RECEIVED
09-04-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent

v. Appellate Case No.: 2018AP1171-CR
Circuit Court Case No.: 2015CF2006
Milwaukee County

DIONTE J. NOWELS,
Defendant-Appellant

APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF POSTCONVICTION MOTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH DONALD AND CAROLINA STARK PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

Sara H. Roemaat
Attorney for Defendant-Appellant
State Bar No.: 1056631

Roemaat Law Offices, LLC
PO Box 280
Pewaukee, WI 53072
Phone: 262-696-9012
Fax: 262-696-6323
sara@roemaatlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent

v. Appellate Case No.: 2018AP1171-CR
Circuit Court Case No.: 2015CF2006
Waukesha County

DIONTE J. NOWELS,
Defendant-Appellant

APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF POSTCONVICTION MOTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH DONALD AND CAROLINA STARK PRESIDING

Issue Presented

1. Should Nowels' plea be withdrawn because the court failed to recite two elements of count 3?

Answered by circuit court: No, Nowels understood all the elements of count 3.

Position on Oral Argument and Publication

Neither is requested, as the appeal can be resolved upon the parties' briefs and publication is not necessary.

Statement of the Case and Facts

On May 1, 2015, Nowels was charged with one count of Armed Robbery (Party to a Crime), one count of Second Degree Reckless Homicide, and one count of Hit and Run (Resulting in Death). On April 28, 2015, Milwaukee Police Officers responded to a fatal motor vehicle crash that had occurred at the intersection of North 53rd Street and W. Center Street in the city and county of Milwaukee. Officers observed a green Chevrolet Malibu with severe front-end damage as well as a silver Mercury Cougar with severe damage to the driver's side door. The Cougar's driver, E.A., was pronounced dead at the scene because of the car accident. R1:4.[1]

Video surveillance showed the driver of the Malibu exited the vehicle and fled on foot. Citizen witness K.N. stated that a man she later identified as Nowels approached her vehicle and attempted to enter the passenger side of it. Citizen witness A.C. told police that she heard somebody asking to be let into her apartment as they appeared to be kicking her back door. She then heard three kicks and saw somebody enter her apartment. The person, later identified as Nowels, offered her money in exchange for her to hid him. A.C. rejected the money, and Nowels ran further into her house. R1:2-3.

Police Officer Jonathan Meijas-Rivera stated that he was responding to an armed robbery call that involved a green Malibu. Officer Meijas-Rivera attempted to pull over the suspected Malibu, but the Malibu drove away, reaching fast speeds. Officer Meijas-Rivera witnessed the car crash and he saw an African-American male flee from the car and attempt to enter a passing vehicle. The officer then saw the male flee into the apartment where Mr. Nowels was arrested. R1:3.

[1] Names have been reproduced to preserve confidentiality.

Further, F.D. told police that Nowels was armed, and forced him to let him drive his car to the bank before all this occurred; this was the alleged armed robbery the officer was responding to. R1:3.

Nowels had an initial appearance on May 2, 2015; probable cause was found, and bail was set at $250,000. R54. A preliminary hearing was held on May 12, 2015, and Nowels was bound over for trial. R55:21. On May 27, 2015, Nowels was arraigned. R56. A standard pretrial conference was held on June 18, 2015, and the case was adjourned. R57.

On July 14, 2015, Nowels' attorney withdrew. R58. On July 27, 2015, a status conference was held to get the new attorney up to speed. R59. On October 29, 2015, Nowels' new attorney withdrew. R60. On December 9, 2015, Nowels had a new attorney appointed, but that attorney withdrew because he obtained new employment. R61. A status of counsel was held on January 5, 2016. R62.

An amended Information was filed on February 26, 2016; it amended count 1, Armed Robbery, to Operating a Motor Vehicle Without Owner's Consent. R14. Nowels entered a guilty plea to all three charges on February 26, 2016. R63. On April 21, 2016, Nowels received 18 months initial confinement and 2 years extended supervision on count 1, 15 years initial confinement and 10 years extended supervision on count 2 (concurrent with count 1, consecutive to count 3 and consecutive to any other sentence), and 5 years initial confinement and 5 years extended supervision on count 3. R22; App. 101.

Nowels timely filed a postconviction motion on March 20, 2018. Nowels argued that he should be allowed to withdraw his plea on count 3 or, in the alternative, be resentenced. Nowels argued that he did not understand count 3 when he pled guilty because the court did not inform him of

element 2 or element 5 for count 3. Element 2 stated that the State would have to prove that he knew the vehicle he was operating was involved in an accident involving an attended vehicle. Element 5 stated that he was physically capable of complying with the requirement of that hit and run statute. R42.

A motion hearing was held on June 19, 2018. Nowels' attorney testified that she had no specific recollection of what the negotiations were. R66:6. She also testified that with regard to going over the plea questionnaire with Nowels, "[I] cannot pretend to know what exact words I used or anything like that; I did document that and, based on my documentation and normal practice, I would say that I have a memory but I can't tell you exactly what I said" R66:7.

She further testified that she gave him the jury instructions on January 25, 2016, but her time log specifically indicated that she did not go through the jury instructions with him. R66:8. On January 26, 2018, her time log did not reflect that she went through the jury instructions with him, although she believed that she did because that was her normal practice; however, she had no independent recollection of that. R66:8. She was also positive that she went through the jury instructions with Nowels in February, but she had no documentation of that; instead, she had documentation that she reviewed the plea questionnaire, options, risks and benefits, and she answered his questions. R66:9. She further believed that she went through the jury instructions with Nowels because there were markings on the page, but again stressed that she had no independent recollection. R66:10.

The attorney testified that she went over defense issues with regard to the second element but had no independent recollection of any discussion of the fifth element. R66:10-11. On cross-examination, the attorney testified that she

typically has the clients recite their crimes using the elements, but she had no independent recollection of Nowels doing that in this case. R66:14.

Nowels then testified. He testified that he did not remember reading the plea questionnaire nor did he remember going over the attached elements sheet. He did not feel like he understood what the elements were when he pled guilty. He stated that he was "led to believe that because [he] was charged and being convicted for two different death charges, one person being killed, and [he] was led to believe that once [he] killed…[E.A.]…that was reckless homicide. And when [he] left the scene, that made the hit and run resulting in death as—she made it seem that was the only thing that was different 'cause [he] left the scene." R66:26. Nowels testified that had he fully known the elements, he would not have pled guilty. R66:26.

Nowels stated that he would not have pled guilty because he thought he was in an accident with a stop sign, and because he did not believe he was physically capable of following the statute. R66:27-28.

The circuit court held that during the plea hearing, the court did not satisfy the requirements of the statute because the court did not completely review the elements, nor did it confirm that Nowels' attorney had accurately reviewed all the elements of the offense. R66:41-42; App. 119-120. The court also held that the attorney had given Nowels the written jury instructions when they met in January 2016, although she did not go over it with him at that time. R66:43; App. 121. The court found that the attorney met with Nowels on February 25, 2016 and "during that in person meeting, she did specifically review jury instruction 2670 with the defendant; specifically reviewing element number 2 and element number 5 with the defendant." R66:43; App. 121.

The court then found that the attorney met with Nowels on February 26, 2016, and she reviewed all five elements of instruction 2670 with him; she read them out loud and "she asked him to tell her in his own words how his conduct, or what he admitted doing, satisfied or related to each of the five elements; including having him tell her in his own words how conduct he admitted to satisfied element number 2 and element number 5." R66:43-44; App. 121-122..

Ultimately, the court found that Nowels knew and understood elements 2 and 5 when he entered his plea on February 26, 2016. The court did not find his testimony to be more credible than the attorney's testimony. The court found that "even though [the attorney] testified that she didn't have the independent recollection of the exact words that she said to him, her testimony included that the markings on the forms were hers, that her practice is to do that with a defendant as she's going through the forms with them." R66:47-48; App. 125-126.

The court also found that the sentence was not harsh and excessive. That issue is not being taken up on appeal. A Notice of Appeal was timely filed.

Argument

I. Nowels' plea was not knowingly, intelligently and voluntarily entered.

a. Standard of review.

Whether a plea colloquy violates Wis. Stat. Sec. 971.08 or other mandatory duties is a question of law that the Court of Appeals determines independently of the circuit court while benefiting from their analysis. Whether a defendant's plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact and an appellate court will uphold the circuit court's findings unless they are

clearly erroneous. However, the appellate court independently determines as a matter of law whether the circuit court's findings of historical fact demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *State v. Finley*, 2016 WI 63, ¶57-59, 370 Wis.2d 402, 882 N.W.2d 761.

b. General principles of law.

A guilty plea must be entered knowingly, voluntarily and intelligently. *State v. Bangert*, 131 Wis.2d 246, 257, 389 N.W.2d 12, 21 (1986) *citing Boykin v. Alabama*, 395 U.S. 238, 242 (1969). In making sure that a plea is entered knowingly, voluntarily and intelligently, the trial court has several duties, including establishing that a defendant understands the nature of the crime charged. *Bangert*, 131 Wis.2d at 262; Wis. Stat. Sec. 971.08(1)(a). An understanding of the nature of the charge must include an awareness of the essential elements of the crime. *Bangert*, 131 Wis.2d at 267.

Post-sentencing, a defendant must prove by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in a "manifest injustice." *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis.2d 714, 605 N.W.2d 836. A manifest injustice exists where a defendant demonstrates that the plea was coerced, uninformed, or unsupported by a factual basis, and where counsel provided ineffective assistance, or the prosecutor failed to fulfill the plea agreement. *State v. Krieger*, 163 Wis.2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991).

Under *Bangert*, a defendant can move to withdraw his plea if the plea colloquy did not conform with Wis. Stat. Sec. 971.08 and judicial mandates, and the defendant did not know or understand information that should have been given at the plea hearing. Thus, his plea would not be knowing,

intelligent and voluntary. *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

The circuit court must hold an evidentiary hearing if the defendant makes a prima facie showing that the court failed to follow the requirements of Wis. Stat. Sec. 971.08 or other mandatory procedures and if the defendant did not know or understand the information that should have been provided at the plea colloquy. *Bangert*, 131 Wis.2d at 274. The defendant is then entitled to withdraw his plea as a matter of right because such a plea "violates fundamental due process" unless the state can show that the plea was entered knowingly, intelligently and voluntarily, despite the deficiencies in the plea hearing. *State v. Van Camp*, 213 Wis.2d 131, 139, 569 N.W.2d 577 (1997); *State v. Trochinski*, 253 Wis.2d 38, ¶17, 644 N.W.2d 891.

With regard to how the court may establish a defendant's understanding of the charges to which he is pleading, the court may use any of the following non-exhaustive methods:

1) The trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions;
2) The trial judge may ask the defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing; and
3) The trial judge may expressly refer to the record or other evidence of defendant's knowledge of the charge established prior to the plea hearing.

Bangert, 131 Wis.2d at 268.

c. Nowels did not understand the elements.

In Nowels' case, the court went through the following elements for count 3, Hit and Run Resulting in Death:

> You understand that the State would have to prove that again, on or about April 28th of 2015 in the 5300 block of West Center Street in the City of Milwaukee, Milwaukee County, State of Wisconsin, being the operator of a vehicle involved in an accident resulting in the death of [E.L.A.], you did fail to immediately stop the vehicle at the scene of the accident or as close thereto as possible, and failed to remain at the scene of said accident until you fulfilled the following requirements. Until you provided name, address, and registration number of the vehicle that you were driving to the person struck, or to the operator, or to the occupant of, or a person attending any vehicle collided with, upon request and if available, exhibit your operator's license to the person struck or the operator or occupant of or a person attending any vehicle collided with, or render to any person injured in such accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary, or if such caring is requested by the injured person. And that you did this contrary to section 346.67(1) and 346.74(5)(d), and 939.50(3)(d) of the Wisconsin Statutes.

R63:14-15; App. 113-114.

However, the court left out two elements in reciting the jury instruction. The second element is that "the defendant knew that the vehicle he was operating was involved in the accident involving an attended vehicle. This requires that the defendant knew, before leaving the scene, that the accident involved an attended vehicle." JI 2670. The fifth element is that "the defendant was physically capable of complying with the requirements I have just recited." *Id.* The court failed to recite either of these elements.

During the plea hearing, Mr. Nowels' trial attorney testified that she went over the plea questionnaire with Mr. Nowels but never stated on the record that she explained the

nature of the charges to him, and the circuit court never asked Mr. Nowels or his attorney to summarize the elements.

Thus, the court held an evidentiary hearing because Mr. Nowels had made a prima facie showing that the court failed to follow the requirements of Wis. Stat. Sec. 971.08 by not reciting all the elements of count 3. At the hearing, the court denied Nowels' motion. The court did find that the court that took the plea did not satisfy the requirements of the statute because the court did not completely review the elements, nor did it confirm that Nowels' trial attorney had accurately reviewed all the elements of the offense. R66:41-42; App. 119-120. Nowels agrees with this finding.

However, the court clearly erroneously exercised its discretion when holding that Nowels understood the elements based on interaction with his trial attorney. First, the court held that the attorney had met with Nowels on February 25, 2016 and "during that in person meeting, she did specifically review jury instruction 2670 with the defendant; specifically reviewing element number 2 and element number 5 with the defendant." R66:43. However, this is not what the testimony demonstrated. The trial attorney testified that her notes stated that on February 25, 2016, she met with Nowels to discuss the plea questionnaire, options, risks and benefits, and to answer his questions. She did not testify that she specifically went over element number 2 nor element number 5 on that date. R66:9.

The court then found that the attorney met Nowels on February 26, 2016, and she reviewed all five elements of instruction 2670 with him; she read them out loud and "she asked him to tell her in his own words how his conduct, or what he admitted doing, satisfied or related to each of the five elements; including having him tell her in his own words how conduct he admitted to satisfied element number 2 and element

number 5." R66:43-44; App. 121-122. Again, this is not what the trial attorney testified to.

She testified that her jury instructions that she submitted to the court has the regular markings that she used when going through jury instructions with clients. R66:9. She believed this meant she went through the jury instructions with Nowels but had no independent recollection. R66:10.

She did say that one defense she recalled was that he did not know he had hit an attended vehicle. R66:10. However, she did not recall going over the other elements, including the 5th element, with him. She testified that she typically has each of her clients explain how their conduct fulfills the elements but had no recollection of this. R66:14.

Trial attorneys often do not have recollections of plea preparations because they happen far in the past, but this trial attorney did not recall anything specifically except for going over the second element. She inferred that she took detailed notes about these meetings with Nowels, and yet there is nothing in her notes about going over the jury instructions, much less that she went over every single element.

In reaching its decision, the circuit court relied on information that was not presented to the court. The trial attorney did state what her typical practice was, but she did not characterize her testimony the way the court did in reaching its decision. At most, the trial attorney testified that she went over element 2 and Nowels understood it, but there is nothing about going over element 5 with him, or how she demonstrated that he understood it.

Further, the fact that the trial attorney missed not one but two elements that the court failed to recite in court indicates that the trial attorney did not spend enough time with Nowels to ensure he understood the elements; she did not even notice when the court neglected to recite multiple elements.

The record conclusively demonstrates that Nowels was never informed and was otherwise unaware that the State had to prove elements 2 and 5. He is therefore entitled to withdraw his plea.

Conclusion

For the reasons set forth above, Nowels respectfully requests that the Court of Appeals reverse the decision of the circuit court to deny the motion to withdraw his plea.

Dated this 30th day of August 2018.

Respectfully submitted,

_____

Sara Roemaat
State Bar No. 1056631
Roemaat Law Offices, LLC
PO Box 280
Pewaukee, WI 53072
Phone: 262-696-9012
Fax: 262-696-6323
sara@roemaatlaw.com

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 3,854. words.

Respectfully submitted,

_____

Sara Roemaat
State Bar No. 1056631

I certify that the text of the electronic appeal is identical to the text of the paper copy of the appeal.

Respectfully submitted,

_____

Sara Roemaat
State Bar No. 1056631

I certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (3) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully submitted,

_____

Sara Roemaat
State Bar No. 1056631

I certify that this brief or appendix was deposited in the U.S. mail for delivery to the Clerk of the Court of Appeals by first class mail, or other class of mail that is at least expeditious, on August 30, 2018. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Respectfully submitted,

_____

Sara Roemaat
State Bar No. 1056631