COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2016 **Cir. Ct. No. 2002CF1321**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC M. WALKER,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Eric M. Walker, *pro se*, appeals from a trial court order denying his WIS. STAT. § 974.06 (2009-10)[1] motion for postconviction relief. Walker argues that the trial court erroneously denied his motion to withdraw his guilty pleas at the conclusion of the evidentiary hearing on his ***Bangert*** motion.[2] We conclude, based on the totality of the record, that the trial court's findings of fact are not clearly erroneous and that those facts demonstrate that the State met its burden of proving that Walker's pleas were entered knowingly, intelligently and voluntarily, despite a deficiency in the plea hearing. Accordingly, we affirm.

BACKGROUND

¶2 Pursuant to a plea agreement, Walker pled guilty to one count each of first-degree reckless homicide, while armed, as a party to a crime, and first-degree recklessly endangering safety. At the plea hearing, Walker and his trial counsel agreed that the trial court could use the facts in the criminal complaint as the basis for the guilty pleas. According to the criminal complaint, both Walker and another man fired guns into a car. The bullets struck and injured the car's driver and killed his one-year-old son.

¶3 Walker was convicted and sentenced. With new counsel, he filed a postconviction motion seeking to withdraw his guilty pleas. The motion alleged

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

[2] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

that Walker's pleas were involuntarily entered because his trial counsel erroneously "guaranteed a particular disposition" and failed to object to the State's alleged breach of the plea agreement. The trial court denied the motion without a hearing and Walker appealed. We affirmed his conviction. *See* ***State v. Walker***, No. 2003AP1835-CR, unpublished slip op. (WI App July 15, 2004).

¶4 Four years later, Walker filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal.[3] He again sought to withdraw his pleas. He argued that his guilty pleas were not knowingly, intelligently and voluntarily entered because he did not understand the concepts of "utter disregard for human life" or party-to-a-crime liability. With respect to party-to-a-crime liability, Walker asserted that the plea questionnaire did not contain a written explanation of party-to-a-crime liability and that the trial court had not discussed it with Walker at the plea hearing. Walker alleged that the plea colloquy did not conform to WIS. STAT. § 971.08 and that he was entitled to an evidentiary hearing pursuant to ***Bangert***.

¶5 The trial court rejected Walker's argument concerning "utter disregard for human life" without a hearing, but ultimately granted Walker's request for an evidentiary hearing on his understanding of party-to-a-crime liability.[4] The trial court said that because no explanation of party-to-a-crime liability was offered on the record, it was "essential to know what trial counsel explained to the defendant with respect to the elements of the offense." Further,

[3] The same trial judge who accepted Walker's pleas and sentenced him reviewed his 2008 postconviction motion.

[4] There was a delay in granting the request for a hearing because Walker's trial counsel was serving in the military.

the trial court concluded that Walker's motion was not barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because postconviction counsel's failure to raise a claim of potential merit was a basis to avoid the ***Escalona-Naranjo*** procedural bar.[5]

¶6 Prior to the evidentiary hearing, Walker filed a motion to add one additional issue to his WIS. STAT. § 974.06 motion: whether he knew, at the time he pled guilty, that "he was waiving his right to have counsel discover potential defenses or mitigating circumstances." The trial court allowed Walker to address that issue at the hearing.

¶7 Walker was represented by retained counsel at the evidentiary hearing. Both Walker and his trial counsel testified, as detailed below. Ultimately, the trial court found that Walker understood party-to-a-crime liability when he pled guilty and that his trial counsel had explored possible defenses with him. The trial court denied Walker's postconviction motion. Walker now appeals, and he has chosen to pursue only a single argument: whether he is entitled to plea withdrawal based on his alleged misunderstanding of party-to-a-crime liability.[6]

[5] On appeal, the State explicitly notes that it does not contest the trial court's ruling concerning ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The State also agrees with the trial court's determination that the plea colloquy was deficient regarding the explanation of party-to-a-crime liability and that an evidentiary hearing was therefore required.

[6] Because Walker has not pursued his allegations concerning utter disregard for human life and potential defenses, we do not discuss those issues. *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).

DISCUSSION

¶8 At issue is the trial court's resolution of Walker's ***Bangert*** claim. Pursuant to ***Bangert*** and its progeny, a defendant is entitled to an evidentiary hearing on his or her motion to withdraw a guilty plea after sentencing if the motion: (1) makes "a prima facie showing of a violation of WIS. STAT. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript"; and (2) alleges "that the defendant did not know or understand the information that should have been provided at the plea hearing." ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. "Once the defendant files a ***Bangert*** motion entitling him to an 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. If the State meets that burden, "the plea remains valid." ***Id.***

¶9 On appeal of an order denying a ***Bangert*** motion after an evidentiary hearing, the appellate court must determine whether the State met its burden of showing that the defendant's guilty plea was entered knowingly, intelligently and voluntarily. ***Hoppe***, 317 Wis. 2d 161, ¶45. The appellate court accepts the trial court's "findings of historical and evidentiary fact unless they are clearly erroneous," but it "independently determine[s] whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.***

¶10 At the evidentiary hearing, trial counsel testified about conversations he had with Walker before Walker pled guilty. Trial counsel said that he went through the elements of the crimes with Walker and that he had explained the concept of party-to-a-crime liability to Walker. He testified that he explained

what it meant to aid and abet a crime, to be a conspirator in a crime and to be a principal in a crime. He explained that he and Walker talked about party-to-a-crime liability as it specifically related to Walker's crime, including the fact that regardless of who actually shot the child, Walker could be found guilty of reckless homicide as a party to the crime. Trial counsel said that he remembered being "confident" at the time of the plea that Walker understood what trial counsel told him about party-to-a-crime liability.

¶11 Walker testified that he and trial counsel had not discussed the elements of the crimes or the concepts of abetting, conspiracy or being a principal actor. He said that when the trial court asked whether he understood the charges and was satisfied with his trial counsel's representation, he answered in the affirmative because he "had an assumption what party to a crime meant." Specifically, he said he believed that it meant "there was another co-defendant with me on the case, that there was more than one person on the case being charged with the case." Walker also denied telling trial counsel that he fired a gun or was even at the crime scene. When asked if he thought trial counsel was "making … up" that Walker told him he shot into the car, Walker answered, "Yes."

¶12 The trial court found trial counsel's testimony was credible and said "that even though [trial counsel] did not specifically recall the language that he used[,] under the totality of [the] circumstances I'm satisfied that he reviewed the elements of the offense with Mr. Walker" using "appropriate language for Mr. Walker to understand." The trial court found Walker's testimony "somewhat disingenuous" and "somewhat incredible" when compared with Walker's answers at the time of the plea hearing. The trial court noted: "At no time during the plea did Mr. Walker indicate to the court that he didn't understand what was going on,

and at no time did he even ask for an opportunity to speak with [trial counsel] further and I extended to the defendant that opportunity." The trial court concluded: "I am satisfied Mr. Walker did understand the elements of the offense, particularly with respect to party to a crime."

¶13 On appeal, Walker challenges the trial court's findings of fact in several respects. He faults the trial court for comparing Walker's motion hearing testimony with the plea hearing transcript, asserting that the trial court misinterpreted the meaning of Walker's answers at the plea hearing. He also challenges the finding that trial counsel had, in fact, explained the elements of the crime to Walker, arguing that "there was no actual proof or written evidence of the essential elements being discussed or defined at the plea hearing." Further, Walker argues that the trial court's finding that trial counsel's testimony was credible "is clearly erroneous." Walker concludes that trial counsel's testimony was "short of the ample evidence necessary to legally conclude that Walker was informed of and understood the essential elements prior to pleading guilty."

¶14 We are not convinced by Walker's arguments. The weight and credibility to be given to witnesses' testimony is left to the trial court's discretion. *See* ***State v. Triplett***, 2005 WI App 255, ¶9, 288 Wis. 2d 515, 707 N.W.2d 881. Trial counsel testified that he went through the elements of each crime with Walker and discussed party-to-a-crime liability both generally and as it related to the facts in Walker's case. The trial court was free to accept this testimony and we will not disturb the trial court's finding. *See* ***id.*** The trial court was also free to reject Walker's testimony, which included his surprising assertions that he never told trial counsel that he shot a gun into the car or was present for the shooting.

¶15 We accept the trial court's findings of fact, as they are not clearly erroneous. *See* ***Hoppe***, 317 Wis. 2d 161, ¶45. We also conclude that those findings, including the finding that trial counsel specifically discussed party-to-a-crime liability with Walker in a way that he could understand, demonstrate that Walker's pleas were knowingly, intelligently and voluntarily entered. *See* ***id.*** The fact that the plea questionnaire and plea hearing did not adequately discuss party-to-a-crime liability—which Walker discusses at length in his brief—does not change our conclusion. Indeed, that is what rendered the plea hearing deficient and gave Walker the right to an evidentiary hearing. Where, as here, the State met its burden of showing "that the defendant's plea was knowing, intelligent and voluntary despite the identified defects in the plea colloquy," the guilty plea will not be disturbed. *See* ***id.***, ¶44.

By the Court.—Order affirmed.

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