COURT OF APPEALS DECISION DATED AND FILED

December 9, 2008

David R. Schanker
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 No. 2007AP1862-CR

Cir. Ct. No. 2006CF3280

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion.*

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge.

¶1 LAROCQUE, J. Marlon Powell pled no contest to one count of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2) (2005-06).[1] The court imposed a bifurcated sentence of twelve years, comprised of seven years of initial confinement and five years of extended supervision, to run consecutively to any other sentence. Powell filed a postconviction motion to withdraw his plea as not entered knowingly, intelligently and voluntarily. Powell also moved to modify his sentence. The trial court denied Powell's motion without a hearing. We conclude that Powell is entitled to an evidentiary hearing on the plea issue. If he is not successful at that hearing, the trial court shall conduct a hearing on the sentencing issue.[2] Accordingly, we reverse and remand for further proceedings consistent with this opinion.

PLEA WITHDRAWAL

A. Facts

¶2 Powell was charged with three counts of second-degree sexual assault of a child, all involving Jasmine B., the thirteen-year-old daughter of Powell's live-in girlfriend. The criminal complaint alleged three different acts of sexual contact—mouth to breast; finger to vagina; and penis to vagina.

¶3 As part of a plea agreement, Powell pled no contest to Count 1 which alleged that he had sexual contact (mouth to breast) with Jasmine B. The

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] In the event Powell is successful in withdrawing his plea, the sentencing issue becomes moot and no hearing is necessary.

other two counts were dismissed. During the plea colloquy, the following exchange took place between the court and Powell:

> [The Court]: You also understand the complaint? You've read it or had it read to you?
>
> [Powell]: Yes.
>
> …
>
> [The Court]: By pleading no contest to the offense, with the understanding that the Court is going to make a finding of guilt, you're going to be waiving those constitutional rights that are contained in the guilty plea questionnaire and waiver of rights form that you've signed.
>
> [Powell]: Yes.
>
> [The Court]: Your right to have the State prove you guilty beyond a reasonable doubt as to every single element of the offense. And have you gone over the elements of the offense with your lawyer and how they relate to the facts of this case?
>
> [Powell]: Yes.
>
> [The Court]: And that you had sexual contact and/or sexual intercourse with the victim of the offense who had not attained the age of 16 years at the time of the contact or intercourse?
>
> [Powell]: Yes.
>
> …
>
> [The Court]: Is there anything that you do not understand by pleading no contest to this offense?
>
> [Powell]: No, I understand.

In the factual summary offered to the court as a factual basis for the plea, the assistant district attorney noted that Powell's DNA was found on the victim's breast.

¶4 The record contains the plea questionnaire alluded to by the trial court during the plea colloquy. That questionnaire indicates that Powell's attorney had explained the elements of the crime to Powell, and a handwritten sheet, apparently in counsel's penmanship, is attached to the questionnaire. The sheet states:

> – Sexual assault of a child. 2nd degree
> – 948.02(2)
> – Sexual contact w/ a person who has not attained the age of 16.
> – Sexual contact means … intentional touching of any body part for the purpose of sexually arousing defendant
> – The child has not attained the age of 16

¶5 In his postconviction motion, Powell contended that the plea colloquy did not show that he understood the elements of the crime to which he pled. Powell claimed that he did not understand the "sexual contact" element of second-degree sexual assault, particularly, the element of intentional touching of an intimate part of the victim. Powell further claimed that he did not know that the victim's breast was an "intimate part," as defined by WIS. STAT. § 939.22(19).[3]

¶6 In its response to Powell's postconviction motion, the State emphasized that the plea colloquy showed that Powell had read the criminal complaint and the criminal complaint contained an "extremely explicit description of the precise nature of the sexual contact," to wit, "mouth to breast." The State reasoned that because the criminal complaint "is entirely adequate to illustrate the elements, and the defendant, several times over, indicated that he had not only read the complaint, but understood it," the record showed that Powell understood

[3] WISCONSIN STAT. § 939.22(19) defines "intimate parts" as a human being's "breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound."

the nature and elements of second-degree sexual assault of a child. The State conceded that the handwritten sheet attached to the plea questionnaire did not correctly describe the elements of the crime, but the State urged the postconviction court not to "elevate [the sheet] to paramount importance" over other "parts of the record that show the defendant's understanding of the nature of the crime charged and its elements."

¶7 The postconviction court denied Powell's motion without an evidentiary hearing. The court's order stated that it had reviewed the record of the plea and sentencing hearings and that it "concur[red] with the State in its analysis" and "adopt[ed] the State's brief *in toto* as its decision in this matter."

B. Discussion

¶8 A no contest plea that is not entered knowingly, intelligently and voluntarily violates fundamental due process. *See* ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. Accordingly, several duties designed to ensure that a defendant's plea is knowing, intelligent and voluntary have been imposed on the circuit courts by WIS. STAT. § 971.08 and case law. ***Brown***, 293 Wis. 2d 594, ¶23. Among those duties is the obligation to "[e]stablish the defendant's understanding of the nature of the crime with which he is charged." ***Id.***, ¶35; *see also* § 971.08(1) ("Before the court accepts a plea of guilty or no contest, it shall … [a]ddress 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."). When a circuit court fails to fulfill a duty at the plea hearing, the defendant is entitled to an evidentiary hearing if his postconviction motion "alleges he did not understand an aspect of the plea because of the omission." ***Brown***, 293 Wis. 2d 594, ¶36. Whether a defendant has shown

that the plea colloquy was deficient is a question of law which is reviewed *de novo*. ***Id.***, ¶21. Similarly, whether a defendant has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing is a question of law. ***Id.***

¶9 On appeal, the State concedes that the plea colloquy was deficient. Accordingly, we need not address this issue at length. Suffice to say that the circuit court's unexplained reference to "sexual contact and/or sexual intercourse" is wholly inadequate. WISCONSIN STAT. § 948.02(2) defines second-degree sexual assault of a child as "sexual contact … with a person who has not attained the age of 16." "Sexual contact" is defined as the "[i]ntentional touching by the defendant … of the complainant's intimate parts." WIS. STAT. § 948.01(5)(a)1. "Intimate parts" is defined as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." WIS. STAT. § 939.22(19). A defendant's understanding of the meaning of "sexual contact" is essential to an understanding of the crime of second-degree sexual assault of a child. *See* ***State v. Jipson***, 2003 WI App 222, ¶¶9-10, 267 Wis. 2d 467, 671 N.W.2d 18.

¶10 In this case, the circuit court did nothing to explain any of those concepts to Powell. The circuit court merely asked Powell whether he had "gone over the elements" of the crime with his lawyer.[4] Powell replied that he did, but as was stated in ***State v. Bangert***, 131 Wis. 2d 246, 269, 389 N.W.2d 12 (1986), "[a] defendant's mere affirmative response that he understands the nature of the

[4] Although an attorney's explanation of the elements to a defendant may play a role in the court's ascertainment that the defendant understands the nature of the charge, *see* ***State v. Bangert***, 131 Wis. 2d 246, 268, 389 N.W.2d 12 (1986), the handwritten evidence attached to the plea questionnaire shows that Powell's attorney made no reference to "intimate parts" and, therefore, did not correctly describe the elements of the crime.

charge, without establishing his knowledge of the nature of the charge, submits more to a perfunctory procedure rather than to the constitutional standard that a plea be affirmatively shown to be voluntarily and intelligently made." Moreover, by referring to both "sexual contact and/or sexual intercourse," the circuit court affirmatively misled Powell as to the nature of the alleged crime.

¶11 Powell has made a *prima facie* showing that the plea colloquy did not conform to WIS. STAT. § 971.08(1). In his postconviction motion, Powell alleged that he did not understand the "sexual contact" element of second-degree sexual assault, particularly, the element of intentional touching of an intimate part of the victim and that "intimate part" included the victim's breast. That information was precisely that which the circuit court should have explained to Powell. Therefore, Powell is entitled to an evidentiary hearing on his motion to withdraw his plea.[5] *See* ***Brown***, 293 Wis. 2d 594, ¶2.

SENTENCE MODIFICATION

C. Facts

¶12 As noted, the court sentenced Powell to twelve years of imprisonment, comprised of seven years of initial confinement and five years of extended supervision, to run consecutively to any other sentence. At the November 20, 2006 sentencing, the State informed the court that Powell would be

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[5] We emphasize that we are not deciding whether Powell's no contest plea, in fact, was not entered knowingly, intelligently and voluntarily. Rather, we hold only that Powell "has raised sufficient concerns" about the question so as to entitle him to an evidentiary hearing. ***State v. Brown***, 2006 WI 100, ¶20, 293 Wis. 2d 594, 716 N.W.2d 906. At that hearing, the "State will have an opportunity to present evidence that [Powell] understood the nature of the charge[]." ***Id.***, ¶6.

on parole supervision until 2016. The court then asked whether Powell had "been revoked for any of this." Powell's attorney informed the court that there had been a revocation hearing but "[n]either of the witnesses appeared [and Powell] was not revoked." The assistant district attorney confirmed that "the lack of revocation was because [the victim's mother] did not bring her daughter in." When Powell's attorney informed the court that Powell also had a consecutive twenty-year term of probation that would be served after the completion of his parole term in 2016, the court again questioned whether he had been revoked. Powell's attorney replied, "No, no. These are only allegations, Judge. And, again, there was no proof." At the conclusion of his allocution, Powell asked the court to "have a little mercy" to which the court replied, "[i]t appears that whoever didn't revoke you had the mercy." The court then went on to impose the above-described sentence.

¶13 After sentencing, the Department of Corrections reinitiated revocation proceedings, and on May 24, 2007, Powell's parole was revoked. As a result, Powell was re-incarcerated on that offense for eleven years, three months and four days. Because the circuit court stated that this sentence for second-degree sexual assault would run "consecutive to anything else the defendant is serving," Powell must serve the confinement portion of the parole revocation sentence before the bifurcated sentence imposed in this case will commence.

¶14 In his postconviction motion, Powell argued that the revocation was a new factor that justified sentence modification. Alternatively, he argued that the revocation created a factual inaccuracy, namely, the assumption that he would not be revoked, and, therefore, the sentence violated due process. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 ("A defendant has a constitutionally protected due process right to be sentenced upon accurate information."). The State countered that Powell's post-sentencing revocation was

not a new factor.[6] As noted, the circuit court adopted the State's analysis in its order denying Powell's postconviction motion.

D. Discussion

¶15 A new factor is

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Ralph, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990) (citation and internal quotation marks omitted). A new factor "must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). "Erroneous or inaccurate information used at sentencing may constitute a 'new factor' if it was highly relevant to the imposed sentence and was relied upon by the trial court." ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656 (citation omitted). Whether a fact or a set of facts constitutes a new factor is a question of law decided by this court without deference to the trial court. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

¶16 The issue is whether the subsequent revocation of Powell's parole is a new factor. The general rule is that "revocation of [parole] in another case does not … present a new factor." ***Norton***, 248 Wis. 2d 162, ¶10. In ***Norton***, this court

[6] The State did not separately address Powell's alternative argument.

crafted an exception to that general rule when it was "clear from the sentencing transcript that everyone understood that Norton's probation would not be revoked at the time of sentencing, or subsequent to sentencing" because of the crime for which Norton was being sentenced. ***Id.*** Powell contends that his case falls into the exception created in ***Norton***. We agree.

¶17 In ***Norton***, the sentencing court was advised that Norton's probation in a misdemeanor theft case would not be revoked. ***Id.***, ¶4. Later, his probation agent suggested he agree to the revocation in the misdemeanor case, and she told him that he could serve the two sentences concurrently. ***Id.***, ¶5. Relying on this advice, he agreed to a voluntary revocation of his probation and waived his right to a hearing. ***Id.*** Norton then learned that the sentences could not be served concurrently because the trial court had stated that the sentence was to be served "'consecutive to any other sentence.'" ***Id.*** Norton then brought a postconviction motion seeking modification of his sentence because the revocation was a "new factor." ***Id.***, ¶6. The trial court denied the motion. ***Id.*** We concluded:

> the circumstances do constitute a new factor and [sentence modification] is required because the inaccurate information relied on by the trial court frustrates the purpose of the sentence. A new factor is a set of facts highly relevant to sentencing, but not known, or not in existence, at the time of sentencing.

Id., ¶13.

¶18 Like in ***Norton***, the trial court here was told that Powell had not been revoked due to the uncooperative attitude of the victim and her mother. The trial court was told the victim recanted and moved out of state. Given these circumstances, the trial court would have believed that revocation was not going to occur. The trial court took this fact into account when fashioning a sentence for

Powell. Powell, however, was revoked. Surely there can be no argument that the trial court did not have all the facts before it at sentencing. The trial court did not know a significant fact – that Powell would be serving more than an eleven-year sentence first. Not only did the court believe that Powell would not be revoked, but also took this fact into consideration when sentencing him. If Powell is unsuccessful in withdrawing his plea, we direct this matter to be set for a hearing to determine whether the new factor of Powell's subsequent revocation warrants sentence modification.

By the Court.—Judgment and order reversed and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports.