COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-1739-CRNM
96-1740-CRNM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD W. KNUDTSON,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

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

PER CURIAM. Gerald Knudtson pled no contest to first-degree sexual assault of a child, contrary to § 948.02(1), STATS., and one count of intentionally causing harm to a child, § 948.03(2)(b), STATS. He received concurrent prison terms of fifteen years and five years respectively. The court granted forty-four days of credit on the sexual assault sentence and forty-two days credit on the child abuse sentence. Knudtson appeals the judgments of conviction.

Knudtson's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Appellate counsel has identified and analyzed two potential issues: (1) the validity of Knudtson's pleas and (2) the validity of the sentences. Knudtson received a copy of the report and has filed a response. In response, Knudtson argues that he was overcharged, sentenced too severely, was poorly represented and was not guilty. Upon our independent review of the record, we address two additional issues: (1) whether the record reflects that Knudtson accurately understood the nature of the elements of the offense of first-degree sexual assault and (2) whether Knudtson was accurately apprised of the potential maximum penalty for first-degree sexual assault.[1] We conclude that the record fails to reveal arguable merit to these or any other potential issue that could be raised on appeal. Therefore, we affirm the judgments.

BACKGROUND

Knudtson was originally charged with six counts of sexual assault, involving two minors, S.R.S., born in October 1982, and K.M.S., born in March 1980, contrary to § 948.02(1), STATS. The complaint states that during the summer, fall and winter of 1993, Knudtson, who was age fifty-three at the time, touched S.R.S's breasts and vagina on numerous occasions at his campground trailer and later at his motel room, where he resided. Her friend, K.M.S., was with her. K.M.S. witnessed the assaults, and was also assaulted. He gave the children cigarettes and alcohol. He attempted sexual intercourse with S.R.S., removing her pants and his pants. He attempted to insert his penis into her vagina. She believes he ejaculated because she became wet on her legs. He inserted his middle fingers in the vaginas of K.M.S. and S.R.S.

At the preliminary hearing, the children testified to essentially the same facts set forth in the complaint. On cross-examination, defense counsel asked the children if they had asked to be touched. In response to the State's objection, defense counsel explained that the relevancy of the question was to

[1] We ordered supplemental briefing on these two issues and appellate counsel responded with a supplemental brief. Knudtson responded to the brief, alleging ineffective assistance of counsel and challenging the plea procedure because he had no idea what the court was saying and was only responding according to counsel's directions.

determine whether the alleged touching was for sexual gratification or other reasons.

The children testified that Knudtson told them not to tell anybody or he would get in trouble. S.R.S testified that when Knudtson took off his pants, she saw his penis. She testified that he had an erection and ejaculated on her. The trial court found probable cause and bound Knudtson over for trial.

Because at the preliminary hearing testimony was received that a third minor girl was also sexually assaulted on two occasions, the information charged eight counts of sexual assault. Later, on defense motion, these two counts involving the third child were dismissed.

A second complaint was filed, charging Knudtson with one count of intentionally causing bodily harm to a minor, K.M.S., born in March 1980, contrary to § 948.03(2)(b), STATS., and bail-jumping, contrary to § 946.49(1)(b), STATS. This charge resulted when Knudtson, released on bond on the sexual assault charges, saw K.M.S. on a public street, came up behind her, placed his arm around her neck in a choke hold, and threw her to the pavement, injuring her elbow. His bond contained conditions that he not commit any crime and that he have no contact of any kind with any person under the age of eighteen years. The charges contained in both complaints were later consolidated.

ANALYSIS

1. Sexual assault charge

No arguable merit exists to a challenge to Knudtson's no contest plea to the sexual assault charge. Knudtson entered a plea agreement providing that he would plead no contest to one count of first-degree sexual assault and the remaining five charges would be dismissed. Two sexual assault counts would be read in at sentencing, however. Knudtson has the burden of showing by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. *See* ***State v. Harrell,*** 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). A plea that is not knowingly, voluntarily and intelligently entered creates a manifest injustice. *See* ***id.***

In ***State v. Bangert,*** 131 Wis.2d 246, 266-72, 389 N.W.2d 12, 22-25 (1986), procedural safeguards are described that satisfy constitutional requisites. These include a personal colloquy between the trial court and the defendant, demonstrating an understanding of the constitutional rights at issue, the nature of the charges and the potential punishment if convicted. ***Id.;*** § 971.08, STATS.

The record shows that the plea procedures were adequate. At his plea hearing on the sexual assault charge, Knudtson stated that he was fifty-four years old, never received treatment for mental or emotional problems, and was not under the influence of any intoxicant. Knudtson completed the plea questionnaire with the assistance of defense counsel. The trial court personally addressed Knudtson. It advised him of the rights he would be giving up by entering a no contest plea. The trial court determined his plea was voluntary. It relied upon the criminal complaint and preliminary hearing as a factual basis for the plea. Knudtson stated that he was satisfied with the legal representation he received.

Any argument that Knudtson did not understand the nature of the charge would be frivolous within the meaning of ***Anders.*** At the plea hearing, the trial court described the crime as "sexual contact" with a victim less than thirteen years of age. An essential element of the charge of sexual contact of a minor is that the contact must be for the purpose of sexual arousal or gratification, or to degrade the victim. *See* ***State v. Nye,*** 100 Wis.2d 398, 404, 302 N.W.2d 83, 86 (Ct. App. 1981), *aff'd,* 105 Wis.2d 63, 312 N.W.2d 826 (1981); *see also* § 948.01(5), STATS. The trial court and the information described the offense as simply as "sexual contact" under § 948.02(1), omitting the definition of sexual contact found in § 948.01(5) that contains the "for the purpose of sexual gratification" element. Also, the plea questionnaire describes the offense as "sexual contact-14 years old."

Nonetheless, the trial court described the offense as one involving a thirteen-year-old and the complaint charging Knudtson with violating § 948.02(1), STATS., alleged the offense occurred in the fall and winter of 1993, and that the victim, S.R.S., was born in October 1982. Also, in the complaint, S.R.S. reportedly stated that Knudtson ejaculated during an incident of sexual contact.

During the preliminary examination, defense counsel asked questions designed to demonstrate whether the purpose of the contact was for sexual gratification. At the plea hearing, in response to the trial court's question, defense counsel answered affirmatively that his client understood the nature of the charge, including the elements of the offense. Although defense counsel later stated that he did not go over the elements specifically, Knudtson had stated that he thoroughly discussed the matter with defense counsel and was satisfied with his representation.

Knudtson, in his response, did not suggest that he did not understand the nature of the offense. The record makes no suggestion of incompetency or mental deficiency. Knudtson's general statement in his supplemental response that he had no idea what the court was asking does not allege that he was unaware of the nature of the charge. Without such assertion, Knudtson does not meet one of the two threshold requirements for challenging a plea as unknowing or involuntary. *See* ***State v. Giebel,*** 198 Wis.2d 207, 216, 541 N.W.2d 815, 818-19 (Ct. App. 1995). We conclude that the record reveals no arguable merit to a challenge to the validity of Knudtson's plea.

Next, the record discloses that Knudtson was initially misinformed as to the penalty. His plea questionnaire indicated a prison sentence of ten years and a $10,000 fine. On the record, the trial court corrected the plea questionnaire on the record to reflect a twenty year potential sentence and Knudtson initialed the correction. Later, however, the trial court indicated that the maximum penalty was twenty years in prison and a $10,000 fine. This statement was erroneous because there is no fine for a Class B felony. However, because the erroneous statement overstated the penalty by including a fine, no prejudice results. Knudtson does not claim that the misinformation regarding the fine in any way affected his decision to plead no contest. Without such an assertion, he has not met the criteria to withdraw a plea as involuntary or unknowing. *See* ***Giebel,*** 198 Wis.2d at 216, 541 N.W.2d at 819.

Next, we conclude the record reveals no arguable basis to challenge the sentence. The court considered the appropriate factors including the gravity of the offenses, Knudtson's character and rehabilitative needs, and

protection of the public. *See* ***State v. Echols,*** 175 Wis.2d 653, 682, 499 N.W.2d 631, 640, *cert. denied*, 510 U.S. 889 (1993). These are proper factors and the sentence is in within the statutory maximum.

2. Child abuse charge

The record reveals that Knudtson entered a negotiated no contest plea to the charge of child abuse. In exchange for the plea, the felony bond violation was dismissed and both parties jointly recommended a five year prison sentence, concurrent with the sentence on the sexual assault charge. The plea procedure complied with the requirements set forth in ***Bangert.*** The record discloses no arguable basis to challenge the sentence. *See* ***State v. Scherreicks,*** 153 Wis.2d 510, 518, 451 N.W.2d 759, 762 (1989).

The potential issues raised in Knudtson's responses lack arguable merit. A valid plea generally waives all nonjurisdictional defects and defenses. *See* ***Bangert,*** 131 Wis.2d at 293, 389 N.W.2d at 34. The record reveals no basis to challenge the effectiveness of defense counsel because it lacks evidentiary support to make such an argument. *See* ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

Because the record reveals no other potential appellate issues, further proceedings would lack arguable merit. Attorney Steven Phillips is therefore relieved of further representation of Knudtson in this matter.

By the Court. – Judgments affirmed.

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