**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 13, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP2277-CR** **Cir. Ct. No. 2007CF461**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS Q. RUBY,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Reversed and cause remanded with directions.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 NEUBAUER, P.J. Thomas Q. Ruby appeals from a postconviction order denying his motion for plea withdrawal. Ruby contends that his no contest plea to first-degree sexual assault of a child was not knowingly and intelligently entered because the trial court failed to ascertain that Ruby understood the

maximum penalties to which he was subject or the elements of the offense as required by WIS. STAT. § 971.08(1)(a) (2007-08).[1] Ruby asserts that if he had understood the omitted information, he would not have entered a plea of no contest. Based on our review of the record, we conclude that the trial court erred in its determination that Ruby failed to make a prima facie case for plea withdrawal. We therefore reverse and remand to the circuit court for an evidentiary hearing at which the State will have an opportunity to prove by clear and convincing evidence that Ruby understood the nature of the charges to which he pled guilty and the penalties involved.

## BACKGROUND

¶2 On June 13, 2007, Ruby was charged with one count of sexual assault of a child under thirteen years of age contrary to WIS. STAT. §§ 948.02(1) and 939.50(3)(b). The complaint specifies that the offense is a "Class B Felony, and upon conviction [Ruby] may be sentenced to a term of imprisonment not to exceed forty (40) years." In a second count, Ruby was also charged with incest because the alleged victim is his daughter. Ruby subsequently pled no contest to first-degree sexual assault of a child under thirteen years of age, and the incest charge was dismissed and read in for purposes of sentencing.

¶3 The transcript of the plea hearing reflects that Ruby was represented by Attorney Linda Meier. The court first asked Ruby if it was his understanding that he would be pleading no contest to "Count Number 1" and that "Count 2"

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

would be read in. Ruby replied, "Yep." The relevant portions of the remainder of the exchange are as follows:

> THE COURT: You filled out the plea questionnaire and waiver of rights form with Ms. Meier?
>
> [Ruby]: Right.
>
> THE COURT: Do you understand that form?
>
> [Ruby]: Yeah.
>
> THE COURT: …. And, Mr. Ruby, if you enter a plea today of no contest or guilty you understand that I will find you guilty on Count 1?
>
> [Ruby]: Yes.
>
> ….
>
> THE COURT: And as to Count 1, first degree sexual assault of a child, what plea do you enter?
>
> [Ruby]: Not guilty—I mean, no contest.
>
> THE COURT: No contest. Has anyone promised you anything or threatened you in order to get you to enter a no contest plea today?
>
> [Ruby]: No.
>
> THE COURT: You're doing it freely and voluntarily?
>
> [Ruby]: Yes.
>
> THE COURT: And you agree, Mr. Ruby, that the facts in the Complaint are essentially correct?
>
> [Ruby]: Yes.
>
> THE COURT: Ms. Meier, are you satisfied that the plea is being entered freely, voluntarily and intelligently?
>
> Ms. Meier: I believe it is.
>
> THE COURT: And … is the State prepared to prove the facts in the complaint?
>
> [The State]: Yes, Your Honor.

> THE COURT: Based on the statement placed on the record the Court does find that Mr. Ruby understands these proceedings, that he is freely, voluntarily, intelligently and with the advice and assistance of counsel entering a no contest plea to one count of first degree sexual assault of a child, I do find there is a factual basis for entry of the plea, I will accept the plea and find Mr. Ruby guilty; that Count 2 is dismissed and read in.

On February 21, 2008, after a presentence investigation, Ruby was convicted and sentenced to thirty years in prison.

¶4 Ruby subsequently filed a postconviction motion to withdraw his no contest plea on July 17, 2008. Ruby argued:

> In its colloquy with Ruby, the court did not ascertain that Ruby understood the maximum penalties to which he was subject or the elements of the offense as it was required to do by [WIS. STAT. §] 971.08(1)(a). The plea questionnaire referenced both of those issues in a very summary form. Ruby asserts that if he understood that information that he would not have pled no contest.

The State opposed Ruby's motion, arguing that the plea questionnaire filled out and turned in by Ruby established that he knew that (1) "the essential element of the charge was that he had sexual contact with a child under thirteen" and (2) that the maximum penalty for the offense was forty years prison and a $10,000 fine. The plea questionnaire, signed by Ruby on January 11, 2008, includes handwritten notations under "Understandings" indicating that (1) the elements to be proved by the State beyond a reasonable doubt are "sexual contact w/ child under 13," and (2) the maximum penalty that he faced upon conviction is "40 yrs prison & [$]10,000 fine."

¶5 At the hearing on Ruby's postconviction motion, the State conceded that "there was minimal information" in the plea colloquy and that "the Court did not specifically list the penalties or the elements in this matter" but did inquire as

to whether Ruby understood the plea questionnaire form. The court determined that the plea colloquy combined with the plea questionnaire were sufficient to deny Ruby's motion.[2]

## DISCUSSION

¶6 During the course of a plea hearing, the court must address the defendant personally and fulfill several duties under WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), including "[e]stablishing the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering his plea." ***State v. Brown***, 2006 WI 100, ¶¶5, 35, 293 Wis. 2d 594, 716 N.W.2d 906.[3] The failure to fulfill a duty at the plea hearing will

[2] We note that, in making its determination, the trial court cited to the court of appeals' decision in ***State v. Hoppe***, 2008 WI App 89, 312 Wis. 2d 765, 754 N.W.2d 203. While this appeal was pending, the supreme court accepted the petition for review in ***Hoppe*** and, at the State's request, this appeal was held in abeyance pending the supreme court's decision in that case. The supreme court ultimately reversed the court of appeals' holding as to whether Hoppe had made a prima facie showing for plea withdrawal entitling him to an evidentiary hearing, but affirmed on other grounds. ***State v. Hoppe***, 2009 WI 41, ¶¶6-8, 317 Wis. 2d 161, 765 N.W.2d 794.

[3] The complete list of duties set forth in ***State v. Brown***, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906, in addition to addressing the defendant personally, are culled from both statute and case law, and are as follows:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;

(continued)

necessitate an evidentiary hearing if a defendant's postconviction motion alleges he did not understand an aspect of the plea because of the omission. ***Id.***, ¶36. A postsentencing motion for plea withdrawal under WIS. STAT. RULE 809.30 must "(1) make 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) allege that the defendant did not know or understand the

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> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in WIS. STAT. § 971.08(1)(c).

***Brown***, 293 Wis. 2d 594, ¶35 (footnotes omitted) (citing ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08(1)(a) & (1)(b); ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998); ***State v. Douangmala***, 2002 WI 62, ¶19, 253 Wis. 2d 173, 646 N.W.2d 1; ***State v. Hampton***, 2004 WI 107, ¶24, 274 Wis. 2d 379, 683 N.W.2d 14; and ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 24, 203 N.W.2d 638 (1973)).

information that should have been provided at the plea hearing."[4] ***Brown***, 293 Wis. 2d 594, ¶39. If the circuit court determines that the defendant's motion meets these requirements, it must hold an evidentiary hearing at which the state is given the opportunity to show by clear and convincing evidence that the plea was knowing, intelligent and voluntary despite the identified inadequacy of the plea colloquy. ***Id.***, ¶40. This court determines de novo the sufficiency of the plea colloquy and the necessity of an evidentiary hearing. ***Id.***, ¶21.

¶7 Ruby argues that the trial court erred in its determination that the plea colloquy was sufficient and in denying his request for an evidentiary hearing. In addressing Ruby's argument, we must determine whether Ruby's motion met the requirements set forth in ***Brown***, namely, that he has made a prima facie showing that WIS. STAT. § 971.08 or other court-mandated procedures were not followed and that he has adequately alleged he did not understand the information that should have been provided at the plea hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶43.

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[4] WISCONSIN STAT. § 971.08(1) provides in relevant part:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

¶8 Ruby argues that the plea colloquy was insufficient to meet the requirements that the court personally ascertain that he understood the elements of the offense and the maximum penalties. The transcript of the plea colloquy confirms Ruby's contention that the court did not specifically address with Ruby the nature of the offense or the potential punishment if convicted. Rather, the court inquired whether Ruby filled out and understood the plea questionnaire form. Ruby argues that the supreme court's decision in ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, made clear that the "use of a plea questionnaire to fulfill a court's mandatory duties when accepting pleas … is merely a supplement to and not a substitute for an in-person colloquy." *See* ***id.***, ¶¶30-33. We agree with Ruby's assessment of the law as stated in ***Hoppe***.

¶9 The State attempts to distinguish ***Hoppe*** on the grounds that the information omitted in the plea colloquy in that case addressed constitutional rights whereas, here, Ruby does not allege that the court failed to advise him of his constitutional rights. However, neither ***Hoppe*** nor the cases preceding it have drawn such a distinction. The ***Brown*** court delineated in detail the duties to be fulfilled by the court during a plea colloquy, including both advising of the waiver of constitutional rights *and* establishing the defendant's understanding of the nature of the crime and range of punishments. ***Brown***, 293 Wis. 2d 594, ¶35. The ***Hoppe*** court explained:

> A circuit court may not … rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. Although a circuit court may refer to and use a Plea Questionnaire/Waiver of Rights Form at the plea hearing, the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in ***Brown***. The point of the substantive in-court plea colloquy is to ensure that the defendant's guilty plea comports with the constitutional requirements for a knowing, intelligent, and voluntary plea.

***Hoppe***, 317 Wis. 2d 161, ¶31. The State's argument seemingly confuses the ***Hoppe*** court's reference to the constitutional requirements for a valid plea (which encompasses that the defendant understands the nature of the charge and range of punishment) with the court's duty to inform the defendant of the waiver of constitutional rights. However, the holding in ***Hoppe*** clearly applies to all of the court's duties at the plea colloquy and clearly admonishes that "[t]he plea colloquy cannot … be reduced to determining whether the defendant has read and filled out the Form." ***Id.***, ¶32.

*1. Nature of the Charge/Elements of the Offense*

¶10 Despite the supreme court's holding in ***Hoppe***, the State argues that the trial court fulfilled its plea colloquy duty to ascertain Ruby's understanding of the nature of the charge—specifically, the elements of the offense. In support, the State relies on the trial court's inquiry during the plea colloquy as to whether Ruby was pleading to count 1, "first degree sexual assault of a child," as sufficient to establish Ruby's understanding of the elements of the offense when coupled with the plea questionnaire and his acknowledgment that the facts as set forth in the criminal complaint were correct. However, ***Brown*** instructs otherwise.

¶11 In ***Brown***, the court did not engage in any discussion as to the elements of the offenses to which the defendant pled guilty; however, the State argued that the court had established the defendant's understanding in other ways during the plea colloquy: (1) defense counsel stated, and the defendant confirmed, that he had reviewed the elements with the defendant; and (2) the defendant stated he understood the charges. ***Brown***, 293 Wis. 2d 594, ¶¶45, 50. The ***Brown*** court rejected the State's argument. The court noted that ***Bangert*** requires that the plea colloquy establish the defendant's understanding of the nature of the charges and

the range of penalties "*on the record*." ***Brown***, 293 Wis. 2d 594, ¶52. The supreme court noted: (1) "[t]he circuit court never enumerated, explained, or discussed the elements of [the charged offenses] or the facts making up the elements," (2) while the attorney stated he explained the elements to the defendant, "the circuit court never asked either [the defendant] or his attorney to summarize the extent of the explanation or the elements of the crimes on the record," and (3) the circuit court never referred to or summarized the charges as found in the plea questionnaire or other writings signed by the defendant. ***Id.***, ¶53.

¶12 As in ***Brown***, the trial court in this case simply failed to address the elements of the offense or the nature of the charge. While the court did reference the plea questionnaire, it did so generally and without specific mention of Ruby's understanding of the elements of the offense. Moreover, the excerpt of the plea colloquy in ***Brown*** reflects that, as here, the court read the charges to the defendant—"first degree sexual assault while armed," "armed robbery, party to a crime," and "kidnapping, party to a crime." ***Id.***, ¶12. The ***Brown*** court nevertheless concluded that the defendant was not informed of the elements of the charges. ***Id.***, ¶53. Therefore, contrary to the State's assertion, the mere reading of the charge—"first degree sexual assault of a child"—was not enough to establish Ruby's understanding of the elements, namely that he had sexual contact with the victim, and that the victim was under the age of thirteen at the time of the alleged sexual contact. *See* WIS JI—CRIMINAL 2102E. As the ***Brown*** court emphasized, when ascertaining whether a defendant understands the nature of the offense, the circuit court is expected to establish that a defendant understands every element of the charges to which he or she pleads. ***Brown***, 293 Wis. 2d 594, ¶58. This is especially true where the charge itself arises under a statutory section which encompasses five distinct offenses with differing penalties. *See* WIS. STAT.

§ 948.02(1); WIS JI—CRIMINAL 2102, Intro. cmt. ("§ 948.02(1) defines 5 types of first degree sexual assault of a child" and "some of the offense definitions differ only slightly").

*2. Range of Punishment*

¶13 The State's arguments as to the sufficiency of the colloquy with respect to the range of punishment also rely on the trial court's mention of the plea questionnaire. In addition, the State points to Ruby's "explicit acknowledgement" that the facts set forth in the complaint were essentially correct—and the complaint indicates the maximum penalty of forty years, and the fact that Ruby's actual sentence of thirty years was less than the maximum. However, none of this renders the plea colloquy on this point sufficient. While the court mentioned the plea questionnaire, it did not specifically mention the maximum range of penalty. As the supreme court stated in ***Hoppe*** "although use of the Plea Questionnaire/Waiver of Rights Form 'lessen[s] the extent and degree of the colloquy otherwise required between the trial court and the defendant,' the Form is 'not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding' of the particular information contained therein." ***Hoppe***, 317 Wis. 2d 161, ¶42.

¶14 Further, the court's reference to the complaint was expressly for purposes of ascertaining a factual basis for the charge—something Ruby does not challenge. Again, the court failed to specifically and personally ascertain Ruby's understanding of the maximum penalties to which he would be subjected upon entering a plea. The plea colloquy in this regard was insufficient.

¶15 In sum, the plea hearing transcript in ***Hoppe***

> show[ed] that neither the circuit court nor the defendant made any statements during the plea hearing relating to promises or threats made in connection with the defendant's plea or any statements relating to the range of punishment to which the defendant subjected himself by entering his plea. The plea hearing transcript [was] completely silent on these matters.

***Id.***, ¶34. Similarly, the plea hearing transcript in this case is silent as to the range of punishment and the specific elements of the offense. Therefore, we agree with Ruby that this gap in the plea hearing serves to make a prima facie showing that there was a violation of WIS. STAT. § 971.08 and a failure to fulfill court-mandated duties. *See* ***Hoppe***, 317 Wis. 2d 161, ¶34. Because Ruby also alleged in his postconviction motion that he did not know or understand the information which should have been provided to him at the plea hearing, the burden now shifts to the State to show by clear and convincing evidence that Ruby's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.[5] *See* ***Bangert***, 131 Wis. 2d at 274.

[5] As explained in ***Bangert***, in meeting its burden,

> [t]he state may then utilize any evidence which substantiates that the plea was knowingly and voluntarily made. In essence, the state will be required to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him. The state may examine the defendant or defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea. The state may also utilize the entire record to demonstrate by clear and convincing evidence that the defendant knew and understood the constitutional rights which he would be waiving.

(continued)

## CONCLUSION

¶16 We conclude that Ruby's postconviction motion made a prima facie case for plea withdrawal based on the trial court's failure to fulfill its duties during his plea colloquy and his allegation that he would not have entered the plea had he known of or understood the information omitted during the colloquy. We therefore reverse the trial court's order denying Ruby's postconviction motion for plea withdrawal and remand for an evidentiary hearing.

*By the Court.*—Reversed and cause remanded with directions.

Not recommended for publication in the official reports.

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***Bangert***, 131 Wis. 2d at 274-75 (citations omitted). The State attempts to raise these issues on appeal by arguing that "the record conclusively demonstrates that Ruby understood that the elements of sexual assault of a child are 'sexual contact with a child under 13' and that the maximum penalty for this count is forty years in prison." While this may be true, as ***Bangert*** instructs, any dispute as to what knowledge Ruby actually possessed will be addressed at the evidentiary hearing.