COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP629 **Cir. Ct. No. 2006CF18**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. H.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Adams County: GUY D. DUTCHER, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Robert L.H. appeals an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for postconviction relief. The circuit court denied relief after an evidentiary hearing. The issues are whether Robert is entitled to withdraw his plea and in the alternative, whether he is entitled to a new sentencing hearing. We conclude that he is entitled to neither, and therefore affirm.

¶2 Robert entered a guilty plea to first-degree sexual assault of a child under the age of thirteen. The victim was his daughter, Katie H. In exchange for the plea, the State dismissed the charge that Robert had repeatedly sexually assaulted Katie's twin sister, Cathy H., although that charge remained as a read-in offense. Robert was sentenced, in September 2006, to ten years of initial confinement and fifteen years of extended supervision.

¶3 Robert's postconviction motion alleged that neither his attorney nor the circuit court adequately explained the elements of his crime, and he therefore did not enter a knowing, intelligent and voluntary plea. He also alleged that he was sentenced on inaccurate information, because the circuit court erroneously believed that he had performed anal intercourse on both his daughters when in fact the anal intercourse occurred with Cathy while he only had vaginal intercourse with Katie. Additionally, he alleged that the circuit court erred by failing to consider the then-existing sentencing guidelines for his crime. Robert presented all of his claims in the context of ineffective assistance of trial counsel for

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

counsel's failure to raise the issue. After an evidentiary hearing, the circuit court denied all of Robert's claims.

¶4 ***Robert's plea***. During the plea colloquy the circuit court must, among other duties, establish the defendant's understanding of the nature of the charged crime. ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794 (citing ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906). An understanding of the nature of the charge requires awareness of the essential elements of the crime. ***State v. Lange***, 2003 WI App 2, ¶17, 259 Wis. 2d 774, 656 N.W.2d 480. If the court does not perform its mandatory duties during the colloquy, such as informing the defendant of the elements of the crime, the defendant is entitled to an evidentiary hearing at which the burden shifts to the State to show by clear and convincing evidence that the defendant in fact knew and understood from other sources the information necessary for a knowing, voluntary and intelligent plea. *See* ***Hoppe***, 317 Wis. 2d 161, ¶44. If the State cannot meet that burden, the defendant is entitled to withdraw the plea. ***Id.*** While the circuit court has "significant discretion" in conducting the plea colloquy and may reference the defendant's plea questionnaire in discharging its duties to ensure the defendant's understanding, it may not rely on the questionnaire as a substitute for a substantive colloquy. ***Id.***, ¶¶30-33.

¶5 Here, the court directly informed Robert during the plea colloquy that the State would have to prove sexual contact with a person less than thirteen years old. The court then relied on Robert's discussions with trial counsel, the information provided in the plea questionnaire, and Robert's affirmative answer, to determine that Robert understood the definition of sexual contact. We need not determine, however, whether by this method the court adequately informed Robert of the elements of his crime, because the State showed by clear and convincing

evidence that Robert understood the elements of the crime regardless of the adequacy of the colloquy.

¶6 Trial counsel testified unequivocally that he discussed the elements of the crime with Robert and that Robert reviewed that part of the plea questionnaire detailing the elements, and that Robert "absolutely" understood the elements, including the element of sexual contact. The court expressly found that testimony credible, and expressly found not credible any argument or assertion by Robert that he did not understand the elements that counsel explained to him both verbally and in writing, and which Robert expressly professed to understand at the plea hearing. Consequently, the State met its burden to show Robert's understanding of the elements, and Robert has no basis to argue otherwise on appeal. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted) (The circuit court, as fact finder, "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony.").

¶7 ***Sentencing on inaccurate information***. A defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. If the defendant meets that burden, resentencing is appropriate unless the State proves that the error was harmless. ***Id.***, ¶3. We review the issue de novo. ***Id.***, ¶9.

¶8 Here, Robert failed to show that he was sentenced on inaccurate information. Robert admitted to the author of the presentence investigation report that he had anal intercourse with both his daughters, and that admission appears in

the report. At sentencing Robert acknowledged that he had the opportunity to review the report, and offered no corrections to the statements attributed to him in it. Nor did he challenge the report's accuracy in the postconviction proceeding. He based his argument that he did not anally assault Katie, who is cognitively disabled, solely on her arguably ambiguous description of the assaults. Under those circumstances, Robert cannot plausibly contend that he met his burden of showing that the information the court relied on, i.e. his own statement, was inaccurate. Additionally, the court's reliance on Robert's statement was harmless, even if we assumed for the sake of argument that his statement was inaccurate. The court explained at the postconviction hearing that whether Robert had anally assaulted Katie, as well as Cathy, was inconsequential to the sentencing decision and played no part in the sentence imposed. We have no basis to reject the court's explanation of its own sentencing rationale.

¶9 ***Sentencing guidelines***. At sentencing, the court did not expressly note whether it had considered the sentencing guidelines then in effect for Robert's crime.[2] He contends that he is, therefore, entitled to resentencing under the holding in ***State v. Grady***, 2007 WI 81, ¶¶2-3, 302 Wis. 2d 80, 734 N.W.2d 364, requiring the sentencing court to state on the record at the sentencing hearing that it had considered the sentencing guidelines. However, for sentencing hearings occurring before September 1, 2007, such as the sentencing hearing in this case, failure to reference the guidelines at the hearing itself did not necessarily constitute reversible error. ***Id.***, ¶¶3, 36. It is sufficient for the court to state at the

[2] At the time of Robert's sentencing the sentencing court was required to consider the applicable sentencing guidelines developed by the Wisconsin Sentencing Commission. *See* WIS. STAT. § 973.017(2)(a) (2005-06).

postconviction hearing that it considered the guidelines at the time of sentencing. ***Id.*** Here, that is what the court did, when it explained that it considered the guidelines for Robert's crime, and factored them into the sentencing decision. Robert's contention that the court failed to comply with ***Grady*** is therefore without merit.

By the Court.—Order affirmed.

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