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DISTRICT II

January 16, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2011AP2682-CR State of Wisconsin v. Richard Garcia (L.C. # 2009CF1224)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Richard Garcia appeals from a judgment of conviction and an order denying his motion for postconviction relief. Garcia contends that the circuit court erroneously denied his motion to withdraw his no contest plea. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2009-10).[1] We affirm the judgment and order of the circuit court.

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

Garcia was convicted following a no contest plea of first-degree sexual assault of a child. The charge stemmed from an allegation that Garcia had placed his penis in the mouth of a young child.

During its plea colloquy, the circuit court indicated to Garcia that, if he had a trial, the State would have to prove that he had sexual contact with the victim and that the victim was under the age of thirteen at the time of the alleged sexual contact. The court asked Garcia if he understood those elements, and Garcia answered "yes." However, the court did not define sexual contact or tell Garcia that the State would have to prove he had sexual contact for the purposes of sexual degradation, humiliation, arousal, or gratification. *See* WIS. STAT. § 948.01(5).

After sentencing, Garcia filed a motion to withdraw his no contest plea, alleging that his plea was defective under WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). In particular, Garcia alleged that his plea was not knowingly, voluntarily, and intelligently entered because he did not understand the meaning of the sexual contact element of the crime.

The circuit court held a hearing on Garcia's motion. At the hearing, Garcia's trial counsel, Douglas Henderson, testified that he went over the elements of the sexual assault charge with Garcia. He further testified that he believed Garcia understood all of the elements of the charge at the time of his plea, including the definition of sexual contact. On cross-examination, Henderson acknowledged that he did not specifically remember going over the definition of sexual contact with Garcia. He also conceded that the definition was not written on the plea

form as he had recalled. Nevertheless, Henderson reiterated that he would not have allowed Garcia to sign the plea form if he did not understand it.

Garcia also testified at the motion hearing. According to Garcia, Henderson never told him the definition of sexual contact. Garcia said that if he had to guess what sexual contact meant at the time of his plea hearing, he would say "it would probably be—probably be an inappropriate touch…[b]ut [he] really didn't know back then what it meant."

Ultimately, the circuit court denied Garcia's motion, concluding that the no contest plea was entered knowingly, voluntarily, and intelligently. In doing so, the court found that (1) Henderson went over the elements of the crime with Garcia; (2) Garcia knew the nature of the allegation against him; and (3) Henderson thought Garcia understood and otherwise would not have allowed him to enter the plea. The court also made a finding that Garcia's testimony was not credible. This appeal follows.

When a defendant moves to withdraw a plea after sentencing, he or she has the burden of establishing by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. One type of manifest injustice is a plea which is not knowingly, voluntarily, or intelligently entered. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995).

When a defendant alleges that he or she should be allowed to withdraw a plea because the plea was not made knowingly, voluntarily, or intelligently, this court is presented with a question of constitutional fact. ***State v. Hoppe***, 2009 WI 41, ¶61, 317 Wis. 2d 161, 765 N.W.2d 794. We accept the circuit court's findings of historical or evidentiary fact unless they are clearly

erroneous. ***Id.*** However, we independently determine whether those facts demonstrate that the defendant's plea was knowing, voluntary, and intelligent. ***Id.***

On appeal, Garcia contends that the circuit court erroneously denied his motion to withdraw his no contest plea. Specifically, he maintains that his plea colloquy was deficient and that the State failed to prove that he understood the definition of sexual contact. In support of his argument, Garcia cites ***State v. Jipson***, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18 and ***State v. Nichelson***, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998) for the proposition that he needed to be aware of the definition of sexual contact before he could validly plead to the offense charged.

We are not persuaded that ***Jipson***, 267 Wis. 2d 467, and ***Nichelson***, 220 Wis. 2d 214, are relevant to this appeal. In both of those cases, the definition of sexual contact was critical to the entry of the defendants' pleas because their defense was that the alleged sexual contact was accidental rather than for sexual gratification. ***Jipson***, 267 Wis. 2d 467, ¶12; ***Nichelson***, 220 Wis. 2d at 220. Here, by contrast, Garcia does not assert that his sexual contact with the victim was accidental. Indeed, there can be no question that his sexual contact was intentional and done for sexual gratification because no other purpose can be inferred from the conduct.[2]

Accordingly, we conclude that the State needed only to show that Garcia understood or had an awareness of the essential elements of the crime to which he pled. *See* ***State v. Trochinski***, 2002 WI 56, ¶21, 253 Wis. 2d 38, 644 N.W.2d 891. Upon review of the record, we

[2] As the circuit court remarked at the postconviction hearing, "I can't imagine why anybody would insert their [sic] penis into the mouth of a 4-year-old but for sexual gratification."

are satisfied that the State met its burden of showing this. As a result, we conclude that the circuit court properly denied Garcia's motion to withdraw his no contest plea.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals