COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3261 **Cir. Ct. No. 2002CF47**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON R. SIGMON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Jason Sigmon appeals an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2003-04).[1] His

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

principal claim is that the circuit court erred in denying his motion to withdraw his no-contest pleas. We affirm.

¶2 Sigmon pled no-contest to two counts of second-degree sexual assault of a child, committed in January and February 2002. *See* WIS. STAT. § 948.02(2) (1999-2000). He argues that his pleas were not knowingly, voluntarily, and intelligently entered because he was not aware of the definition for "sexual contact" that requires the conduct to be for "sexual gratification." *See* WIS. STAT. § 948.01(5) (1999-2000).

¶3 One method for a defendant to attempt to withdraw his plea is to argue that the plea colloquy failed to comply with certain requirements. Before accepting a guilty or no contest plea, the court must address the defendant personally and determine that the plea is made voluntarily with an understanding of the nature of the charge and the potential punishment. WIS. STAT. § 971.08(1)(a); ***State v. Bangert***, 131 Wis. 2d 246, 266-70, 389 N.W.2d 12 (1986). Whenever the § 971.08 procedure is not undertaken, and the defendant alleges that he did not know or understand the information that should have been provided at the plea hearing, the burden shifts to the State to show by clear and convincing evidence that the plea was entered knowingly, voluntarily and intelligently. ***Bangert***, 131 Wis. 2d at 274.

¶4 The State argues that the denial of a plea-withdrawal motion is reviewed for erroneous exercise of discretion. Although it is often said that whether to grant a post-sentence plea withdrawal motion is committed to the sound discretion of the trial court, when a defendant establishes a constitutional violation, the withdrawal of his or her plea becomes a matter of right and the trial court has "no discretion in the matter" to deny the motion. ***Id.*** at 283. Whether a plea was knowingly and voluntarily entered is a question of constitutional fact. ***Id***.

We affirm the trial court's findings of evidentiary or historical facts unless they are clearly erroneous, but we independently determine whether the established facts constitute a constitutional violation that entitles a defendant to withdraw his or her plea. ***Id***. at 283-84; ***State v. Sturgeon***, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999).

¶5 Sigmon relies on ***State v. Jipson***, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18. In ***Jipson***, the defendant argued that the plea colloquy failed to meet the ***Bangert*** requirements as to a charge against him that included the element of sexual contact. We concluded that the "sexual gratification" component of the definition of "sexual contact" is an element of the charge, and that because the plea colloquy record did not show that the court or Jipson's attorney explained that definition to him, the plea colloquy was inadequate and the burden shifted to the State. ***Id.***, ¶9.

¶6 In attempting to apply ***Jipson*** to our present case, we encounter a complication. The statute that Sigmon was charged under makes it a crime to have "sexual contact or sexual intercourse" with a child under sixteen. WIS. STAT. § 948.02(2) (1999-2000). Each of those terms has a separate definition. *See* WIS. STAT. § 948.01(5) and (6) (1999-2000). We cannot determine with certainty from the record which conduct Sigmon was charged with. In the complaint Sigmon was charged with one count of repeated acts of "sexual contact" with the child. However, the text portion of the complaint uses the term "sexual intercourse," and specifically states that the victim agreed this term meant penetration of her vagina with Sigmon's penis.

¶7 The information again alleged one count of repeated sexual contact. At the plea hearing the information was amended, but no written amended

information appears in the record. The charge was orally amended to the two counts of sexual assault that Sigmon pled to, but the oral amendment did not say whether the conduct alleged was sexual contact or sexual intercourse. During the plea colloquy, the circuit court's brief description of the nature of the charge included the phrase "sexual contact or intercourse," but it did not define either term. The court found there was a factual basis for the plea stated in the complaint, but it did not obtain the defendant's assent to the facts in the complaint, and did not specify whether the factual basis was sexual contact or intercourse.

¶8 Because we are unable to determine what conduct Sigmon pled to, to analyze Sigmon's argument it is necessary to address both possibilities and the law applicable to each. Sigmon argues that if sexual intercourse was the charge, he was not provided with the definition of that term, either. As we have noted, in ***Jipson*** we held that the plea colloquy was inadequate because the defendant was not informed by the court or his attorney on the record of the "sexual gratification" component of the term "sexual contact." We did not address whether a similar requirement exists for a defendant to be provided with a definition of the term "sexual intercourse." We have found no case law deciding that point. We briefly consider it now.

¶9 We note that the current pattern jury instruction for the offense Sigmon pled to includes a definition of "sexual intercourse." *See* WIS JI—CRIMINAL 2101B and 2104. In at least one relevant case, the supreme court appears to have concluded that it is necessary for a plea colloquy to include such a definition, even if the definition is not given to the jury in the form of a separate element. In evaluating a "sexual contact" plea colloquy for compliance with ***Bangert***, the supreme court apparently regarded it as insignificant that the definition of "sexual contact" was incorporated in the jury instruction as a

definition, as opposed to being stated as a separate element of the charge. *See* ***State v. Bollig***, 2000 WI 6, ¶50 n.8, 232 Wis. 2d 561, 605 N.W.2d 199. We will therefore assume, without deciding, that a plea colloquy must include a definition of "sexual intercourse" when that is the charge made and pled to.

¶10 Sigmon's plea colloquy did not include any definition of either "sexual contact" or "sexual intercourse" on the record. The State argues that the colloquy was nonetheless adequate because of the plea questionnaire. That questionnaire contains a preprinted clause stating that the defendant understands that the crimes to which he is pleading have elements that the State would have to prove beyond a reasonable doubt, and that "[t]hese elements have been explained to me by my attorney or are as follows." The form then contains blank lines, which on Sigmon's form are not filled in. The State argues that the preprinted portion of the form, saying that Sigmon understands the elements, is sufficient to fulfill the court's obligation to satisfy itself that the defendant understands the nature of the charge, when the circuit court also ensures on the record that Sigmon signed the form and reviewed the questionnaire with his attorney.

¶11 The State cites no case law directly holding that this preprinted language is sufficient, and we are not aware of any. The State relies by analogy on ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which we held that the court could rely on the questionnaire to satisfy itself that the defendant understood the rights he was waiving. However, ***Moederndorfer*** does not resolve the issue now before us, for two reasons. First, ***Moederndorfer*** relied on certain language in ***Bangert*** regarding the method by which a plea colloquy can properly address the constitutional rights issue. ***Moederndorfer***, 141 Wis. 2d at 826-27. That language does not appear in the ***Bangert*** discussion of how a court should address the nature of the charge. While

Bangert contains language providing circuit courts with considerable flexibility in the method used to ascertain the defendant's understanding of the nature of the charge, we see nothing there that authorizes reliance on only a conclusory, preprinted-form statement. In fact, the opinion contains several passages that appear to state the contrary:

> While we have not established inflexible guidelines which a trial court must follow in ascertaining a defendant's understanding of the nature of the charge, this court is of the opinion that the time has arrived to require a trial court to do more than merely record the defendant's affirmation of understanding pursuant to sec. 971.08(1)(a)….
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> ….
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> … But it is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant that he understands the nature of the offense, without an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the requirement of sec. 971.08, Stats.
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> … A defendant's mere affirmative response that he understands the nature of the charge, without establishing his knowledge of the nature of the charge, submits more to a perfunctory procedure rather than to the constitutional standard that a plea be affirmatively shown to be voluntarily and intelligently made. Form would be elevated over substance.

Bangert, 131 Wis. 2d at 267-69. We perceive no difference between the State's reliance on the preprinted form in Sigmon's case and the "perfunctory affirmative response" deemed unacceptable in ***Bangert***.

¶12 ***Moederndorfer*** also appears inapplicable because, in that case, part of the significance of the questionnaire was the fact that the document itself listed and explained the specific rights the defendant was waiving. ***Moederndorfer***, 141

Wis. 2d at 827-28. The form did not contain merely a simple, general statement like "my rights have been explained to me and I understand them." In Sigmon's case, his questionnaire contained no substantive information about the nature of the charge.

¶13 In light of the above concerns, we conclude the plea colloquy was inadequate in that it does not establish Sigmon's understanding of the element "sexual contact or sexual intercourse," and therefore Sigmon has established a *prima facie* case for plea withdrawal.

¶14 We turn next to the question whether the State proved by clear and convincing evidence that the plea was entered knowingly, voluntarily and intelligently. ***Bangert***, 131 Wis. 2d at 274. The circuit court held a hearing on Sigmon's motion, which he brought pro se. For reasons that do not appear to be of record, Sigmon did not appear in person, but only by telephone. The court advised Sigmon that because he was the movant, he had "the burden." The court asked Sigmon if he wanted to call witnesses or testify on his behalf, and Sigmon stated that he wanted to "stand on the arguments of the motion." The court then conducted a discussion with Sigmon as to the grounds for the motion, but he did not testify. After that the State presented the testimony of Sigmon's trial counsel in this case and his trial counsel in an earlier sexual assault case.

¶15 Additional argument followed the testimony. The court then summarized the testimony provided by counsel, but did not make any express findings. The court concluded that as to the sufficiency of the plea colloquy on the nature of the charge, "the Court finds that Mr. Sigmon has not met that burden, based upon the testimony of [the two trial counsels]." The court further stated that if, for argument's sake, it found that the colloquy was inadequate, "there has not

been clear and convincing evidence showing that there wasn't a knowing, voluntary, and intelligent waiver."

¶16 The court's analysis was incorrect in two respects. First, the adequacy of a plea colloquy is judged by the words of the colloquy itself, as preserved in the transcript, and, if applicable, by the information contained in a plea questionnaire that appears in the record. Therefore, the testimony at the postconviction hearing was irrelevant as to whether the colloquy satisfied the requirements of ***Bangert***. However, this error is of no consequence because we have already assumed above that Sigmon's colloquy was inadequate. Second, in reaching its alternative conclusion, the court arguably placed the burden to make a clear and convincing showing on Sigmon, rather than on the State, as required under ***Bangert***.

¶17 Nonetheless, we conclude the motion was properly denied. As we stated above, it is a question of law whether the defendant's plea was entered knowingly, voluntarily, and intelligently. Therefore, the fact that the circuit court may have misapplied the burden does not require a remand for the court to make findings of fact using the proper burden. In the absence of disputed historical facts, we are permitted to decide independently whether the State's evidence met its burden to a clear and convincing degree.

¶18 We first address the State's showing as it relates to "sexual contact." It was clear from the testimony of counsel who represented Sigmon in this case that counsel believed the conduct charged and pled to was sexual contact. Counsel specifically stated that he and Sigmon discussed the statutory definition of "sexual contact," including the gratification aspect. In addition, Sigmon's trial counsel from an earlier case testified at the hearing that he had discussed with Sigmon the

"sexual contact" element in that case, including the sexual gratification part, and that Sigmon was present in court when the jury was read the instruction that included that definition.

¶19 Because Sigmon did not testify, there is no evidence in the record to dispute the two attorneys' descriptions of their discussions with Sigmon. Even without Sigmon's testimony, the circuit court was, of course, free to disbelieve counsel as to the historical facts and conclude that such discussions never occurred, and that as a result the State had not met its burden. But there is no indication in the court's discussion of the testimony that the court rejected their description of the historical facts. Finally, the testimony does not appear inherently incredible or internally inconsistent so as to compel rejection.

¶20 Accordingly, the remaining question is whether the attorneys' testimony is, by itself, of sufficient detail and persuasiveness to support a finding to a clear and convincing degree. We conclude that the testimony on the definition of "sexual contact" establishes to a clear and convincing degree that Sigmon knew that definition. Both counsels' recall of their discussions was specific, and the testimony by counsel from the present case makes sense in the context of counsel's belief that sexual contact was the charge Sigmon faced.

¶21 We turn next to the showing on "sexual intercourse." This point was not addressed during the State's direct examination of counsel, given the fact that counsel in this case stated his belief that this was a "sexual contact" case. However, during cross-examination by Sigmon, his counsel from the present case stated twice that counsel believed Sigmon knew "the elements of both crimes," meaning the definitions of sexual contact and sexual intercourse. Counsel did not testify that he explained both definitions, or otherwise give any explanation of

why he believed Sigmon knew the definition of "sexual intercourse." However, we conclude that this testimony was sufficient to a clear and convincing degree. Given the factual allegation of intercourse in the complaint and the way the statute is written, it makes sense that counsel would have explained both definitions to Sigmon.

¶22 Sigmon next argues that the complaint and information charge an offense not known to law, and therefore the court lacked jurisdiction. He relies on ***Champlain v. State***, 53 Wis. 2d 751, 193 N.W.2d 868 (1972), *abrogated by* ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991). The argument is short and difficult to understand. It appears he may be arguing that because there is no statutory definition of the term "sexual gratification," as used in the definition of "sexual contact," the offense is one not known to law. The argument is meritless. It is not necessary that every word used in a criminal statute be defined by statute. Dictionaries serve that purpose, and if a word used in a statute is ambiguous, the ambiguity is resolved by agreement of the parties or by the court deciding between differing jury instructions, not by dismissing the charge.

¶23 Finally, Sigmon argues that WIS. STAT. § 948.02(2) (1999-2000) is void for vagueness because the term "sexual gratification" does not give fair notice of the conduct prohibited. The initial question is whether the admitted facts fall within the "zone of prohibited conduct" so that no reasonable person could have doubt of their criminality. ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 539, 280 N.W.2d 316 (Ct. App. 1979). In this case Sigmon admitted to two acts of sexual contact or sexual intercourse on unspecified dates. The complaint alleged several acts of penis-vagina intercourse in Sigmon's car with a fifteen-year-old girl. There can be no reasonable doubt, and Sigmon does not suggest a basis for any, that this conduct was for sexual gratification. If the conduct falls

within this zone, the defendant may not raise by hypothetical example fact situations which might arguably be prosecuted for which the statute might be unconstitutionally vague. ***Id.***

By the Court.—Order affirmed.

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