COURT OF APPEALS DECISION DATED AND FILED

October 19, 2010

A. John Voelker
Acting 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 No. 2009AP2206-CR

Cir. Ct. No. 2006CF2179

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK WILLIAM REILLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JEFFREY A. CONEN, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Patrick William Reilley appeals from a judgment of conviction for fleeing causing great bodily harm, *see* WIS. STAT. §§ 346.04(3)

& 346.17(3)(c) (2005-06);[1] possession of cocaine, second or subsequent offense, *see* WIS. STAT. §§ 961.41(3g)(c) & 961.48; and homicide by intoxicated use of a motor vehicle with a detectable amount of a restricted controlled substance in his blood, *see* WIS. STAT. § 940.09(1)(am). Reilley, who entered no-contest pleas to all three crimes, also appeals from an order denying his postconviction motion to withdraw his plea to the charge of fleeing causing great bodily harm. At issue is whether Reilley should be allowed to withdraw that plea on grounds that it was not knowingly, intelligently and voluntarily entered. We affirm.

BACKGROUND

¶2 In 2006, Reilley led police officers on a high-speed car chase while high on illegal drugs. The chase ended when Reilley's vehicle hit another vehicle, causing the other driver's death.

¶3 An amended information charged Reilley with fleeing causing death, *see* WIS. STAT. §§ 346.04(3) & 346.17(3)(d) (2005-06); possession of cocaine, second or subsequent offense, *see* WIS. STAT. §§ 961.41(3g)(c) & 961.48; and homicide by intoxicated use of a motor vehicle with a detectable amount of a restricted controlled substance in his blood, *see* WIS. STAT. § 940.09(1)(am). The parties reached a plea agreement. At the plea hearing, the State told the trial court that the agreement was to amend the first charge from fleeing causing death to fleeing causing great bodily harm, *see* §§ 346.04(3) & 346.17(3)(c). Pursuant to the agreement, Reilley would plead no contest to each of the three charges.

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

¶4 After the State stated the plea agreement, there was a discussion concerning whether the penalty on the amended charge would be a Class F or a Class H felony. After trial counsel consulted with the State and Reilley off the record, the State told the trial court that "[t]here was some misunderstanding … whether … this was a Class F or a Class H. It is a Class F. The Court can review that with the defendant."

¶5 The trial court proceeded to ask Reilley if he understood the plea agreement and that he was facing a maximum penalty of twelve-and-a-half years for the charge of fleeing causing great bodily harm. Reilley indicated that he understood. Later, when the trial court was going through the charges with Reilley, the trial court misspoke, referring in the same sentence to both "bodily harm" and "great bodily harm." Specifically, the trial court asked Reilley if he understood that "the violation results in bodily harm as defined by statute … [and] you're found guilty of that offense and of great bodily harm as defined." Reilley answered: "Yes, I do," without questioning the trial court's use of the term "bodily harm."

¶6 The trial court accepted Reilley's no-contest pleas, found him guilty and ordered a presentence investigation. A month later, the trial court sentenced Reilley as follows: six years of initial confinement and three years of extended supervision for the fleeing count; fifteen months of initial confinement and fifteen months of extended supervision for the possession count, concurrent with the fleeing count; and twelve years of initial confinement and eight years of extended supervision on the homicide count, consecutive to the fleeing count.

¶7 Reilley was assigned postconviction counsel, who filed a no-merit report with this court. Reilley filed a response in which he asserted that there were

deficiencies in the plea hearing. Specifically, he asserted that he had not been "informed of the elements of the crime of fleeing causing great bodily harm" and "that he did not understand the potential punishment for that crime." *See* ***State v. Reilley***, No. 2007AP2016-CRNM, unpublished slip op. at 2 (WI App Dec. 9, 2008). We concluded that Reilley had made a *prima facie* showing that the trial court "did not correctly explain the elements of the crime of fleeing causing great bodily harm."[2] ***Id.*** at 4. We concluded that because Reilley was asserting that he misunderstood the elements of the crime, he was entitled to a postconviction evidentiary hearing. ***Id.*** Consequently, we rejected the no-merit report and extended the deadline for Reilley to file a postconviction motion. ***Id.***

¶8 Reilley secured new postconviction counsel and filed a motion to withdraw his plea.[3] He asserted that his no-contest plea to the fleeing charge was not knowingly, intelligently and voluntarily entered because "he did not know the maximum penalty … and … he did not know what the elements were for fleeing causing great bodily harm." He pointed to the misstatements by his trial counsel and the trial court at the plea hearing, as well as to the fact that the printed plea

[2] We did not reach the issue of whether Reilley had also shown that he did not understand the potential punishment for that crime, although we noted that there were handwritten changes to the plea questionnaire and that some parts of the plea colloquy and the plea questionnaire supported the inference that Reilley understood he was pleading no contest to causing great bodily harm, a Class F felony, while others supported the inference that he was pleading no contest to causing bodily harm, a Class H felony. *See* ***State v. Reilley***, No. 2007AP2016-CRNM, unpublished slip op. at 4 (WI App Dec. 9, 2008).

[3] At the motion hearing, Reilley's postconviction counsel offered conflicting statements concerning whether Reilley was seeking to withdraw all three no-contest pleas based on his misunderstanding of the fleeing charge, or whether he was seeking to withdraw only the plea to that charge. Because we affirm the order denying Reilley's motion to withdraw his plea to fleeing causing great bodily harm, we do not consider whether he would have been allowed to withdraw the other two pleas.

questionnaire that his attorney completed with Reilley contained an attachment identifying the penalty as a Class H felony, rather than a Class F felony.[4]

¶9 At the motion hearing, the State presented testimony from Reilley's trial counsel in support of its assertion that Reilley's plea was knowingly, intelligently and voluntarily entered despite the defective plea colloquy. Reilley, a thirty-six-year-old high school graduate who attended one year of technical college, also testified. Ultimately, the trial court found that Reilley understood the maximum penalties for, and the elements of, the crime of fleeing causing great bodily harm. The trial court concluded that the State had therefore met its burden of proving that Reilley's plea was knowingly, intelligently and voluntarily entered. The trial court denied Reilley's motion and this appeal follows.

LEGAL STANDARDS

¶10 During the course of a plea hearing, a trial court must address the defendant personally and fulfill several duties under WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), including "[e]stablish[ing] the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea." ***State v. Brown***, 2006 WI 100, ¶¶5, 35, 293 Wis. 2d 594, 716 N.W.2d 906. If a plea colloquy is deficient and the defendant alleges that he or she did not understand an aspect of the plea because of the omission, the defendant is entitled to an evidentiary hearing. ***Id.***, ¶36.

[4] This attachment was altered during the plea hearing after the confusion arose concerning whether the fleeing charge was a Class F or Class H felony. Trial counsel handwrote "12.5 yrs & 25,000 Fine" on the attachment and Reilley put his initials under that handwriting. The letter "F" was also handwritten under the words, "Class H Felony."

¶11 At the evidentiary hearing, "the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***State v. Hoppe***, 2009 WI 41, ¶44, 317 Wis. 2d 161, 765 N.W.2d 794. In meeting this burden, the State:

> may rely on the totality of the evidence, much of which will be found outside the plea hearing record. The State, for example, may present the testimony of the defendant and defense counsel to establish the defendant's understanding. The [S]tate may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden.

Id., ¶47 (citations, footnotes and internal quotation marks omitted). "If the State carries its burden of proof that the [no-contest] plea was knowing, intelligent, and voluntary, the plea remains valid. Otherwise, the defendant may withdraw the [no-contest] plea." ***Id.***, ¶44.

¶12 On appeal, we review "whether the State met its burden of showing that the defendant's [no-contest] plea was entered knowingly, intelligently, and voluntarily" by accepting the trial court's "findings of historical and evidentiary fact unless they are clearly erroneous." ***Id.***, ¶45. However, we "independently determine whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.***

DISCUSSION

¶13 Reilley argues that he is entitled to withdraw his no-contest plea because he "clearly did not understand the maximum penalties."[5] We conclude that the trial court's findings of fact are not clearly erroneous and that the State met its burden of proving that Reilley's plea was knowingly, intelligently and voluntarily entered. *See **id.***

¶14 At the plea hearing, trial counsel testified that it was always his understanding that the plea agreement was that Reilley would plead no contest to fleeing causing great bodily harm. Trial counsel acknowledged that at the plea hearing there was confusion over whether the crime was a Class F or Class H felony. However, he also acknowledged that when the confusion arose in court, he wrote "12.5 yrs & 25,000 Fine" on the attachment to the plea questionnaire and had Reilley initial that notation. Trial counsel said that he had been "satisfied that [Reilley] understood what was going on" at the plea hearing, and in fact told the trial court that during the plea hearing.

¶15 Reilley testified in support of his motion. He said that the day before the plea hearing, trial counsel told him, "[']They dropped it down to great

[5] In his postconviction motion, Reilley also argued that his plea was not knowing, intelligent and voluntary because he did not understand the elements of the crime of fleeing causing great bodily harm. However, his appellate brief did not provide specific argument on that issue, prompting the State to assert the following in its response brief: "Reilley no longer seems to be seriously arguing that he did not understand the 'great bodily harm' element." Reilley did not refute the State's assertion in his reply brief, and we agree that he has not sufficiently presented the issue on appeal. Therefore, we do not discuss either the argument Reilley made at the trial court concerning the elements of the crime or the trial court's discussion of that issue. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned); ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

bodily harm which is an H Felony, and this is the best you are going to get, so take the deal now.[']" Reilley said that he believed he would be pleading no contest to an H Felony, and that the in-court discussion at the plea hearing did not make him believe otherwise. Reilley testified:

> I was explained [sic] that it was an H Felony, I signed papers saying it was an H Felony, and they were arguing [at the plea hearing] … [and] my lawyer was confused … if it was an H or an F. And they were going back and forth over [it], and I didn't know what the heck was going on.

¶16 The State asked Reilley about his initials next to the handwritten notation of the correct penalty for fleeing causing great bodily harm that appeared on the attachment to the plea questionnaire. Reilley acknowledged initialing the document, but said, "I didn't really know what I was initial[]ing at the time." Reilley testified:

> I was confused of what the charge was, if it was an H or F. But then … the judge started reading on the record, he explained what the great bodily harm statute was…. So I figured, okay, it's still an H, and then when sentencing came around … it was something different.

¶17 Reilley acknowledged that when the trial court asked him at the plea hearing whether there was anything he did not understand, Reilley replied, "No. I understand everything, Your Honor." When asked why he did not say anything at sentencing when his own attorney recommended a sentence of seven years on the charge—a term greater than that allowed for a Class H felony—Reilley said that he "didn't know what was going on" and he believed that "[i]t was too late" to say anything. Therefore, he testified, he never mentioned at sentencing that he thought the wrong exposure was being considered.

¶18 The trial court found that although there was confusion at the plea hearing and in the plea questionnaire regarding the penalty for fleeing causing

great bodily harm, "during the course of the plea hearing … that was changed to the F Felony as everyone finally came to that conclusion." The trial court found that Reilley was aware of the proper penalty and, in fact, had initialed the questionnaire with that handwritten information.

¶19 The trial court also found that if Reilley had been confused about the maximum penalty, he could have raised that issue prior to sentencing, such as when he went through the presentence investigation report with his trial counsel, or at sentencing when recommendations were made in excess of the maximum allowed for a Class H felony. The trial court said that if Reilley "didn't understand it … he should have spoken up. He didn't."

¶20 The trial court's finding that Reilley understood the maximum penalty for fleeing causing great bodily harm is supported by the testimony and documentary evidence in the record and is not clearly erroneous. When questions were raised at the plea hearing about the penalty for the crime, the correct penalty was identified. Reilley initialed a document indicating that penalty and told the trial court that he understood the penalty. Then, when asked if he understood everything, Reilley assured the trial court that he did. Later, he never raised the question of whether the proper penalty was being applied, either before or at sentencing. We agree with the trial court that these facts support the conclusion that Reilley's plea was knowingly, intelligently and voluntarily entered. He knew the maximum penalty for the crime of fleeing causing great bodily harm at the time he entered his plea. Therefore, we affirm the trial court's denial of Reilley's motion to withdraw his plea.

By the Court.—Judgment and order affirmed.

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