a cogent, rational choice. Jones simply does not show any manifest injustice would result from a failure to permit plea withdrawal.

By the Court.—Judgment and order affirmed.

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