COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1461-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR G. PTACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Arthur G. Ptack appeals from a judgment convicting him of sexual assault of a child contrary to § 948.025(1), STATS., and from a postconviction order denying his motion to withdraw his guilty plea. We affirm.

Ptack was charged with one count of repeatedly sexually assaulting the same child contrary to § 948.025(1), STATS., and one count of first-degree sexual assault of a child contrary to § 948.02(1). The parties entered into a plea agreement whereby Ptack would plead guilty to repeated sexual assault and the first-degree sexual assault charge would be dismissed but read-in at sentencing. After sentencing, Ptack moved the court to withdraw his guilty plea on the grounds that he did not understand the plea and was not aware that an element of the offense required that the sexual contact have been for purposes of sexual gratification. Ptack claimed that he touched the victim's breast and vaginal area during horseplay. Postconviction, Ptack specifically alleged that he did not touch the victim for purposes of sexual gratification. Ptack also contended that his trial counsel was ineffective for failing to ensure that he understood the elements of the offense and for failing to bring this lack of understanding to the attention of the trial court at the time of the plea.

We first address the manner in which Ptack's guilty plea was entered.

> Before accepting a plea from a defendant, a trial court must "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge." Section 971.08(1)(a), STATS. The trial court must, therefore, establish that the defendant has "an awareness of the essential elements of the crime." ***State v. Bangert,*** 131 Wis.2d 246, 267, 389 N.W.2d 12, 23 (1986). The trial court can do this in any one of three ways: 1) by personally summarizing the elements for the defendant; 2) by asking defense counsel whether he or she explained the elements of the crime to the defendant, and then asking the lawyer to "reiterat[e]" what he or she told the defendant; or 3) by "expressly refer[ing] to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing." ***Id.*** at 268, 389 N.W.2d at 23.

State v. Johnson, 210 Wis.2d 197, 201, 565 N.W.2d 191, 193 (Ct. App. 1997).

A trial court can also rely upon a plea waiver form executed by the defendant as an indication of the defendant's understanding of matters relating to the plea. *See* ***State v. Moederndorfer,*** 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987). The trial court is charged with assuring that the defendant understands the nature of the charge and understands the rights waived by the plea. *See* ***Bangert,*** 131 Wis.2d at 266, 270, 389 N.W.2d at 23.

At the plea colloquy, the court confirmed the terms of the plea agreement and that Ptack understood them. The court confirmed that Ptack had reviewed the guilty plea questionnaire which stated the terms of the plea agreement, the maximum penalty for the crime, the specific constitutional rights waived by the guilty plea, an admission to "sexual assault (touching) of child under 16 years of age," and that the factual basis for the plea was established by the criminal complaint. Ptack affirmed that he read the questionnaire, initialed each paragraph, discussed each paragraph in detail with his attorney, and understood its contents.

The court confirmed that Ptack had completed ten grades in school and that he could read and write. The court described the crime as sexual assault by a touching of a child under sixteen years of age in the vaginal area. The court asked Ptack to initial or review the jury instruction relating to this crime. Although the record does not indicate a break was taken for Ptack to do so, Ptack's counsel then stated that "[w]hat I have done is gone through the jury instruction, initialed the element ...." A copy of the jury instructions initialed by Ptack appears in the record. The instruction contains Ptack's initials at the paragraph indicating that sexual contact is intentional touching by the defendant for purposes of sexual arousal or gratification. Ptack affirmed that he had a chance to discuss in detail the facts of his case with counsel. The court directed Ptack's attention to

paragraphs of the questionnaire which set forth the maximum penalty for the offense and the specific constitutional rights waived by the entry of a plea. The court confirmed that Ptack had not been threatened or promised anything in consideration for entering the plea other than the terms of the plea agreement itself and that he had had ample time to discuss the matter with counsel.

On this record, we conclude that the plea colloquy satisfied the requirements of ***Bangert*** and ***Moederndorfer.*** There is no indication in this record that Ptack was unable to read or understand the jury instruction which specifically set forth the sexual gratification element of the crime to which he pled guilty.[1] It was only subsequent to the plea hearing that Ptack alleged that he did not understand the sexual gratification element. However, Ptack and his counsel had an opportunity to advise the court at the plea hearing that he did not understand the sexual gratification element of the crime. He did not do so.

We find additional confirmation of Ptack's understanding of the sexual gratification element in the record of the hearing on his postconviction motion to withdraw his plea. Trial counsel testified that Ptack contended that the touching occurred during horseplay and was not intended to harm the victim. Counsel testified that prior to the plea hearing, he and Ptack reviewed the elements of the crime and discussed the jury instruction which states that sexual gratification is an element of the crime. Trial counsel stated that Ptack has some cognitive problems and requires more explanation of complicated matters. However, counsel emphasized that he discussed in detail the sexual gratification

[1] Sexual assault of a child requires sexual contact with the child. *See* §§ 948.02(1) and 948.025(1), STATS. "Sexual contact" is defined as intentional touching "for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." Section 948.01(5)(a), STATS.

element and believed Ptack understood it. While counsel stated that Ptack did not actually read the jury instruction in court at the plea hearing, the plea hearing record does not indicate that the court knew Ptack had not read it. Trial counsel testified that Ptack admitted to him that he touched the victim and that it was solely Ptack's choice to enter a plea. Ptack did not testify at the postconviction motion hearing.

The trial court found that based upon the totality of the evidence, trial counsel was not ineffective in the manner in which he furthered Ptack's understanding of the elements of the crime. Even if Ptack maintained that the touching occurred during horseplay, Ptack was informed of the sexual gratification element. Therefore, counsel was not ineffective and there was no basis for withdrawing the guilty plea. On the record at the postconviction motion hearing, the trial court's findings of fact are not clearly erroneous. *See* § 805.17(2), STATS.[2]

Although Ptack continues to contend that the touching was horseplay and not for sexual gratification, such does not mean that he did not understand that sexual gratification was an element of the crime. For his own reasons, Ptack was willing to admit to the crime to obtain the benefits of the plea agreement. An otherwise valid plea is not involuntary because it is induced or motivated by the defendant's desire to get a lesser penalty due to fewer charges. *See* ***Armstrong v. State,*** 55 Wis.2d 282, 288, 198 N.W.2d 357, 359 (1972).

[2] Page five of the appellant's brief excerpts the plea colloquy. We have noted what we assume is a typographical error in the appellant's brief. The brief states that the court stated "not knowing what the elements of the offense are ..." while the transcript reveals that the court said "now knowing what the elements of the offense are ...." If this was not a typographical error, it presents a serious misrepresentation of the record.

By the Court.—Judgment and order affirmed.

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