COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2545-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN T. TROCHINSKI, JR.

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Affirmed.*

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

¶1 PER CURIAM. John T. Trochinski, Jr., appeals from a judgment convicting him, upon a no contest plea, of exposing a child to harmful material as a repeat offender, as well as from an order denying his motion for postconviction relief. He claims he should be allowed to withdraw his plea because he did not

understand the meaning of the statutory term "harmful to children," and further contends that the statute under which he was convicted is unconstitutional. We conclude that the plea colloquy was sufficient to show that Trochinski understood the essential elements of the offense and that Trochinski waived his constitutional argument by entering the plea. Accordingly, we affirm.

¶2 Trochinski was charged under WIS. STAT. § 948.11(2) (1997-98)[1] with two counts of exposing a minor to harmful materials after he showed several service station employees (two of whom were minors) nude photographs of himself which he indicated had been accepted for publication in Playgirl magazine.[2] Each count included a penalty enhancer for habitual criminality under WIS. STAT. § 939.62(2). Trochinski moved to dismiss the charges on the grounds that § 948.11(2) unconstitutionally relieved the State of the burden to show that an offender knew the person to whom he showed the pictures even if the offender had reason to believe that a minor he had met face to face was an adult. After the trial court denied his motion, Trochinski agreed to plead no contest to one count in exchange for the dismissal of the other count and freedom to argue for probation. The trial court accepted the plea, but imposed a six-year prison term in accordance with the State's recommendation. Trochinski then moved to withdraw the plea, arguing that the plea was unknowingly made and renewing his claim that the

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

[2] Defense counsel explained that Trochinski had first given the pictures to a nineteen-year-old employee, who handed them to a fifteen-year-old employee. Two weeks later, a seventeen-year-old employee at the same store congratulated him on having his pictures selected for publication in Playgirl. Trochinski then provided her with copies of the pictures as well, asking her to keep them away from children and to return them if she did not want them.

statute was unconstitutional. The trial court denied Trochinski's postconviction motion, and he appeals.

¶3 A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). A manifest injustice occurs when a plea is not entered knowingly, voluntarily, and intelligently. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). We will independently determine whether such a due process violation has occurred. ***Id.*** at 140.

¶4 WISCONSIN STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986), require the trial court to make sufficient inquiries to show on the record that the defendant understands the nature of the charges against him and the constitutional rights which would be waived by a plea. If a defendant can make a *prima facie* showing that the trial court's plea colloquy was deficient, the burden shifts to the State to demonstrate by clear and convincing evidence that the defendant's plea was nonetheless knowingly, voluntarily, and intelligently entered. ***Van Camp***, 213 Wis. 2d at 140-41.

¶5 Trochinski contends that his plea was unknowingly made because trial counsel, the plea questionnaire, and the trial court all failed to explain what the State would need to show in order to prove that the nude photographs he had displayed were "harmful to children" within the meaning of WIS. STAT. § 948.11(1)(b), leaving him with the mistaken impression that every nude photograph qualifies as harmful material.[3] He asserts that he would not have

[3] The criminal complaint and information both referred to "harmful material, to-wit: a picture of himself depicting nudity."

entered his plea if he had been advised that harmful material means that which is patently offensive to prevailing community standards regarding what is suitable for a child of the victim's age and which lacks serious value for children of that age when taken as a whole. *See* WIS JI—CRIMINAL 2142; *see also* ***State v. Thiel***, 183 Wis. 2d 505, 536, 515 N.W.2d 847 (1994). Instead, he would have gone to trial, arguing that nude photographs which did not depict him with an erection or touching himself, and which had been selected for publication, had artistic value and were not unsuitable for a seventeen-year-old, as opposed to grade school kids.

¶6 Trochinski relies heavily on ***State v. Nichelson***, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), for the proposition that a colloquy which fails to discuss one of the elements of the charged offense is deficient. In ***Nichelson***, however, the trial court had neglected to even mention that the State would need to prove that the defendant's purpose in sexually touching a child had been sexual gratification, where the defendant's purpose was an element of the charged offense. ***Id.*** at 220-21. Here, the plea questionnaire and the plea colloquy both indicated that the State would need to prove that Trochinski exhibited harmful material to a child. Requiring the trial court to explain how the State would be able to make that showing goes beyond informing the defendant of the elements of the offense. We see nothing in ***Nichelson*** which would have required the trial court to explain in detail the type of evidence required to prove the element which had been omitted from the colloquy in that case, and conclude that the trial court had no responsibility to explain the elements here, beyond naming them and asking whether the defendant had any questions about them. We are satisfied that the trial court properly discharged its duty under WIS. STAT. § 971.08 and ***Bangert***. Thus, Trochinski's plea was valid and operated to waive all

nonjurisdictional defects and defenses. ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983).

¶7 Trochinski attempts to avoid application of the waiver rule to his constitutional argument by characterizing it as a facial challenge to the validity of WIS. STAT. § 948.11(2), a matter of subject matter jurisdiction. *See* ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 536-39, 280 N.W.2d 316 (Ct. App. 1979). However, the Wisconsin Supreme Court has already sustained the validity of § 948.11 against a challenge that it was unconstitutionally overbroad. ***Thiel***, 183 Wis. 2d at 510. In addition, we have rejected a facial attack on § 948.11 that was based on its lack of a scienter requirement that the offender know the victim's age. ***State v. Kevin L.C.***, 216 Wis. 2d 166, 186, 576 N.W.2d 62 (Ct. App. 1997). We are bound by the precedent of our own court. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Trochinski asserts that ***Kevin L.C.*** should be reexamined in light of the subsequent decision in ***State v. Weidner***, 2000 WI 52, ¶1, 235 Wis. 2d 306, 611 N.W.2d 684, in which the supreme court held that § 948.11(2) was unconstitutional in the context of internet communications or other situations not involving face to face contact. He fails to recognize that ***Weidner*** involved an as-applied, rather than a facial challenge. Indeed, the court in ***Weidner*** specifically declined to disturb the holding in ***Kevin L.C. Weidner***, 2000 WI 52 at ¶37. To the extent that Trochinski attempts to raise an as-applied challenge beyond the issue already controlled by ***Kevin L.C.***, his argument has been waived by his no contest plea. The trial court properly denied Trochinski's postconviction motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).