COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP275-CR **Cir. Ct. No. 2007CF177**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD F. GEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: PATRICK J. FARAGHER and JAMES G. POUROS, Judges. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Richard F. Geyer appeals from a judgment of conviction entered upon his no contest pleas to repeated acts of sexual assault against the same child and child enticement and from an order denying his

postconviction motion for plea withdrawal entered following reversal and remand by this court.[1] Geyer argues that the trial court erred in determining that: (1) Geyer understood the legal definition of sexual contact despite deficiencies in the plea colloquy and (2) Geyer's pleas were knowing, intelligent, and voluntary rather than the product of undue coercion. We affirm.

¶2 In 2007, Geyer was charged with one count of repeated acts of sexual assault against the same child, five counts of child enticement, and one count of using a computer to facilitate a child sex crime. Geyer retained private counsel and at a hearing in early October 2007, the court scheduled a jury trial for April 8, 2008. At the November 2007 arraignment, the trial court reaffirmed the jury trial date and set a pretrial status hearing for March 5, 2008. At the pretrial status hearing, trial counsel informed the court that Geyer was in the process of hiring successor counsel. Concerned that this would delay the trial, the court stated that though it did not have a problem with substituting attorneys, neither successor counsel nor Geyer "should expect an adjournment of the trial."

¶3 More than three weeks later, proposed successor counsel filed a motion to adjourn the jury trial, which the State opposed in writing. On April 2, 2008, Geyer appeared in court with both trial counsel and proposed successor counsel and argued in favor of the adjournment. After considering its earlier warnings to Geyer not to expect an adjournment as well as the rights of the alleged victim, the trial court denied the motion, concluding that "there is no

[1] The Honorable Patrick J. Faragher presided in the trial court through sentencing and entered the original postconviction order later reversed by this court. *See* ***State v. Geyer***, No. 2011AP316-CR, unpublished slip op. (WI App May 2, 2012). Upon remittitur, the Honorable James G. Pouros heard and denied Geyer's postconviction motion.

legitimate reason for the delay. It's simply dilatory." The court denied trial counsel's motion to withdraw and stated that either trial counsel or his proposed successor was expected to proceed to trial as scheduled.

¶4 Once off the record, both defense attorneys met with Geyer for about an hour to determine how to proceed. Later that morning, court was reconvened to allow Geyer to enter no contest pleas pursuant to a plea agreement. Both trial attorneys appeared as co-counsel and, after a colloquy, the court accepted Geyer's pleas to one count each of repeated acts of sexual assault of a child and child enticement, and adjourned the case for sentencing.[2]

¶5 After sentencing, Geyer filed a postconviction motion for plea withdrawal which was summarily denied by the trial court. On appeal, this court concluded that the trial court should have conducted an evidentiary hearing on Geyer's postconviction motion and we reversed the order denying postconviction relief with directions to conduct an evidentiary hearing.[3] ***State v. Geyer***, No. 2011AP316-CR, unpublished slip op. (WI App May 2, 2012). Geyer, trial counsel, and successor counsel all testified at the lengthy evidentiary postconviction hearing. After the parties submitted written briefs, the trial court entered a decision and order denying Geyer's postconviction motion in full.

[2] The trial court subsequently signed an order of substitution and successor counsel represented Geyer for sentencing purposes. For clarity, Geyer's prior attorney, who represented him at the plea hearing, will be referred to as trial counsel.

[3] Geyer claimed that the plea colloquy was deficient as to the child sexual assault count and that his pleas to both counts were the result of undue coercion based on the trial court's refusal to grant an adjournment. We concluded that Geyer was entitled to an evidentiary hearing on both grounds. ***Geyer***, No. 2011AP316-CR, ¶¶12-13.

¶6 On appeal, Geyer argues that he is entitled to plea withdrawal under both ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). The ***Bangert*** analysis addresses defects in the plea colloquy while ***Bentley*** applies where the defendant alleges that factors extrinsic to the plea colloquy rendered his plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. In determining whether plea withdrawal is warranted, we accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

¶7 Geyer first asserts that he is entitled to plea withdrawal because the State failed to establish that when entering his plea, Geyer understood the meaning of sexual contact, an essential element of the child sexual assault offense.[4] In meeting its burden, the State may "rely on the totality of the evidence, much of which will be found outside the plea hearing record." ***Hoppe***, 317 Wis. 2d 161, ¶47. This may include the testimony of the defendant and trial counsel, the plea

[4] Our prior opinion determined that because the trial court did not define "sexual contact," the statutory definition was not attached to the signed plea questionnaire, and Geyer alleged he did not understand this element, Geyer established a prima facie case entitling him to a hearing at which the State bore the burden to establish the knowing and voluntary nature of his plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986) (where a postconviction motion establishes a prima facie case that the trial court failed to comply with Wis. Stat. § 971.08 or other mandatory procedures, the burden shifts to the State to demonstrate by clear and convincing evidence that despite the deficiency, the defendant otherwise knew or understood the missing information); ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (in a charge of sexual assault by sexual contact, the purpose of the sexual contact is an offense element of which the defendant must be aware).

questionnaire and waiver of rights form, documentary evidence, and transcripts of prior hearings. ***Id.***

¶8 We conclude that the State proved by clear and convincing evidence that Geyer understood the nature of the child sexual assault charge to which he pled, including the legal definition of sexual contact and the State's burden to prove this element at trial. Though Geyer testified that he did not understand the definition of sexual contact when entering his plea, the record contains an abundance of evidence to the contrary, and we accept the trial court's finding that Geyer's testimony was not credible. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975) (the trier of fact is the arbiter of witness credibility and its findings will not be overturned unless they are inherently or patently incredible). At the postconviction hearing, successor counsel testified that where sexual contact is an offense element, he always explained its statutory definition and the State's burden of proof, and that he specifically remembered discussing sexual contact with Geyer on more than one occasion prior to April 2, 2008, and again during the break immediately before Geyer entered his no contest pleas. Trial counsel testified that it is his regular practice to explain each essential offense element to his clients, and that he believed he discussed the meaning of sexual contact with Geyer. Geyer's understanding of sexual contact is also supported by the March 3, 2008 email he sent to successor counsel asserting: "Although we never actually had sexual intercourse, we had what the state calls 'sexual contact.'" That Geyer understood the concept of sexual contact is further corroborated by the record of the original plea hearing, where Geyer informed the court that he had discussed the meaning of sexual contact with his attorney:

> THE COURT: I am assuming that your lawyer has discussed with you what sexual contact means and how that is defined; and what sexual intercourse means in Wisconsin

> and how that's defined. Because it's not the dictionary definition; it's a statutory definition. Has that been done?
>
> GEYER: Yes, sir.

At this hearing, Geyer also agreed that the criminal complaint, which detailed the charged instances of sexual contact, could be used to provide a sufficient factual basis for his pleas, and informed the trial court that he had reviewed and understood the plea form and its attachments, which included the jury instructions for both offenses, and had "sexual contact" handwritten in on the form instruction for child enticement. The State proved by clear and convincing evidence that Geyer understood the nature of the charge.

¶9 We also reject Geyer's claim that his pleas were coerced by a combination of pressure from his attorneys and the trial court's refusal to grant an adjournment.[5] Though Geyer testified at the postconviction hearing that on the day of the plea, he was in "a state of shock" and was told by both counsel that he "had no other choice but to take a plea and that [he] better do it" that day, the trial court found that Geyer was not credible.[6] This finding is not clearly erroneous. The record demonstrates that the jury trial date was scheduled in October 2007, the State made it known that it would oppose an adjournment, and the trial court made it clear to Geyer on more than one occasion that he should not expect an adjournment. Prior to entering his pleas, Geyer met with co-counsel for over an hour to decide how to proceed. According to both attorneys, they informed Geyer

[5] On this second claim, Geyer bears the burden to establish by clear and convincing evidence that his pleas were unknowingly, involuntarily, or unintelligently entered. ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794.

[6] The trial court credited the testimony of both attorneys and determined that it depicted "not a defendant in shock, but rather that the defendant is having difficulty accepting the inevitable, a defendant in denial, and a defendant coming to grips with the reality of his case."

that the decision whether to plead or proceed to trial was ultimately his to make. Based on the postconviction testimony, the trial court found that Geyer and his attorneys had anticipated resolution by a plea agreement and that even prior to the status hearing, "this case was not headed for a jury trial."

¶10 Geyer emphasizes that at the time of the status hearing, neither attorney was prepared to try the case. According to Geyer, this conclusively establishes that he had no reasonable alternative to pleading no contest and that his pleas were therefore coerced. We disagree. Trial counsel, whom the court found to be a "very, very experienced" criminal defense attorney, testified that "if push came to shove" he could have been ready to try the case by the scheduled trial date. Trial counsel testified that Geyer had stopped communicating with him in January 2008 and that while they were in communication, Geyer's stated interest was to delay the plea and stay out of jail for as long as possible. Trial counsel testified that in the hour-long meeting preceding the plea hearing, he did not "believe that Mr. Geyer really ever took that stance of that he was really intent on going to trial" and that Geyer never asked whether counsel could be prepared for trial by the scheduled trial date. The trial court credited the testimony of Geyer's attorneys and found Geyer not credible. On this record, Geyer has not established a manifest injustice entitling him to plea withdrawal. *See* ***Hoppe***, 317 Wis. 2d 161, ¶60.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).