COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1719-CR **Cir. Ct. No. 2008CF113**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. HOLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. James Hole appeals a judgment convicting him of first-degree intentional homicide, and an order denying his postconviction motion. The sole issue on appeal is whether the trial court erroneously exercised its discretion when it refused to allow him to withdraw his plea based upon

ambiguous or misleading statements in the plea colloquy and plea questionnaire about the punishment Hole faced. We affirm for the reasons discussed below.

¶2 A defendant may not withdraw a plea after sentencing unless it is necessary to correct a manifest injustice such as ineffective assistance of counsel, evidence that the plea was unknowing, involuntary or unsupported by a factual basis, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). A defendant who makes a prima facie showing that the procedures outlined in WIS. STAT. § 971.08 (2009-10)[1] or other court-mandated duties were not followed at the plea colloquy (*i.e.*, a ***Bangert*** violation), and further alleges that he did not understand the omitted information, is entitled to a hearing on his plea withdrawal motion at which the State will carry the burden of showing that the plea was nonetheless knowing and voluntary. ***State v. Hampton***, 2004 WI 107, ¶¶46-65, 274 Wis. 2d 379, 683 N.W.2d 14; ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986). We will not disturb credibility determinations and will accept the circuit court's other findings of historical and evidentiary facts unless they are clearly erroneous, but we determine independently whether those facts demonstrate that constitutional standards for a knowing and voluntary plea were satisfied. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

¶3 The State acknowledges that there was a ***Bangert*** violation here, because both the circuit court and the plea questionnaire failed to inform Hole that a first-degree homicide charge carries a mandatory life imprisonment term with

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the court having the discretion to set a parole eligibility date after twenty years. *See* ***State v. Byrge***, 2000 WI 101, ¶¶67-68, 237 Wis. 2d 197, 614 N.W.2d 477. The question before the trial court was whether Hole nonetheless understood the actual penalty he faced.

¶4 Hole testified that the reason he entered his guilty plea was that his attorney told him "that he was going to argue for 30 years' prison sentence." Hole said he thought that meant counsel would be arguing for a total sentence of thirty years, not just eligibility for supervised release after thirty years, and that the court would be bound by that recommendation. He claimed that he believed that the mandatory minimum penalty was "20 years prison" and the maximum penalty was "life imprisonment" as stated on the plea questionnaire. He further claimed that counsel never discussed the concept of supervised release with him, and he didn't even know what that was. He also denied any recollection of the court telling him at the plea hearing that he would be sentenced to life imprisonment upon conviction.

¶5 Counsel testified that he discussed the penalty for first-degree intentional homicide with his client multiple times, beginning with reading the complaint to him, which correctly stated that "upon conviction [the defendant] shall be sentenced to imprisonment for life." In their discussions, the way counsel phrased the potential punishment Hole faced was that "the Court would have to give him life in prison, but the Court did not have to give him life in prison in custody; and that the Court did have the ability to release him after a certain period of time … [and] that required period of custody was 20 years, but it could be up to his whole life." Counsel said he further informed Hole that if he were released from prison "the Court would place him on supervision and that that would go until the end of his life." Counsel's advice to Hole was "that if [they] were going

to argue for the 30 years in custody [as opposed to life in custody], that even though it was a small chance, it was still a better chance if [they] were to argue it post-change-of-plea versus going to trial and losing and then having to argue at that point." Based on their discussions, counsel believed the two driving forces behind Hole's decision to enter a plea were to avoid the emotional toll of a trial and to maximize the possibility of post-custodial release.

¶6 The trial court found counsel's assertions that he had told Hole the court must give him a life sentence, but could allow him the possibility of release from custody after twenty years to be credible. The court did not believe Hole's assertions that he did not understand he faced a mandatory life sentence, and that counsel was only arguing for release from custody after thirty years. Thus, the trial court's determination that Hole's plea was knowingly entered was based upon the court's finding that—notwithstanding any incomplete or inaccurate statements made in the plea colloquy and plea questionnaire—Hole in fact understood when he entered his plea that he would be sentenced to life imprisonment, that the court could allow him the possibility of release on extended supervision after twenty years, and that counsel would argue for release after thirty years. Contrary to Hole's argument on appeal, the standard for whether the defendant actually understood the penalty he faced does not change based upon whether the ***Bangert*** violation was one of omission or commission. The testimony the State produced from trial counsel was sufficient to satisfy its burden.

By the Court.—Judgment and order affirmed.

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