COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP1384-CR
2010AP1385-CR

Cir. Ct. Nos. 2003CF59
2002CF735

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD J. SMUHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Trempealeau and Eau Claire Counties: JOHN A. DAMON, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Chad Smuhl appeals a judgment of conviction for two counts of sexual assault of a child under the age of thirteen, contrary to WIS.

STAT. § 948.02(1) (2009-10),[1] and from an order of the circuit court denying his motion for postconviction relief. Smuhl, who pled guilty to the charges, now argues that he should be entitled to withdraw his guilty pleas because he did not understand what facts he was admitting and therefore his plea was not knowing and voluntary. Alternatively, he argues that he should be able to withdraw his guilty pleas because his trial counsel was ineffective. In addition, Smuhl contends that the circuit court erred in denying his request for postconviction discovery. We disagree and affirm.

BACKGROUND

¶2 Smuhl was charged in Trempealeau County with one count of sexual assault of a child under the age of thirteen, contrary to WIS. STAT. § 948.02(1), and in Eau Claire County with one count of repeated sexual assault of a child under the age of thirteen, contrary to WIS. STAT. § 948.025(1).[2] The victim in both cases is N.C.B.

¶3 The Trempealeau County complaint alleged that "while [N.C.B. was] spending the weekend at Smuhl's residence, Smuhl and he were in bed together and [] at one point Smuhl touched [N.C.B.'s] buttocks and then rubbed [N.C.B.'s penis]. [N.C.B.] stated that this conduct happened about five or six times at Smuhl's residence in Strum."

¶4 The Eau Claire County complaint alleged that:

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Trempealeau County case and the Eau Claire County case were consolidated.

> [B]etween June of 2002 and October of 2002, [Smuhl] sexually assaulted [N.C.B.] five to six times at N.C.B.'s residence, located in the … County of Eau Claire. On each of those occasions, [Smuhl] placed his tongue into N.C.B.'s mouth, rubbed N.C.B.'s penis, and placed his finger in N.C.B.'s buttocks. [Smuhl] would then have N.C.B. rub [Smuhl's] penis and place his finger up [Smuhl's] buttocks.

¶5 Smuhl pled guilty to one count of sexual assault of a child under the age of thirteen in each county. In preparation for the plea hearing, Smuhl signed separate plea questionnaires prepared by his attorney for each count to which he would plead. Attached to each questionnaire was a document that listed the elements of the offense and the maximum penalty he faced.[3]

---

[3] The documents attached to each questionnaire were identical and read:

CHAD SMUHL

ELEMENTS 94[8].02(1)(e):

> Whoever has sexual contact with a person who has not obtained the age of 13 years is guilty of a Class B felony.

ELEMENT NO. 1:

> Sexual contact is the intentional touching of the penis of [N.C.B.]. The touching may be of the penis directly or it may be through the clothing. The touching may be done by any part or any object, but it must be intentional touching.

ELEMENT NO. 2:

> [N.C.B.], at the time of the offense, had not obtained the age of 13. [N.C.B.]'s date of birth is May 23, 1991.

MAXIMUM PENALTY CLASS B FELONY

> Imprisonment not to exceed 60 years.

The documents incorrectly specified WIS. STAT. § 940.02(1)(e) as the statute, when in fact the correct statutory number was WIS. STAT. § 948.02(1)(e).

¶6 The questionnaires, along with the attachments, were provided to the circuit court and referred to by the court at the plea hearing. In addition, the court asked Smuhl's attorney if it could "use the facts in each complaint as a factual basis, including the Eau Claire complaint." Smuhl's attorney agreed that the court could do so.

¶7 At the conclusion of the hearing, the court found Smuhl guilty on both counts. Smuhl was sentenced to concurrent sentences of twenty-five years' confinement for each count, with twenty years of initial confinement and five years of extended supervision on each count.

¶8 Smuhl brought a motion for postconviction relief alleging, as here, that his pleas were not entered knowingly or intelligently because he believed that he was admitting to less aggravated facts than those stated in the criminal complaint. Alternatively, he asked to withdraw his pleas because he was deprived of the effective assistance of counsel because counsel failed to clarify for Smuhl which facts he was agreeing to. He also asked for postconviction discovery.

¶9 The basis of Smuhl's postconviction motion was that Smuhl had been willing to admit that he touched N.C.B.'s penis and that N.C.B. touched his penis (the penis-touching allegations), but was unwilling to admit to the allegations that he placed his tongue into N.C.B.'s mouth, penetrated N.C.B.'s buttocks, or had N.C.B. do the same to Smuhl's buttocks (the penetration allegations). According to Smuhl, he entered his pleas in the belief that only the penis touching allegations were admitted, but later learned that using the criminal complaint as a factual basis for the pleas amounted to admitting the penetration allegations as well.

¶10 The circuit court denied Smuhl's postconviction motions. Smuhl appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶11 Smuhl seeks to withdraw his guilty pleas on the basis that they were not knowing, intelligent and voluntary because, he argues, he did not understand the effect of his counsel's agreement that the facts in the complaint could be used as a factual basis for his pleas. That effect, he contends, was that he was admitting to all of the facts in the complaint, including the penetration allegations that he denied, and that this admission could be used against him for purposes other than establishing a factual basis for his pleas. In the alternative, he asserts that he should be able to withdraw his pleas due to his attorney's ineffectiveness in failing to adequately explain the consequences of permitting the court to rely on the complaint as a factual basis for the pleas. Smuhl also contends the circuit court erred in denying his request for postconviction discovery. For reasons discussed below, we affirm.

*1. Smuhl Has Not Set Forth a Valid **Bangert** Argument*

¶12 Smuhl first contends that he should be allowed to withdraw his plea under ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). ***Bangert***, which governs the plea colloquy mandated by WIS. STAT. § 971.08(1)(a), may be invoked only in situations where it is alleged that the circuit court failed to fulfill

its plea colloquy duties.[4] ***Bangert***, 131 Wis. 2d at 262; ***State v. Howell***, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48.

¶13 Although Smuhl generally relies on ***Bangert***, he does not specifically identify the circuit court's failing. It may be that Smuhl contends the circuit court had an obligation to explain to Smuhl that using the criminal complaint to establish a factual basis for finding him guilty upon his pleas would be an admission of all of the facts alleged in the complaint for purposes of establishing a factual basis *and for other purposes*. If this is Smuhl's argument, it is meritless for the reason described in detail in the next section, namely that Smuhl did not unwittingly admit to penetration conduct for any purpose other than establishing a factual basis for his pleas.

2. Smuhl Did Not Unwittingly Admit to Any Conduct for a Purpose Other Than Establishing a Factual Basis

¶14 Apart from his defective plea colloquy argument, Smuhl appears to contend, in a non-***Bangert*** argument, that he entered unknowing pleas because he did not understand that he was admitting the penetration allegations. Smuhl bases this claim on a single statement from the case law that "it is a well-established rule 'that what is admitted by a guilty or no contest plea is all the material facts alleged in the charging document.'" ***State v. Liebnitz***, 231 Wis. 2d 272, 286-87, 603 N.W.2d 208 (1999) (quoting ***State v. Rachwal***, 159 Wis. 2d 494, 509, 465 N.W.2d 490 (1991)). Thus, according to Smuhl, when his counsel agreed that the facts in

[4] WIS. STAT. § 971.08(1)(a) reads: "(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."

the complaint could be used as a factual basis, Smuhl was, as a matter of law, admitting all of the facts in the complaint for all purposes.

¶15 Smuhl's reliance on factual basis case law is misplaced. The purpose of requiring a judge to find a factual basis for the charge in taking a guilty or no contest plea is "*not* to resolve factual disputes about what did or did not happen." ***State v. Merryfield***, 229 Wis. 2d 52, 61, 598 N.W.2d 251 (Ct. App. 1999). Rather:

> The purpose of the statutory requirement for a court inquiry as to basic facts is to protect the defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does not actually fall within the statutory definition of the charge. What is required is a sufficient postplea inquiry to determine to the court's satisfaction that the facts, if proved, "constitute the offense charged and whether the defendant's conduct does not amount to a defense."

Id. at 60 (quoted source omitted).

¶16 Thus, while the plea of guilty admits "all the material facts alleged in the charging document," ***Liebnitz***, 231 Wis. 2d at 286-87, the admission is not a finding of fact and it does not establish that any alleged fact is true for any purpose other than establishing a factual basis for a plea. *See* ***Merryfield***, 229 Wis. 2d at 60-61.

¶17 Smuhl is not claiming that the facts in the complaint do not support the pleas. In fact, he admits that a portion of the facts in the complaint, specifically the penis touching allegations, are sufficient to support the charges. Smuhl's contention is that he has admitted these acts for purposes *other* than establishing a factual basis for the pleas. However, he has provided no legal

authority supporting his claim that an admission to the facts at a plea hearing has that effect.

¶18 Smuhl has also made no showing that the penetration allegations have been used for any purpose other than establishing a factual basis for his pleas. His only example of the penetration allegations being used for any other purpose is his allegation that the Department of Corrections used the penetration allegations on his intake sheet and has been treating him differently as a result. However, he provides no proof of such disparate treatment and, more importantly, he provides no legal authority for the proposition that the Department may treat the allegations in the complaint as *admitted by Smuhl.*

¶19 Accordingly, Smuhl has not established that, when his counsel agreed that the court could rely on the allegations in the complaint to establish a factual basis for accepting Smuhl's pleas, that act constituted an admission by Smuhl for purposes apart from establishing a factual basis. It follows that Smuhl has made no showing that his pleas were not knowing, intelligent and voluntary.

3. Smuhl Has Not Established Ineffective Assistance of Counsel

¶20 Because Smuhl has not established that the use of the complaint to establish a factual basis for his pleas has any effect beyond establishing that factual basis, he has also not established ineffective assistance of counsel. The first prong of the two-prong ***Strickland*** analysis of ineffective assistance of counsel is that counsel's performance must have been deficient. ***Strickland v. Washington***, 466 U. S. 668, 687 (1984). If counsel did not give deficient advice, there is no basis for finding that this prong of the test is met.

¶21 Smuhl's claim of ineffective assistance is based upon his contention that counsel did not properly explain to him that the use of the complaint to establish a factual basis for his pleas amounted to his admission that the penetration allegations were true. As we have discussed above, Smuhl has not shown that the use of the complaint had such an effect; therefore, there is no basis for Smuhl's claim that counsel's performance was deficient. Accordingly, we conclude that Smuhl is not entitled to withdraw his plea on the basis of ineffective assistance of counsel.

4. Postconviction Discovery

¶22 Smuhl also contends that the circuit court erred when it denied his postconviction motion for discovery. A defendant has a right to postconviction discovery if the evidence that he or she seeks is relevant to an issue of consequence. ***State v. Ziebart***, 2003 WI App 258, ¶32, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant seeking discovery "must establish that the evidence probably would have changed the outcome of the trial." ***Id.*** We review the circuit court's decision as an exercise of discretion. ***Id.*** Smuhl has not demonstrated that the question of whether he fought extradition would have changed the outcome of sentencing and we, therefore, uphold the circuit court's exercise of discretion.

¶23 At sentencing, Smuhl introduced a privately obtained presentence investigation (PSI) report, which contained the following statement: "Chad Smuhl has indicated that he was coming back to Wisconsin to turn himself in for the instant offenses." The prosecutor argued that the circuit court should not accept this claim as true, offering in support evidence that Smuhl had purchased a round-trip ticket between Europe and Canada, that Smuhl's statements to an agent with the Canadian Border Services contained inconsistent statements, and that Smuhl

resisted extradition. It is this argument by the prosecutor, that Smuhl resisted extradition, that forms the basis for Smuhl's motion for postconviction discovery.

¶24 At the sentencing hearing, the prosecutor stated:

> [That Smuhl was not returning to face the charges is also] supported by the fact that the defendant fought extradition from Canada. He had monthly detention reviews. I was updated monthly by the Department of Justice in New York. According to the Department of Justice, the Canadian court ordered deportation on approximately December 23rd, 2008, at which point he was transported to Niagara County, New York where he had additional extradition hearings to determine if he should be brought back to Wisconsin and … he waived extradition to come back to Wisconsin.

What Smuhl now demands discovery of is documentation from the United States Department of Justice in support of the prosecutor's statement that Smuhl fought extradition.

¶25 Smuhl's counsel at sentencing responded as follows to the State's claim that Smuhl fought extradition:

> There is absolutely no evidence that he fought extradition in Canada. That's a statement made up by [the prosecutor] because the family called me while he was in Canada and said what should he do and I advised him you need to waive extradition and get back here and take care of this. He went to New York and he waived that extradition.

¶26 Smuhl does not dispute that he fled the United States to avoid prosecution and remained in Europe for five years. While it is also undisputed that Smuhl waived extradition from New York to Wisconsin, nowhere does Smuhl allege that he waived extradition from Canada, nor does Smuhl dispute the State's claim that he was deported from Canada by court order. That being the case, the argument about whether or not he fought extradition, viewed in the context of the

sentencing hearing in this case, would not have changed the outcome of the sentencing and is, thus, not relevant to any issue of consequence.

¶27 The court considered all of the standard sentencing factors and explained their application to this case in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court placed particular emphasis on protection of the public. The court quoted Smuhl's own psychologist:

> "This client," referring to Mr. Smuhl, "presents a number of significant psychological problems, including high levels of unacknowledged anger and hostility. He remains in denial about the nature and extent of his sexual offenses. He demonstrates a number of cognitive distortions, including his failure to understand his own molestation as a sexual violation, and he shows a marked persistency to continue to blame his victims for his own offenses…."

The circuit court also focused on statements in Smuhl's private PSI that showed that he did not fully accept responsibility for his actions. Both Smuhl's private PSI and his psychologist recommended prison.

¶28 Smuhl argues that one statement by the court shows that the question of extradition played a role in his sentencing. The circuit court in the course of sentencing stated: "I agree with [the prosecutor], it's just a matter of fortunate [sic] and chance that we were able to get him back. I'm not sure I believe the theory that he was coming back to surrender at this time when they caught him." However, this statement concerned Smuhl's behavior at the time that he was initially detained, not his subsequent behavior in either cooperating with or fighting extradition. There is a difference between whether or not Smuhl fought extradition and whether he was voluntarily returning to face criminal charges at

the time that he was detained in Canada. Smuhl offers no other indication that the question of whether or not he fought extradition played any role in his sentencing.

¶29 Nothing in either the record or the briefs demonstrates that the question of whether or not Smuhl "fought extradition" was a factor in his sentencing, let alone a significant factor. Smuhl has offered neither factual nor legal citation to establish that determining with certainty that he did not fight extradition would have changed the outcome of his sentencing. We have no basis to find that the circuit court erroneously exercised its discretion.

CONCLUSION

¶30 For all of the foregoing reasons, we affirm the judgment of conviction and the order of the circuit court denying postconviction relief.

By the Court.— Judgment and order affirmed.

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