

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1645-CR

Cir. Ct. No. 2007CF440

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANTIAGO M. RAMIREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOHN A. FIORENZA, Reserve Judge, and RICHARD CONGDON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Santiago M. Ramirez has appealed from a judgment convicting him of two counts of second-degree sexual assault of a child in

violation of WIS. STAT. § 948.02(2) (2009-10)¹ and from an order denying his motion to withdraw his pleas of no contest. We affirm the judgment and order.

¶2 In the criminal complaint filed in this case, Ramirez was charged with one count of first-degree sexual assault of a child under the age of thirteen and two counts of second-degree sexual assault of a child under the age of sixteen. The victim of all three counts was Ramirez' stepdaughter, M.O., whose date of birth is February 13, 1992. The first count alleged sexual contact between January 1, 2000, and December 31, 2001. The second count alleged sexual intercourse between January 1, 2004, and December 31, 2005, at the family's residence at 3107 MacArthur Road in Waukesha. The third count alleged sexual intercourse at 3107 MacArthur Road between April 1, 2007, and April 15, 2007.

¶3 On January 16, 2008, Ramirez entered pleas of no contest to counts two and three. In exchange for his pleas, count one was dismissed and read in for purposes of sentencing. Subsequently, Ramirez filed a postconviction motion to withdraw his no contest pleas, alleging, among other things, that the trial court failed to ascertain that there was a factual basis for the pleas during the plea colloquy.

¶4 After the trial court denied his motion for postconviction relief without an evidentiary hearing, Ramirez appealed. In *State v. Ramirez*, No.

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

2008AP3208-CR, slip op. at 5-6 (Wis. Ct. App. Mar. 9, 2010), this court granted the State's motion for summary reversal of the order denying postconviction relief and remanded the matter for an evidentiary hearing on Ramirez' postconviction motion. This court agreed with the parties that the transcript of the plea hearing revealed that, at the plea hearing, the trial court did not discharge its duty of ascertaining personally that a factual basis existed to support the pleas, as required by WIS. STAT. § 971.08(1)(b). *Ramirez*, No. 2008AP3208-CR, slip op. at 4. This court held that because Ramirez' motion made a prima facie showing that the trial court violated its duties during the plea colloquy, an evidentiary hearing should have been held on the motion. *Id.* at 5. However, this court rejected Ramirez' request that this court decide as a matter of law that Ramirez was entitled to withdraw his no contest pleas due to defects in the plea colloquy. *Id.* at 1. Because the State was entitled to an opportunity to prove that despite the defect in the plea colloquy, Ramirez' pleas were knowing, voluntary and intelligent, we stated that we would not grant Ramirez' request for plea withdrawal without an evidentiary hearing. *Id.* at 5 n.3.

¶5 After remand, an evidentiary hearing was held on Ramirez' motion to withdraw his no contest pleas.² Ramirez and his trial counsel testified. In a

² The Honorable John A. Fiorenza, acting as a reserve judge, presided at the plea hearing and the initial postconviction hearing. The Honorable Richard Congdon presided at the evidentiary hearing following remand.

written order entered after the hearing, the trial court denied Ramirez' motion, concluding that the State met its burden of proving by clear and convincing evidence that Ramirez' pleas were knowingly and intelligently made. Ramirez then commenced his current appeal.³

¶6 The sole issue on appeal is whether the trial court erroneously exercised its discretion when it denied Ramirez' motion to withdraw his no contest pleas after the evidentiary hearing. Ramirez contends that he is entitled to withdraw his pleas because no factual basis for his pleas to counts two and three can be found in the record. He further contends that even if a factual basis can be found in a post-plea examination of the record, the factual basis requirement of WIS. STAT. § 971.08(1)(b) was not satisfied because neither he nor his counsel admitted the requisite facts prior to the acceptance of his no contest pleas. We reject both arguments.

¶7 This court reviews a trial court's decision granting or denying a motion to withdraw a no contest plea under an erroneous exercise of discretion

³ After commencing this appeal, Ramirez filed a motion in the trial court seeking clarification of the trial court's May 18, 2010 decision and order denying his postconviction motion after the evidentiary hearing. Ramirez asked the trial court to clarify that it had considered his claim regarding a lack of a factual basis for his pleas. This court remanded the record pursuant to WIS. STAT. § 808.075(6) to permit the trial court to address Ramirez' motion for clarification and instructed the parties that any objection to the trial court's order on remand should be included in the parties' briefs, stating that no separate objection under § 808.075(8) was necessary. In an order entered on October 19, 2010, the trial court, the Honorable Mark D. Gundrum presiding, denied Ramirez' motion for clarification, noting that Ramirez himself acknowledged having previously concluded that Judge Congdon had "impliedly ruled" that there was a factual basis for his pleas.

standard. *State v. Thomas*, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. “[I]f a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred.” *Id.*, ¶17. The lack of a factual basis constitutes a manifest injustice, entitling a defendant to withdraw his plea. *See id.*, ¶¶16-17. The trial court’s obligation to establish a sufficient factual basis helps ensure that the defendant’s plea is knowing and intelligent. *State v. Howell*, 2007 WI 75, ¶67, 301 Wis. 2d 350, 734 N.W.2d 48.

¶8 When, as here, a trial court fails to discharge its duty of ascertaining at the plea hearing that a factual basis exists to support the plea and the matter is remanded for an evidentiary hearing, the State is given an opportunity to show by clear and convincing evidence that the defendant’s plea was knowing, voluntary and intelligent, despite the inadequacy of the plea hearing.⁴ *State v. Lackershire*, 2007 WI 74, ¶56, 301 Wis. 2d 418, 734 N.W.2d 23. When the defect was the trial court’s failure to establish an adequate factual basis for a plea, the focus of the evidentiary hearing is on whether the defendant’s pleas were knowing and intelligent. *Id.* The trial court may look at the totality of the circumstances to determine whether the defendant has agreed to the factual basis underlying the plea. *Id.*, ¶60; *Thomas*, 232 Wis. 2d 714, ¶18. The totality of the circumstances

⁴ For this reason, we reject any argument that Ramirez was entitled to automatic plea withdrawal merely because the trial court failed to ascertain at the plea hearing that a factual basis existed for his pleas or to obtain his admission to the offenses at the plea hearing. As already determined in his prior appeal, Ramirez was entitled to an evidentiary hearing on the issue of whether a factual basis existed, not automatic plea withdrawal.

includes the plea hearing record, the sentencing record, statements of the defendant's counsel concerning the factual basis, and other portions of the record, including witnesses' statements and police reports or statements of evidence. *Thomas*, 232 Wis. 2d 714, ¶¶18, 21. The trial court also may consider the record of the postconviction hearing. *Id.*, ¶23. The defendant does not need to admit to the factual basis in his or her own words. *Id.*, ¶18.

¶9 At the conclusion of the post-remand evidentiary hearing, the trial court determined that Ramirez' no contest pleas were knowing and intelligent. It thus implicitly determined that they were supported by an adequate factual basis.⁵ The record supports its determination.

¶10 Initially, we note that in the context of a negotiated plea, the court need not go to the same length to determine whether the facts would sustain the charge as it would if there had been no negotiated plea. *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). However, even ignoring that Ramirez entered his no contest pleas in exchange for dismissal of a first-degree sexual assault charge, the record provides a sufficient factual basis for his pleas.

⁵ Even accepting Ramirez' argument that the trial court should have made an explicit determination as to whether an adequate factual basis existed, his contention provides no basis for relief on appeal. When a trial court fails to adequately explain its decision on the record, this court will independently review the record to determine whether the trial court's decision can be sustained based on the facts as applied to the applicable law. *State v. Jenkins*, 2007 WI 96, ¶35, 303 Wis. 2d 157, 736 N.W.2d 24. Here, the record supports a determination that an adequate factual basis existed for Ramirez' pleas.

¶11 As set forth above, counts two and three alleged that Ramirez had sexual intercourse with M.O. between January 1, 2004, and December 31, 2005, at the family's residence at 3107 MacArthur Road in Waukesha, and between April 1, 2007, and April 15, 2007, at the same residence. The record includes a probable cause statement filed in the trial court when this case was commenced. According to the probable cause statement, Ramirez provided both written and recorded statements in which he admitted that he had sexual intercourse and sexual contact with M.O. since she was in the third grade, including oral and anal sex, occurring at the family's two homes in Waukesha, including the MacArthur Road residence. This was consistent with statements made by Ramirez to the presentence investigation report (PSI) writer, in which he acknowledged the accuracy of the criminal complaint, and acknowledged that from 2001, when M.O. was about nine years old, until early April 2007, he had repeated sexual contact with her at the family's various homes, including numerous acts constituting sexual intercourse as defined in WIS. STAT. § 948.01(6).⁶

¶12 The criminal complaint set forth M.O.'s statements that when she was in sixth and seventh grades and living at the MacArthur Road address, Ramirez put his mouth and tongue on her vagina and made her put her mouth on his penis, acts of sexual intercourse within the meaning of WIS. STAT. § 948.01(6).

⁶ Ramirez made similar admissions in a mental health examination report, acknowledging that he engaged in conduct as alleged in the police reports.

Based upon M.O.'s birth date, it can be inferred that these acts fell within the time frame alleged in count two. M.O. also alleged that the last act of sexual assault occurred on April 15, 2007. Based upon M.O.'s statement and the acts and incidents as admitted by Ramirez, including his admission that he continued to engage in sexual conduct with M.O. until early April 2007, a clear factual basis existed for his pleas to counts two and three.⁷

¶13 The trial court's determination that an adequate factual basis existed is also supported by the testimony of Ramirez' trial counsel at the postconviction hearing. Ramirez' trial counsel testified that prior to Ramirez' entry of his no contest pleas, he and another attorney from his office discussed the nature of each count with Ramirez, including the time frame for each count and the facts that supported counts two and three. Counsel testified that he had the benefit of police reports and other discovery material to review with Ramirez at the time of the discussions, including Ramirez' statements. Counsel testified that he also reviewed the definition of sexual intercourse with Ramirez and concluded that Ramirez understood his pleas to counts two and three.

⁷ We reject Ramirez' argument that his admissions concerning the time, place and nature of his acts were not sufficiently definite as to constitute an admission to the offenses alleged in counts two and three. This argument ignores well-established law providing that a factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted by the defendant, even though it may conflict with an exculpatory inference elsewhere in the record, and the defendant later maintains that the exculpatory inference is the correct one. *State v. Black*, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363.

¶14 The trial court found the testimony of Ramirez' trial attorney to be credible, while finding Ramirez' conflicting testimony to be incredible. Because credibility determinations are for the trial court, *State v. Hubanks*, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992), no basis exists to disturb its findings. Based on its findings and the totality of the circumstances, an adequate factual basis existed for Ramirez' no contest pleas, and the trial court properly determined that his pleas were knowing, intelligent and voluntary. Ramirez' motion to withdraw his no contest pleas therefore was properly denied.

By the Court.—Judgment and order affirmed.

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

