COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2006

Cornelia G. Clark
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. 2005AP1573-CR

Cir. Ct. No. 2002CF3168

STATE OF WISCONSIN

IN COURT OF
APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD PETER GILLILAND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Richard Peter Gilliland appeals the order denying his postconviction motion seeking to withdraw his guilty plea to one count of child enticement, contrary to WIS. STAT. § 948.07(1)

(1997-98).[1] On appeal, he argues that the trial court erred in denying his motion to withdraw his guilty plea because his plea was not knowingly, voluntarily and intelligently entered, and because no factual basis for the plea existed. Finally, he claims that his attorney was ineffective for: failing to adequately explain the elements of the crime; failing to have the trial court adequately explain the elements of the crime; and failing to move to withdraw Gilliland's guilty plea. Because the record establishes that Gilliland knew the elements of the crime to which he pled guilty, a factual basis existed for the plea, and his attorney was not ineffective, we affirm.

I. BACKGROUND.

¶2 According to the criminal complaint, on March 16, 1997, D.D., a juvenile, then seventeen years old, reported to the West Allis Police that on March 14, 1997, he accompanied a man who identified himself as Reverend LaMar Sloan to a church in West Allis. Reverend Sloan had hired him several days earlier. D.D. told police that after sitting around for a couple of hours and doing very little, Reverend Sloan invited him to sit down next to him and watch computer-generated pornographic pictures. After D.D. sat down and watched, Reverend Sloan placed his hand on D.D.'s leg, and eventually his hand crept up his leg until it reached D.D.'s penis. Reverend Sloan then asked if he could see how big D.D.'s penis was, and D.D. complied by

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

unzipping his pants and moving his underwear out of the way. Reverend Sloan then proceeded to rub D.D.'s penis until D.D. ejaculated. Reverend Sloan then laid down on the floor and began masturbating.

¶3 One month after receiving D.D.'s report, the police discovered that Reverend LaMar Sloan was actually Richard P. Gilliland. Gilliland was charged with child enticement, exposing genitals or pubic area, and obstructing an officer. However, Gilliland had already fled the state, and a warrant was issued for his arrest. Gilliland was returned to Wisconsin after serving sentences in several other states. As a result, his initial appearance did not occur until June 12, 2002.

¶4 Gilliland waived his preliminary hearing and ultimately agreed to plead guilty to child enticement in exchange for the dismissal of the two other charges, both misdemeanors. The trial court accepted his guilty plea, used the criminal complaint as a factual basis, and ordered a presentence investigation report. Gilliland was sentenced to ten years' imprisonment on October 16, 2002. After being granted several continuances, he filed a postconviction motion seeking to withdraw his guilty plea. It was denied. This appeal follows.

II. ANALYSIS.

¶5 Gilliland contends that the trial court erred in denying his motion seeking to withdraw his plea because: he did not understand the elements of the crime to which he pled guilty, resulting in his plea not being entered knowingly, voluntarily and intelligently; and the

complaint, which was used as a factual basis for the plea, was insufficient to prove the crime of child enticement. Gilliland claims that he never intended to cause D.D. to expose his penis when he first entered the church, and consequently, he did not understand the element of "with intent to," and, he submits, the criminal complaint does not support this element either. We are not persuaded by either argument.

¶6 A defendant seeking to withdraw a guilty plea after sentencing must show, by clear and convincing evidence, that a manifest injustice would result if the motion to withdraw is denied. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily and intelligently. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). The question of whether a defendant may withdraw a plea is ordinarily a question addressed to the discretion of the trial court. ***State v. Rock***, 92 Wis. 2d 554, 559, 285 N.W.2d 739 (1979). However, on appellate review, the issue of whether a plea was voluntarily, knowingly and intelligently entered is a question of constitutional fact. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). "We review constitutional questions independent of the conclusion of the lower courts." ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997); *see also* ***State v. Kywanda F.***, 200 Wis. 2d 26, 42, 546 N.W.2d 440 (1996). Historical facts found by the trial court are upheld unless they are clearly erroneous. *See* ***Bangert***, 131 Wis. 2d at 283-84. "When a defendant establishes a denial of a relevant constitutional right, withdrawal of the plea is a matter of

right." ***Bangert***, 131 Wis. 2d at 283; *see also* ***State v. Bartelt***, 112 Wis. 2d 467, 480, 334 N.W.2d 91 (1983).

¶7 Further, the "'failure of the trial court to establish a factual basis showing that the conduct which the defendant admits constitutes the offense ... to which the defendant pleads, is evidence that a manifest injustice has occurred,' warranting withdrawal of the plea." ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994) (citation omitted; ellipses in ***Harrington***).

¶8 According to the criminal jury instructions, the following constitute the elements of the crime of child enticement as charged against Gilliland:

> 1. The defendant caused (name of victim) to go into a (vehicle) (building) (room) (secluded place).
>
> 2. The defendant caused (name of victim) to go into a (vehicle) (building) (room) (secluded place) with intent to "expos[e] a sex organ to the child or caus[e] the child to expose a sex organ in violation of s. 948.10."
>
>   The phrase "with intent to" means that the defendant must have had the mental purpose to "expos[e] a sex organ to the child or caus[e] the child to expose a sex organ in violation of s. 948.10."
>
> 3. (Name of victim) was under the age of 18 years.
>
> 4. Knowledge of (name of victim)'s age by the defendant is not required and mistake regarding (name of victim)'s age is not a defense.

WIS JI—CRIMINAL 2134 (footnotes omitted).

¶9 Gilliland argues that he did not understand at the time of his guilty plea that he had to have the intent to have D.D. expose his penis when he entered the church, and because he had no such intent then, his guilty plea was not knowingly entered. He also submits that the criminal complaint contains no evidence to support the "with intent to" element.

¶10 At Gilliland's guilty plea hearing, the following exchange took place between the trial court and Gilliland:

> THE COURT: Do you understand that before you can be found guilty the State would be required to prove that on March 14th of 1997 you were in the company of a person named [D.D.]. The State would have to prove that as of March 14th of 1997 he had not yet attained the age of 18. The State would have to prove that on that date you were acting with the intent to cause him to expose his genitals. And the State would further have to prove that by some means, either by talking to him or by some other means you caused him to go into a building, a room or some other place that was secluded from public view?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> ….
>
> THE COURT: May I accept as true the facts stated in the complaint?
>
> [DEFENSE ATTORNEY]: Yes.
>
> THE COURT: Mr. Gilliland, did you go through the complaint with [defense attorney]?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is it true what is said here?

THE DEFENDANT: Yes, sir.

¶11 At sentencing, an issue concerning the elements of the crime arose again. Gilliland's attorney advised the court that, with regard to the presentence report:

> Also – And let me back up just a little bit. The second paragraph under offender interview refers to my client suggesting he's not guilty.
>
> In fact, my client has always maintained that it was wrong to engage in the encounter with this 17-year-old and he accepts responsibility for that.
>
> We have had lengthy discussions, however, about the legal definition of what makes up child enticement….
>
> ….
>
> That the initial bringing up to Mr. Gilliland's place of business was not for sexual reasons and we dealt with some issues about whether once in that place of business can you entice or lure a person into a particular portion of that building and ultimately we decided to accept responsibility under the child enticement laws, but I think that's what he's trying to explain to the presentence writer that it wasn't initially to have some sort of sexual encounter with this young man.

¶12 These texts show that the elements of the crime of child enticement were discussed with Gilliland by both the trial court and his attorney. Moreover, implicit in the comments of his lawyer at sentencing is that a discussion was held about whether child enticement could occur even if Gilliland did not have the necessary intent to commit the crime at the time he entered the church, and that he was made aware that child enticement also occurs when one causes the underage person to go into "a room or some other place that was

secluded from public view." There can be no serious question that a room inside a church containing a computer and chairs is "secluded from public view." Thus, a fact finder could properly conclude that an invitation to sit and watch pornographic material on a computer in a room in a church while placing one's hand on the leg of the minor and asking to see the child's penis fulfills the statutory requirements: Gilliland had the intent to cause a child to expose his penis when he asked him to sit down in a secluded place and watch pornographic material. On appeal, Gilliland cherry picks the language of the statute and contends that because he did not have the intent to have D.D. expose his penis when he originally went into the *building*, his plea was unknowing. We disagree. The trial court's remarks to Gilliland, coupled with his attorney's statements at sentencing explaining Gilliland's comments to the presentence report writer, compel the conclusion that Gilliland realized that the crime could be committed by one who caused a minor to enter "a room or some other place that was secluded from the public," and was not limited to entering a building with the necessary intent.

¶13 We are also satisfied that the criminal complaint adequately sets forth facts which constitute the crime of child enticement. A court may not accept a guilty plea from a defendant unless there is a factual basis for the plea. ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. Generally, the factual basis for a guilty plea may be established by reference to the allegations set forth in the criminal complaint. *See, e.g.*, ***Harrington***, 118 Wis. 2d at 988 (complaint provided factual basis for burglary plea).

¶14 Gilliland repeats his argument that he believes the State needed to prove that he had the intent to cause the minor to expose his penis at the time they entered the building when he argues that the factual basis was insufficient because it did not "support the temporal component of intent at the time of causing [D.D.] to enter the building." As noted, the statute does not require the State to prove that Gilliland had the intent at the time he entered the building with D.D. Consequently, the criminal complaint is sufficient because it sets out the following allegations:

> [J]uvenile citizen [D.D.] … age 17, was transported to work at the office of the "Hope Church-ULC" at 8544 West National Avenue, office 10, in West Allis, by his employer, whom he knew as Reverend LaMar Sloan. For the first couple of hours, they sat around doing nothing.
>
> Juvenile citizen [D.D.] reported that sometime between 2 a.m. and 3 a.m., the defendant asked him to sit down next to him and invited him to view computer-generated pornographic pictures on the office computer screen. The pictures included men with men, men with women, and women with women; each depicting various sex acts to include oral sex, masturbation, anal sex, and penis to vagina sex.
>
> [D.D.] said that sometime during, or just after, looking at the computer pornography, the defendant tapped [D.D.]'s leg, and then put his hand on [D.D.]'s knee, then proceeded to rub his leg; eventually rubbing higher and higher up the leg until he made contact, with his hand, with [D.D.]'s penis on the outside of his clothing.
>
> After rubbing [D.D.]'s penis for a while, outside of his clothing, the defendant then asked him if he could see "it"; if he could see how big "it" is; and other such things. [D.D.] admitted that he then consensually unbuttoned and unzipped his pants and moved his underwear out of the way, exposing his penis to the defendant.

The complaint either directly contains all the elements of the crime of child enticement or they can be inferred from the stated facts.

¶15 Gilliland also claims that his attorney was ineffective for "failure to adequately explain the necessary and essential elements required for a guilty plea to Child Enticement (specifically, the temporal component)"; "failing to ensure the trial court adequately explained to Mr. Gilliland the necessary temporal component required"; and "failing to move to withdraw the guilty plea based upon Mr. Gilliland's denial of forming the requisite intent at the time of causing [D.D.] to enter the building prior to the court imposing sentence." We disagree.

¶16 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. There is a "strong presumption" that counsel has rendered adequate assistance. ***Id.*** at 690. Ineffective assistance of counsel is a mixed question of law and fact. *See* ***Pitsch***, 124 Wis. 2d at 633-34. A trial court's factual

findings must be upheld unless they are clearly erroneous, but whether the alleged deficient performance prejudiced the defendant is a question of law subject to our independent review. ***Id.*** at 634.

¶17 First, we note that Gilliland filled out and signed a guilty plea questionnaire which had printed on it: "I understand that the crime(s) to which I am pleading has/have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by my attorney…." The last sentence was underlined in ink, strongly suggesting that Gilliland's attorney explained the elements to Gilliland. Second, Gilliland told the trial court during questioning that he had signed the guilty plea questionnaire, his attorney had read it to him, and he understood it. Further, as noted, at sentencing Gilliland's attorney explained to the court that discussions had been held concerning the elements of the crime, and from the content of the conversation, revealed by Gilliland's attorney, it appeared that an in-depth discussion took place between Gilliland and his attorney, during which his attorney explained that the element of "with intent to" could occur at a time other than when Gilliland and the victim first entered the building. Moreover, at the guilty plea hearing, the trial court also explained on the record the elements of the crime of child enticement. Consequently, we are satisfied that Gilliland's attorney adequately explained the elements of the crime to Gilliland, as did the trial court.

¶18 Finally, given the record before us, there would have been no reason for Gilliland's trial attorney to move to withdraw the guilty plea because Gilliland entered it knowingly, voluntarily and

intelligently. Thus, his attorney engaged in no deficient performance for failing to do so. Accordingly, we affirm the trial court's denial of his postconviction motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.