

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2002

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. 01-3326-CR
01-3327-CR**

**Cir. Ct. Nos. 96-CF-319
96-CF-323**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEREMY R. ENGBRETSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 ROGGENSACK, J. Jeremy Engebretson appeals his conviction for second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (1999-2000)¹ and burglary as party to the crime, contrary to WIS. STAT. §§ 943.10(1)(a) and 939.05 and the circuit court's order denying postconviction relief. Engebretson argues that he is entitled to withdraw his no contest pleas to sexual assault of a child and burglary because he did not make them in conformity with WIS. STAT. § 971.08(1).² Alternatively, Engebretson argues that he complied with the terms of his deferred prosecution agreement and is therefore entitled to the dismissal of these convictions. We conclude that Engebretson made his no contest plea to burglary consistent with the statutory requirements in § 971.08(1). However, because we conclude that the circuit court did not ascertain on the record whether Engebretson understood the elements of sexual assault of a child before accepting his plea to this charge, we remand to the circuit court for an evidentiary hearing to determine whether Engebretson made this plea voluntarily and knowingly. If the circuit court concludes that Engebretson pled voluntarily and knowingly, we affirm the circuit court's determination that Engebretson breached his deferred prosecution agreement by failing to participate in sex

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² WISCONSIN STAT. § 971.08(1) provides in relevant part:

(1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

offender treatment. However, in the event the circuit court concludes that Engebretson did not plead voluntarily and knowingly, Engebretson is entitled to withdraw his plea and be tried on the § 948.02(2) charge.

BACKGROUND

¶2 In December 1996, Engebretson was charged with committing three crimes, theft as party to the crime, burglary as party to the crime and second-degree sexual assault of a child.³ As part of a plea agreement, Engebretson waived his right to a preliminary hearing for all three violations. The court accepted the waiver as freely and voluntarily given and Engebretson, by counsel, stipulated that the criminal complaint provided sufficient factual bases for the court to find probable cause that Engebretson committed each offense. Engebretson also agreed to plead no contest to one count of misdemeanor theft, one count of felony burglary and one count of felony sexual assault of a child. The State agreed to recommend twenty-four months of probation on the theft count and an eighteen-month deferral of adjudication on the burglary and sexual assault counts, pending Engebretson's meeting certain conditions.

¶3 At the plea and sentencing hearing, Engebretson pled according to the agreement and submitted a plea questionnaire outlining the terms of the agreement. The questionnaire enumerated the charges against Engebretson, the maximum penalties associated with each charge and listed the criminal elements of burglary and theft, but not of sexual assault of a child. Engebretson signed the questionnaire, acknowledging that he understood its contents. The court also

³ The charges resulted in two separate criminal cases that were consolidated on appeal.

engaged Engebretson in a colloquy confirming that he had reviewed and signed the plea questionnaire and that he understood the constitutional rights he was waiving. Based on the colloquy and the plea questionnaire, the court accepted Engebretson's pleas as "freely and voluntarily given with full understanding" and sentenced Engebretson to twenty-four months probation for the theft count with the following conditions: (1) abide by and obey all rules and regulations of probation and parole, (2) pay restitution and costs in full, (3) undergo sex offender treatment and (4) have no contact with the victim. The court also deferred adjudication of the burglary and sexual assault charges for a period of eighteen months, and required Engebretson to comply with the terms of a deferred prosecution agreement. That agreement required Engebretson to follow all rules of probation imposed by the court for his theft conviction, including participation in sex offender treatment.

¶4 Approximately three months later, Engebretson violated the terms of his probation by failing to work and report to his probation agent as required and by having sexual relations with a minor. The court sentenced Engebretson to sixty days in jail. In September of 1998, the State moved to revoke the deferred prosecution agreement because Engebretson continued to violate his probation by failing to participate in sex offender treatment. As an alternative to revocation, the court extended the deferred prosecution agreement and Engebretson's probation until January 2000, to allow him time to re-enroll in and complete treatment.

¶5 In January 2000, the State again moved to revoke the deferred prosecution agreement because Engebretson had not complied with his obligation to undergo sex offender treatment. At the hearing, Engebretson and the State fashioned a compromise whereby the deferred prosecution agreement would be

revoked, but only with regard to the burglary charge. The court agreed and convicted Engebretson of one count of felony burglary, stayed sentencing, and placed him on probation for three years with the same probationary terms as had been imposed for the theft conviction, including completion of sex offender treatment. The court orally amended the deferred prosecution agreement to require Engebretson to comply with the terms of his probation for burglary and extended it three years to run concurrent with the probationary period.

¶6 In October 2000, the court revoked Engebretson's probation because he failed to undergo sex offender treatment, and the State moved to completely revoke the deferred prosecution agreement. Following a hearing, the court revoked probation and the deferred prosecution agreement. It sentenced Engebretson to two years for burglary as party to the crime and seven years consecutive for second-degree sexual assault of a child.

¶7 Engebretson filed for postconviction relief contending that he was entitled to withdraw his no contest pleas to burglary and sexual assault of a child because (1) he did not enter the pleas knowingly, intelligently and voluntarily and (2) the court failed to establish a factual basis for each element of the crimes charged. Alternatively, Engebretson argued that his convictions should be dismissed because (1) he complied with the terms of his deferred prosecution agreement and (2) the court improperly extended and modified his deferred prosecution agreement. The circuit court did not rule on the motion within sixty days of its filing and pursuant to WIS. STAT. § 809.30(2)(i), the motion was denied. Engebretson appeals.

DISCUSSION

Standard of Review.

¶8 The determination of whether a plea is voluntarily and knowingly made presents a question of constitutional fact. *State v. Bollig*, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. We review constitutional questions independently of a circuit court's determination. *State v. Bangert*, 131 Wis. 2d 246, 283, 389 N.W.2d 12, 30 (1986). However, we will not upset a circuit court's findings of evidentiary or historical fact unless the findings are clearly erroneous. *Id.* at 283-84, 389 N.W.2d at 30.

¶9 A court's decision to allow withdrawal of a no contest plea is a matter of discretion, and our review is limited to determining whether the court erroneously exercised its discretion. *State v. Thomas*, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. Finally, we construe a deferred prosecution agreement *de novo*. See *State v. Toliver*, 187 Wis. 2d 346, 355, 523 N.W.2d 113, 116 (Ct. App. 1994).

Plea Withdrawal.

¶10 Engebretson argues that he is entitled to withdraw his no contest pleas to burglary as party to the crime and second-degree sexual assault of a child because he did not make his pleas in conformity with WIS. STAT. § 971.08(1)(a) and (1)(b). Because subsec. (1)(a) and (1)(b) present distinct inquiries, we address each subsection in turn.

a. WIS. STAT. § 971.08(1)(a).

¶11 Engebretson first argues that he did not make his plea voluntarily, understanding the “the nature of the charge,” because the circuit court failed to explain the elements of each charge and the plea questionnaire and waiver of rights form did not contain any reference to the elements of all the offenses. Engebretson also argues that he did not know the potential penalties if convicted.

¶12 WISCONSIN STAT. § 971.08(1)(a) requires a circuit court, before accepting a plea of guilty or no contest, to address “the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.”⁴ A circuit court may discharge its § 971.08(1)(a) duty to inquire into the defendant’s understanding of the charge by using any one or a combination of three methods. *Bangert*, 131 Wis. 2d at 267, 389 N.W.2d at 23. The trial court may (1) summarize the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute; (2) ask defendant’s counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing; or (3) expressly refer 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.

¶13 To successfully withdraw his plea, Engebretson must make a *prima facie* showing that the circuit court violated WIS. STAT. § 971.08(1)(a) and that he

⁴ WISCONSIN STAT. § 971.08(1)(a) represents the statutory codification of the constitutional requirement that a defendant enter a plea of guilty or no contest knowingly, voluntarily and intelligently. *State v. Bollig*, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199.

did not in fact understand the nature and consequences of the crimes charged. *State v. Brandt*, 226 Wis. 2d 610, 617-18 & n.5, 594 N.W.2d 759, 763 & n.5 (1999). The burden then shifts to the State to show by clear and convincing evidence that the defendant's plea was made knowingly, voluntarily and intelligently. *Id.* at 618 n.5, 594 N.W.2d at 763 n.5. The State may utilize any part of the record to demonstrate the defendant's knowledge and understanding of the nature of the offense. *Bollig*, 2000 WI 6 at ¶53.

¶14 Here, the record reflects that Engebretson entered his plea of no contest to burglary and misdemeanor theft understanding the nature of the charges and potential punishment if convicted. During the plea hearing, the circuit court inquired whether Engebretson read and signed the plea questionnaire, which detailed the elements of theft and burglary and the maximum penalties for each, and whether he understood its contents. Engebretson answered affirmatively. The circuit court also questioned whether Engebretson understood the constitutional rights he was waiving and he again answered affirmatively. We conclude, therefore, that Engebretson pled no contest to theft and burglary knowingly, intelligently and voluntarily.

¶15 We cannot conclude, however, that Engebretson pled no contest to the charge of second-degree sexual assault of a child consistent with WIS. STAT. § 971.08(1)(a). The record demonstrates that the circuit court did not inquire whether Engebretson understood the essential elements of sexual assault of a child, and the plea questionnaire is devoid any reference to the elements of this offense. Furthermore, the State concedes that the circuit court did not satisfy its statutory duty to inquire into the defendant's understanding of this charge. The State argues, however, that the circuit court's failure to comply with

§ 971.08(1)(a) does not entitle Engebretson to withdraw his plea if the State presents clear and convincing evidence that the plea was made knowingly and voluntarily. *See Bollig*, 2000 WI 6 at ¶52. And the State was not afforded the opportunity to present such evidence.⁵ We agree. Accordingly, we remand to the circuit court for an evidentiary hearing to make this determination.

b. WIS. STAT. § 971.08(1)(b).

¶16 Engebretson also argues that the circuit court failed to establish a factual basis for the crimes charged, contrary to WIS. STAT. § 971.08(1)(b), and that he is entitled to withdraw his pleas to correct a “manifest injustice.” We disagree. Section 971.08(1)(b) sets forth an additional requirement that a circuit court must satisfy before accepting a plea of guilty or no contest. The court must “[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.” Section 971.08(1)(b). If a court fails to satisfy its statutory duty, a defendant may withdraw a plea contingent on his or her establishment by clear and convincing evidence that the withdrawal will correct a “manifest injustice.” *Thomas*, 2000 WI 13 at ¶16.

¶17 We conclude that the circuit court satisfied the requirements of WIS. STAT. § 971.08(1)(b). On December 20, 1996, Engebretson waived his right to a preliminary hearing for all of the charges against him. At that time, Engebretson,

⁵ At the initial postconviction hearing, the State requested and was granted a continuance in order to procure Engebretson’s prior counsel as a witness. At the subsequent hearing, the State produced the witness but the court adjourned the hearing without any testimony with the intent that the parties submit briefs on a potentially dispositive issue that did not require testimony from Engebretson’s prior counsel. However, the circuit court did not rule on the motion within sixty days and the motion was automatically denied pursuant to WIS. STAT. § 809.30(2)(i).

by his attorney, stipulated that the criminal complaint provided sufficient factual basis for the court to find probable cause that Engebretson committed each of the crimes charged. “[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint.” *Thomas*, 2000 WI 13 at ¶21. Accordingly, we conclude that the circuit court satisfied its statutory duty and established proper factual bases prior to taking Engebretson’s pleas.

Deferred Prosecution Agreement.⁶

¶18 Engebretson argues that he complied with the terms of his deferred prosecution agreement and is therefore entitled to dismissal of his sexual assault and burglary convictions. Engebretson contends that the deferred prosecution agreement required him to comply with the terms of probation for his theft conviction and that the deferred prosecution agreement was never modified to require his compliance with the terms of probation for his subsequent burglary conviction. Alternatively, Engebretson argues that any extension or modification of the deferred prosecution agreement after he completed the probationary period for theft is “moot” and entitles him to dismissal of the burglary and sexual assault counts. There is no merit to any of Engebretson’s arguments.

¶19 A deferred prosecution agreement is analogous to a contract and therefore, we apply contract law to interpret the agreement. *See State v. Windom*, 169 Wis. 2d 341, 348, 485 N.W.2d 832, 835 (Ct. App. 1992). When the terms of the contract are plain and unambiguous, we will construe the contract as it stands. *Toliver*, 187 Wis. 2d at 355, 523 N.W.2d at 116.

⁶ We address this argument in the event that the circuit court concludes that Engebretson entered his no contest plea to second-degree sexual assault of a child voluntarily and knowingly.

¶20 The unambiguous language of paragraph four of the deferred prosecution agreement states, “[t]he defendant shall follow all rules of probation and parole as imposed in [the theft conviction] … including … sex offender treatment and evaluation.” The court extended the deferred prosecution agreement in October 1998 to run until January 2000 because Engebretson had failed to undergo sex offender treatment. The court also extended Engebretson’s probation term to run concurrent with the deferred prosecution agreement. The record unequivocally reflects that Engebretson acquiesced to these terms. In February 2000, the court again extended the agreement and, with Engebretson’s understanding and approval, modified its terms. The court revoked the deferred prosecution agreement with regard to the burglary charge and sentenced Engebretson to three years probation for one count of burglary as party to the crime. The court then amended the deferred prosecution agreement to require Engebretson to comply with the terms of probation for burglary, which was converted from a deferred prosecution. Engebretson and his counsel agreed to the amendment. The deferred prosecution agreement, original and as amended, unambiguously required Engebretson to participate in sex offender treatment. Because he failed to do so, the court properly revoked the deferred prosecution agreement and sentenced Engebretson for second-degree sexual assault of a child.

CONCLUSION

¶21 We conclude that Engebretson made his no contest plea to burglary as party to the crime consistent with WIS. STAT. § 971.08(1). However, because we conclude that the circuit court did not ascertain on the record whether Engebretson understood the elements of sexual assault of a child before accepting his plea to this charge, we remand to the circuit court for an evidentiary hearing to

determine whether Engebretson made this plea voluntarily and knowingly. If the circuit court concludes that Engebretson pled voluntarily and knowingly, we affirm the circuit court's determination that Engebretson breached his deferred prosecution agreement by failing to participate in sex offender treatment. However, in the event the circuit court concludes that Engebretson did not plead voluntarily and knowingly, Engebretson is entitled to withdraw his plea to the WIS. STAT. § 948.02(2) charge and be tried.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

