

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2012

Diane M. Fremgen
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. 2011AP316-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF177

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD F. GEYER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Washington County: PATRICK J. FARAGHER and JAMES G. POUROS, Judges.¹ *Order reversed and cause remanded with directions.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¹ The Honorable Patrick Faragher presided in the circuit court through sentencing. The Honorable James Poulos denied the postconviction motion.

¶1 PER CURIAM. Richard Geyer appeals from judgments convicting him of repeated sexual assault of the same child and child enticement and from an order denying his motion to withdraw his no contest pleas. We conclude that the circuit court erroneously denied Geyer’s postconviction plea withdrawal motion without an evidentiary hearing. Therefore, we reverse the order denying Geyer’s postconviction motion and remand for an evidentiary hearing.²

¶2 Postconviction, Geyer sought to withdraw his pleas because his trial counsel coerced him into entering pleas and he did not understand the elements of repeated sexual assault of the same child. The State concedes on appeal that the circuit court should have held an evidentiary hearing on Geyer’s coercion claim. We agree. However, the State argues that the court properly rejected, without a hearing, Geyer’s claim that he did not understand the elements of repeated sexual assault of the same child. We disagree and conclude that the circuit court should have held an evidentiary hearing on this claim as well.

¶3 Geyer completed a plea questionnaire for his pleas to count 2, repeated sexual assault of a child, and count 3, child enticement (intent to have sexual contact). The questionnaire stated that the elements of the crimes were explained to him by counsel or were attached.³ Attached to the questionnaire was the jury instruction for repeated acts of sexual assault of a child, WIS JI—CRIMINAL 2107. That instruction directs the court to refer to WIS JI—CRIMINAL

² While the appellant appeals from both judgments and an order, we address only the order for the reasons set forth in the opinion.

³ The jury instructions for child enticement were attached to the plea questionnaire.

2101A and B for definitions of sexual contact and intercourse. The definition instructions were not attached to the questionnaire.

¶4 At the plea hearing, excerpted below, defense counsel stated that he reviewed the questionnaire with Geyer.

Court: Let's talk about the sexual assault. The government would need to show that you had at least three sexual assaults. Assault is kind of a strange word because people think it means like physical assault. It just means some kind of either contact of a sexual nature or intercourse. I am assuming that your lawyer has discussed with you what sexual contact means and how that is defined; and what sexual intercourse means in Wisconsin and how that's defined. Because it's not the dictionary definition; it's a statutory definition. Has that been done?

Defendant: Yes, sir.

Court: All right. Now so the government will need to show at least three incidents of that type occurred while the child was under the age of 16 years. That's what they need to show. Do you think they could show that?

Defendant: Yes, sir.

Court: All right. Now and this, of course—I didn't lay it out but this is implicit within the period of time specified. Do you understand that?

Defendant: Yes.

Court: There is a beginning date, end date. Within that time they have to show three or more what the Statute calls assault.

Defendant: Yes, sir.

Court: Do you think they could prove that?

Defendant: Yes, sir.

¶5 The court also discussed the child enticement charge.⁴ The court took the complaint as the factual basis. The complaint alleges activity that amounts to sexual contact and intercourse. The court accepted Geyer's no contest pleas.

¶6 Postconviction, Geyer moved to withdraw his pleas because he was coerced into entering them.⁵ Geyer's affidavit in support of his postconviction motion alleged that his trial counsel never conveyed a plea offer and never expressed any interest in proceeding to trial. Geyer tried to replace counsel, but on April 2, 2008, the circuit court declined to adjourn the April 8 trial or permit Geyer to retain successor counsel. Trial counsel and putative successor counsel told Geyer that he had to enter a plea because the court had declined to adjourn the trial or permit new counsel. Successor counsel told Geyer he had to enter a plea that day and that if he went to trial, he would face a longer sentence. Geyer had only an hour to make a decision. Geyer alleged that he was coerced into entering his pleas because he could not retain successor counsel and no attorney was prepared to try his case.

¶7 The court rejected Geyer's claim that he was coerced into entering his pleas. The court noted that after it refused to adjourn the trial, Geyer returned to the courtroom seventy-five minutes later and entered no contest pleas. The

⁴ Geyer did not allege that he did not understand the elements of child enticement.

⁵ Geyer's motion is governed by the standards for a postsentencing request to withdraw a plea. *See State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Geyer must establish a manifest injustice requiring plea withdrawal. *Id.* An unknowing, involuntary and unintelligent plea constitutes a manifest injustice. *Id.*

court found no basis to suggest that Geyer was coerced into entering his pleas and the documentation in support of the motion was “flimsy.”

¶8 Geyer’s postconviction motion also alleged that he did not understand the elements of repeated sexual assault of the same child.⁶ The circuit court rejected this claim because Geyer signed the plea questionnaire and acknowledged that he had reviewed and understood the questionnaire to which the jury instructions were attached. The court found that trial counsel had reviewed the questionnaire with Geyer. The court concluded that Geyer entered a proper plea to the offense.

¶9 We first address Geyer’s claim that he did not understand the elements of repeated sexual assault of a child. The portion of Geyer’s postconviction motion claiming that the circuit court failed to fulfill its plea colloquy duties with regard to the defendant’s understanding of the elements is analyzed under *Bangert*.⁷ See *State v. Howell*, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant is entitled to an evidentiary hearing if the defendant’s postconviction motion makes a prima facie showing that the plea colloquy was deficient and the defendant did not know or understand information that should have been provided at the plea hearing. *State v. Brown*, 2006 WI 100, ¶2, 293 Wis. 2d 594, 716 N.W.2d 906. We independently determine the sufficiency of the plea colloquy and the necessity of an evidentiary hearing. *State v. Hoppe*, 2009 WI 41, ¶17, 317 Wis. 2d 161, 765 N.W.2d 794. The circuit court

⁶ Geyer’s affidavit did not make this claim. However, his motion was sufficient to raise this claim. *State v. Brown*, 293 Wis. 2d 594, ¶¶62-66.

⁷ *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

has the burden to insure the defendant understands information that should be provided at the plea hearing. *See id.*, ¶18.

¶10 The State argues on appeal that Geyer did not make a prima facie case for plea withdrawal because he did not allege, with specificity, what elements of the repeated sexual assault charge he did not understand. A general statement that the defendant did not understand the elements was sufficient in *Brown*. *Brown*, 293 Wis. 2d 594, ¶66.

¶11 The State also argues that the plea colloquy was sufficient. Geyer made a prima facie showing that it was not. During the plea colloquy, the circuit court must “[e]stablish the defendant’s understanding of the nature of the crime with which he is charged....” *Hoppe*, 317 Wis. 2d 161, ¶18. “To understand the nature of the charge, the defendant must be aware of all of the essential elements of the crime.” *State v. Jipson*, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18. A charge of repeated sexual assault includes, as an element, sexual assault of a child under WIS. STAT. § 948.02 (2007-08).⁸ Section 948.025. The criminal complaint against Geyer alleges conduct that amounts to intercourse and sexual contact. In a charge of sexual assault by sexual contact, the purpose of the sexual contact is an element of the offense. *Jipson*, 267 Wis. 2d 467, ¶9. A defendant must be aware of this element before the defendant can knowingly plead to the offense. *Id.*

¶12 The circuit court relied upon counsel’s statement that he reviewed the plea questionnaire with Geyer, but the questionnaire and attached jury

⁸ All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

instructions did not define sexual intercourse or sexual contact under WIS. STAT. § 948.01(5) and (6). The plea colloquy does not establish that Geyer “knew the State had to prove the purpose of the sexual contact was an element of the crime.” See *Jipson*, 267 Wis. 2d 467, ¶16. Postconviction, Geyer alleged that he did not understand the elements of the offense. An evidentiary hearing should have been held on this claim.

¶13 The portion of Geyer’s postconviction motion alleging that he was coerced into entering his no contest pleas is analyzed differently because coercion is a factor extrinsic to the plea colloquy. *Howell*, 301 Wis. 2d 350, ¶74. In order to obtain an evidentiary hearing, Geyer had to allege facts that, if true, would entitle him to relief. *Id.*, ¶75. The State concedes that Geyer’s motion alleges facts supporting his claim that he was coerced into entering his no contest pleas. After conducting an independent review of the motion, *id.*, ¶78, we agree. The circuit court erroneously denied an evidentiary hearing on this claim.

¶14 The circuit court erroneously denied Geyer’s postconviction motion without an evidentiary hearing. We reverse the postconviction order and remand for an evidentiary hearing on Geyer’s postconviction motion.

By the Court.—Order reversed and cause remanded with directions.

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

