COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 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 Nos. 2005AP1678-CR
2005AP1679-CR
2005AP1680-CR

Cir. Ct. Nos. 2002CF206
2003CF239
2003CF635

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. PICKERIGN,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Marathon County: LISA K. STARK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael Pickerign appeals from judgments of conviction and an order denying his postconviction motion seeking plea withdrawal. He asserts that he was entitled to withdraw his no-contest plea to

sexual assault of a child because the trial court failed to follow WIS. STAT. § 971.08 (2003-04),[1] and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), which require the trial court to "determine that the plea is made voluntarily with understanding of the nature of the charge," § 971.08, and "ascertain a defendant's understanding of the nature of the charge," ***Bangert***, 131 Wis. 2d at 266.

¶2 In particular, Pickerign asserts that the trial court failed to determine that Pickerign understood the nature of the charge because the plea questionnaire that he signed stated both "intercourse" and "sexual contact" as describing the charge to which he pled. The State agrees that these are two different acts, each of which can be an element of the crime of sexual assault of a child.

¶3 Pickerign bases his appeal on ***Bangert***. He does not directly assert that he was entitled to a hearing under the ***Nelson***[2]***/Bentley***[3] line of cases. WISCONSIN STAT. § 971.08 and ***Bangert*** require trial courts to "determine" or "ascertain" that a defendant understand the nature of a charge. Neither § 971.08 nor ***Bangert*** involves an inquiry into whether a defendant *actually* understood the nature of the charge. If the record shows that a trial court conducted a plea colloquy which permitted it to ascertain or determine that the defendant understood the nature of a charge, that is all that is required. If a defendant claims

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

[3] ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

that notwithstanding everything the defendant was told, he or she still did not have the required understanding, his or her remedy is to make a ***Nelson/Bentley*** motion.

¶4 At Pickerign's plea hearing, the circuit court asked:

> THE COURT: The complaint alleges that you engaged in sexual intercourse with someone, K.K.M., who had not attained the age of 16 years, and by pleading no contest I assume that you are acknowledging that the State could prove beyond a reasonable doubt the elements of this offense to a jury; is that correct?
>
> THE DEFENDANT: Yes, Your Honor.

¶5 ***Bangert*** made it explicit that a circuit judge must ascertain the defendant's understanding of the nature of the charge. We know of no better way to accomplish this than to tell a defendant charged with sexual assault of a child by intercourse that he or she is charged with having sexual intercourse with a person who has not attained the age of sixteen years, and asking the defendant whether he or she understands that this is what the State would have to prove to convict him or her. That is what the trial judge did.

¶6 The circuit judge did what ***Bangert*** and WIS. STAT. § 971.08 require. Thus, on the record before us, the court was not required to hold a hearing on Pickerign's claim that the requirements of ***Bangert*** had not been met. We therefore affirm the trial court's denial of Pickerign's motion to withdraw his plea insofar as his motion made a ***Bangert*** claim.

¶7 In his motion to withdraw his plea, Pickerign cited ***Bangert*** and ***State v. Brandt***, 226 Wis. 2d 610, 594 N.W.2d 759 (1999), arguing that: "In order to enter a valid guilty or no contest plea, a defendant must understand the nature of the offense, and that understanding must include 'an awareness of the essential

elements of the crime.'" *See* ***Brandt***, 226 Wis. 2d at 619. We have previously explained Pickerign's asserted reasons for his claimed confusion. Pickerign's reason for his misunderstanding asserts a ***Nelson/Bentley*** claim, though Pickerign does not identify it in that way. ***Nelson/Bentley*** claims require that a defendant explain why he or she did not understand a matter vital to a guilty or no-contest plea. ***State v. Howell***, 2006 WI App 182, No. 2005AP731-CR. Pickerign has done so by citing the plea questionnaire, which we have described.

¶8 At a ***Nelson/Bentley*** hearing, the defendant must prove that his or her plea was unknowingly entered. ***Howell***, 2006 WI App 182, ¶16. Here, at a postconviction evidentiary hearing, Pickerign and his attorney both testified. The trial court found that Pickerign was an intelligent man. It noted that it had asked him a question specifically pertaining to sexual assault by intercourse and that he had responded that he understood. The court credited the testimony of Pickerign's attorney, who testified that he had explained to Pickerign that the charge was one of sexual intercourse with a child. Pickerign acknowledged during the plea colloquy that he had discussed the plea questionnaire with his attorney. The court discredited Pickerign's postconviction testimony by noting: "It suits Mr. Pickerign's case, quite frankly, to claim confusion at this time and misunderstand the difference between intercourse and sexual contact …." The court concluded that Pickerign knew the basis for his plea, and that it was knowingly entered.

¶9 The trial court's findings are supported by the record, and are not clearly erroneous. Based on those facts, we agree with the trial court's conclusion that Pickerign knowingly entered his plea of no contest.

By the Court.—Judgments and order affirmed.

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