COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP171 **Cir. Ct. No. 2002CF73**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN L. PARR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Curley JJ.

¶1 PER CURIAM. Benjamin Parr appeals an order denying his WIS. STAT. § 974.06[1] motion to withdraw his 2002 no contest plea to one count of

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

solicitation to commit first-degree sexual assault of a child. The motion alleged: (1) the court failed to inform Parr that sexual assault involved intentional touching for the purpose of sexual arousal or gratification and Parr did not understand that element; (2) the court failed to confirm Parr's understanding of all of the constitutional rights he waived by pleading no contest; and (3) the court failed to establish a factual basis for the plea.[2] After conducting a hearing on the motion, the circuit court denied the motion, finding the plea was knowingly, voluntarily and intelligently entered. We affirm the order.

¶2 The complaint alleged Parr contacted a woman through an internet messenger service and by telephone. He expressed an interest in dating her and wanted to "hang out naked at his house" with her son and Parr's son, ages one and one-half and four years, respectively. Parr expressed an interest in having the woman fondle his son and referred to his desire to have sexual contact between himself and the woman and their two sons. He advised the woman to touch her son's genitals and told her he had already "pleasured his own son." He also indicated he wanted to see the woman "hang out naked with her son and wanted to see her perform oral sex on the child. In addition, if [she] wanted him to suck on her son, that he would and that if her son wants to feel Parr, he could."

¶3 A defendant is entitled to an evidentiary hearing on a motion to withdraw his plea when the motion makes a prima facie showing that the circuit

[2] At the postconviction hearing and on appeal, Parr also contends he was not adequately informed of the maximum term of initial confinement, although he was informed of the maximum term of imprisonment. Because that issue was not raised in the motion, Parr failed to make a prima facie showing to entitle him to a hearing on that issue. In addition, the court only needs to inform a defendant of the maximum term of imprisonment, not the maximum term of initial confinement. ***State v. Sutton***, 2006 WI App 118, ¶15, 294 Wis. 2d 330, 718 N.W.2d 146.

court's colloquy did not conform with WIS. STAT. § 971.08 or judicially mandated procedures. ***State v. Taylor***, 2013 WI 34, ¶32, 347 Wis. 2d 30, 829 N.W.2d 482. The motion must also allege the defendant did not know or understand the information that should have been provided at the plea colloquy. ***Id.*** Two of the issues Parr raises on appeal do not meet that standard. He alleges the court failed to adequately inform him of the constitutional rights he waived by pleading no contest. However, the motion did not allege any lack of understanding of those rights. He also contends the circuit court failed to establish a factual basis for the plea. Parr stipulated to the factual basis and does not challenge the stipulation. Therefore, the only issue adequately raised in the postconviction motion was whether Parr was adequately informed that any sexual contact had to be for the purpose of sexual arousal or gratification.

¶4 Parr's motion alleged a prima facie violation of WIS. STAT. § 971.08 because the court failed to ascertain Parr's understanding of the sexual gratification element and Parr denied knowing of that element. Therefore, the court properly granted a hearing on that issue. *See* ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815 (Ct. App. 1995). At the hearing, the burden shifted to the State to show by clear and convincing evidence that the plea was knowingly, voluntarily and intelligently entered despite any inadequacies in the record at the time the plea was entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¶5 The record supports the circuit court's finding that Parr was informed of the arousal or gratification element by his attorney. Parr's trial attorney testified: "I have no doubt, based on this particular case, that I talked with Mr. Parr on more than one occasion about the nature of the elements in preparation for the case itself and in preparation for trial …." Although counsel

could not specifically recall every conversation that occurred ten years earlier, he testified:

> What I can tell you is that I have no doubt, based on my experience and my practice and how I've been doing things and [was] doing things in 2002 with these types of cases, that I would have gone over with Mr. Parr the elements, the jury instructions, what everything meant. And all of that stuff in this particular case I'm certain would have been discussed because of what I just said in this particular case, the concerns that I had about having to try this case to a jury.

¶6 Counsel's testimony was further supported by the transcript of a hearing that took place four days before the plea hearing at which Parr's counsel extensively discussed the jury instructions, particularly whether the sexual gratification requirement applied to Parr or to the woman. From this discussion, Parr should have also learned that sexual arousal or gratification was an element of sexual contact.

¶7 Parr denied knowing of the sexual gratification requirement. The circuit court did not believe Parr's testimony and found his trial attorney's testimony more credible. Parr contends the State did not meet its burden of proving by clear and convincing evidence that he understood the elements of the offense. *See* ***id.*** at 274. He contends his direct denial of understanding the elements should prevail over his trial counsel's less specific testimony about how he conducted cases rather than specific memory of conversations that occurred in 2002. The court is not required to accept a defendant's self-serving testimony that his attorney did not adequately explain the elements of the offense. The determination of witness credibility is for the circuit court to decide. *See* ***State v. Harvey***, 139 Wis. 2d 353, 378, 407 N.W.2d 235 (1987).

By the Court.—Order affirmed.

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