RECEIVED
10-05-2016
CLERK OF COURT OF APPEALS
OF WISCONSIN

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP001411 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Richard J. Scott,

Defendant-Appellant.

On appeal from a judgment of the Kenosha County Circuit Court, The Honorable Bruce E. Schroeder, presiding

---

Defendant-Appellant's Brief and Appendix

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Avenue, Suite 1200
Milwaukee, WI 53233

414.671.9484

Attorneys for the Appellant

Table of Authority

Cases

Statutes

Table of Contents

Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

I. Whether the circuit court erred in denying Scott's postconviction motion to withdraw his guilty plea to count four of the information (repeated sexual assault of a child) where Scott alleged in his motion that count four of the information failed to allege an offense known to law; at the plea colloquy, the judge failed discuss the essential nature of the offense alleged in the information; and where the "facts" established during the plea colloquy do not establish a violation of the statute alleged in the information.

Answered by the circuit court: No. At the plea hearing the judge asked Scott whether, on at least three occasions, he touched the child's vagina for purposes of sexual gratification; and Scott admitted that he did. It is irrelevant that these facts do not match the allegations of the information.

II. Whether the circuit court erred in denying Scott's postconviction motion to withdraw his guilty plea to count seven of the information (possession of child pornography), where Scott's motion alleged that there was not a sufficient factual basis in the record for the court to accept the plea.

Answered by the circuit court: No. The complaint alleged that Scott showed a picture of someone peeing in another person's mouth.

Summaries of the Arguments

I. The circuit court erred in denying Scott's motion to withdraw his guilty plea on count four. Scott pleaded guilty to count four of the information, which alleged that between August 1, 2007 and August 31, 2008, he committed repeated sexual assaults on the same child.

In his postconviction motion, Scott sought to withdraw his guilty plea to count four. The motion alleged that the circuit court lacked subject matter jurisdiction to accept his guilty plea because the information fails to allege a crime known to law. Specifically, the information alleges that "fewer than three of the violations" were first degree sexual assaults of a child; and the applicable version of the statute requires that "at least 3 of the violations" were first degree sexual assaults of a child. Further, Scott argued that the "facts" elicited by the judge during the

plea colloquy do not establish that fewer than three of the violations were first degree sexual assaults of a child.

The State responded by arguing that the *former* statute prohibiting repeated acts of sexual assaults *did* require that "fewer than three" of the violations were first degree sexual assaults of a child. The State acknowledged that the statute was amended effective March 26, 2008. That is, smack in the middle of the charging period alleged in the information.

The circuit court denied Scott's motion. The judge's reasoning was, in a nutshell, that Scott admitted that he first degree sexually assaulted the child on at least three occasions, and the language in the information requiring that "fewer than three" of the violations were first degree sexual assault, was inapplicable language affecting only the penalty provision.

The circuit court erred in denying Scott's motion to withdraw his guilty plea to count four for the following reasons:

- Where there is a continuing offense, the applicable statute is determined by the date of the most recent act constituting the offense; and, therefore, the "new" version of the statute applies. The information, therefore, which refers to the "old version" of the statute, fails to allege an offense known to law. By August 31, 2008, that version of the statute no longer existed. The court lacks subject matter jurisdiction to enter a conviction based on an information that alleges an offense that no longer exists.

- Even if the court had subject matter jurisdiction, during the plea colloquy, the judge described the elements of the "new" version of the statute, and this is wholly inconsistent with the version of the offense alleged in the information (i.e. the "old" version). Thus, the judge utterly failed to discuss the essential nature of the offense alleged in the information.
- Finally, the "facts" elicited by the judge during the plea colloquy, that Scott had sexual contact with the child on at least three occasion (that is, he committed three acts of first degree sexual assault), take this case wholly out of the purview of the old statute (which requires that fewer than three of the offenses first first degree sexual assaults of a child)

II There was not a factual basis to support Scott's guilty plea to possession of child pornography. At the plea hearing, the court accepted the criminal complaint as the factual basis for Scott's guilty plea to count seven of the information (possession of child pornography).

Concerning count seven, the complaint alleged:

> Tina Gaspar talked to [MM], who stated that whenever they were at the defendant's house alone with him the defendant would put them in his lap and make them look at "nasty pictures" of naked girls and movies with naked males, females, and children. Gaspar stated that [MM] told her that she remembered one movie of a man

peeing into a girl's mouth.

(R:9) The complaint also alleges that, "A forensic analysis of the defendant's computer revealed numerous images of child pornography. There is one specific photograph that was moved to a "lost folder", which means the item was deleted. It is a girl, clearly under age 18, with a penis in the photo ejaculating onto her face. The photo was deleted on December 20, 2011." *Id.*

As will be set forth in more detail below, Tina Gaspar's interview of MM is totally insufficient to establish that Scott possessed child pornography. The complaint alleges that they were "nasty pictures", and in one of the pictures, a man was peeing into a girl's mouth. Was is conspicuously missing is any allegation that any of the individuals in the images were under the age of eighteen years. Similarly, the allegations concerning the images on "Scott's computer" is insufficient to permit an inference that Scott possessed those images. Simply calling the device "Scott's computer", with none of the surrounding circumstances, is a bald, conclusory allegation; and it is insufficient to establish possession.

Statement of the Case[1]

On January 26, 2015, the defendant-appellant, Richard Scott (hereinafter "Scott") was charged with six counts of repeated sexual assault of the same child, and ten counts of possession of child pornography. (R:2)

Several months later, on May 26, 2015, Scott reached a plea agreement with the State. Under the plea agreement, Scott would plead guilty to count four (repeated sexual assault of the same child) and count seven (possession of child pornography), and the state would then dismiss all other counts in the information. (R:45-2) The State agreed to recommend nine years of initial incarceration.

Count four of the information alleges that:

> The above-named defendant on or about ***August 1, 2007 to August 31, 2008,*** Kenosha County, Wisconsin, did commit repeated sexual assault involving the same child, MM, DOB 06/09/2002 ***where fewer than three of the assaults were violations of sec. 948.02(1) Wis. Stats***., contrary to sec. 948.025(1)(b), 939.50(3)(c) Wis. Stats., a Class C Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars ($100,000), or imprisoned not more than forty (40) years, or both.

(emphasis provided; R:15).

During the plea colloquy, the judge told Scott:

[1] This case was resolved with guilty pleas. The issues raised are procedural in nature. Therefore, a separate section for the factual background is not necessary. The facts, as necessary to an understanding of the issues, will be set forth as needed.

> MR. BURGOYNE: Judge, count four is fewer than three assaults.
>
> THE COURT: No. I think it means-- well, you are right, at least-- well-- *but on at least three occasions you touched the child with some part of your body on the vagina for the purpose of your own sexual gratification.* Do you understand this charge against you?

(emphasis provided; R:15-7) Scott said that he did understand.

Concerning the factual basis for the guilty plea to Count 7, alleging that Scott possessed child pornography on or about December 20, 2011, the judge stated, "I'm further satisfied that there is sufficient evidence in the sworn complaint to warrant acceptance of the plea . . ." (R:15-9)

However, concerning the possession of child pornography, the amended criminal complaint alleges:

> Tina Gaspar talked to [MM], who stated that whenever they were at the defendant's house alone with him the defendant would put them in his lap and make them look at "nasty pictures" of naked girls and movies with naked males, females, and children. Gaspar stated that [MM] told her that she remembered one movie of a man peeing into a girl's mouth.

(R:9) The complaint also alleges that, "A forensic analysis of the defendant's computer revealed numerous images of child pornography. There is one specific photograph that was moved to a "lost folder", which means the item was deleted. It is a girl, clearly under age 18, with a penis in the photo ejaculating onto her face. The photo was deleted on December 20, 2011." *Id.*

The circuit court accepted Scott's guilty pleas to counts

four and seven.

The matter then proceeded to sentencing. On count four (repeated sexual assault), the court sentenced Scott to twenty-four years in prison, bifurcated as nine years initial confinement, and fifteen years extended supervision. On count seven, the court sentenced Scott to four years in prison consecutive to count four, bifurcated as one year initial confinement, and three years extended supervision. (R:46-12)

Scott timely filed a notice of intent to pursue postconviction relief.

On June 6, 2016, Scott filed a postconviction motion to withdraw his guilty pleas. (R:34) The motion alleged that the plea to count four was wholly invalid because it did not allege an offense known to law; and, further, that the plea to count seven was invalid because there was no factual basis in the criminal complaint to support Scott's guilty plea to possession of child pornography.

Specifically, Scott's argument as to count four was that the criminal complaint alleged that he violated § 948.025(1)(b), Stats., which was alleged to be a Class C felony, where *fewer than three* of the assaults were violations of sec. 948.02(1) Wis. Stats. Scott pointed out that, in fact, § 948.025(1)(b), Stats., is a Class B felony, and it requires that "at least 3 of the violations were violations of s. 948.02 (1) (am), (b), or (c)."

The State filed a letter response. In the response, the

State claimed that Scott was charged under an earlier iteration of the statute.[2] (R:35) Under the earlier statute, § 948.025(1)(b), Stats., was a Class C felony, and did require that "fewer than three of the assaults were violations of sec. 948.02(1) Wis. Stats." The State correctly pointed out that the new statute-- argued by Scott in his motion-- was effective March 27, 2008.

The State's brief did not address the fact that the charging period alleged in count four, (August 1, 2007 to August 31, 2008) *spans the effective date of the new statute.* In other words, under the charging period in the statute, some of the acts may have occurred before the amendment of the statute, and some of the acts may have occurred after the amendment of the statute.

The circuit judge almost immediately denied Scott's motion. (R:36) The judge wrote:

> Sexual Assault of a Child of the First Degree, prohibited by § 948.02(1), Stats., consisted in having sexual contact with a person who had not attained the age of 13. Sexual contact included the intentional touching of the child's vagina by any part of the defendant's body if done for the purpose of his own sexual gratification. § 939.22(19) & (34), Stats.
>
> At the plea, the defendant stated that he understood the charge, which was described as having, on at least three occasions during the period specified in the Information, touched the child with

[2] The information does not set forth what version of the statute-- that is, what year of the statutes-- that Scott was alleged to have violated.

> a part of his body for his own sexual gratification.[3] The portion of the written charge which mentioned "fewer that [sic] 3 of the violations" merely classified the crime as a Class C rather than a more serious class of felony.

Id.

The court was equally dismissive of Scott's claim that there was an insufficient factual basis in the criminal complaint to support his guilty plea to possession of child pornography. The judge reasoned, "Of course, the defendant omits reference to the allegation of the Amended Complaint that one of the children 'stated that the defendant would show her . . . nasty pictures and naked pictures including pictures of people peeing in other people's mouths." *Ibid.* p. 2

Scott timely filed a notice of appeal

[3] The judge's reasoning appears to be that the oral description of the charge given at the plea hearing, which clearly differs from the written charge in the information, is sufficient to permit the court to accept Scott's guilty plea to count four.

Argument

I. The circuit court erred in denying Scott's motion to withdraw his guilty plea to count four (repeated sexual assault)

Scott pleaded guilty to count four of the information, which alleged that between August 1, 2007 and August 31, 2008, he committed repeated sexual assaults on the same child.

In his postconviction motion, Scott sought to withdraw his guilty plea to count four. The motion alleged that the circuit court lacked subject matter jurisdiction to accept his guilty plea because the information fails to allege a crime known to law. Specifically, the information alleges that "fewer than three of the violations" were first degree sexual assaults of a child; and the applicable version of the statute requires that "at least 3 of the violations" were first degree sexual assaults of a child. Further, Scott argued that the "facts" elicited by the judge during the plea colloquy do not establish that fewer than three of the violations were first degree sexual assaults of a child.

The State responded by arguing that the former statute prohibiting repeated acts of sexual assaults *did* require that "fewer than three" of the violations were first degree sexual assaults of a child. The State acknowledged that the statute

was amended effective March 26, 2008. That is, smack in the middle of the charging period alleged in the information.

The circuit court denied Scott's motion. The judge's reasoning was, in a nutshell, that Scott admitted that he first degree sexually assaulted the child on at least three occasions, and the language in the information requiring that "fewer than three" of the violations were first degree sexual assault, was inapplicable language affecting only the penalty provision.

The circuit court erred in denying Scott's motion to withdraw his guilty plea to count four for the following reasons:

- Where there is a continuing offense, the applicable statute is determined by the date of the most recent act constituting the offense; and, therefore, the "new" version of the statute applies. The information, therefore, which refers to the "old version" of the statute, fails to allege an offense known to law. By August 31, 2008, that version of the statute no longer existed. The court lacks subject matter jurisdiction to enter a conviction based on an information that alleges an offense that no longer exists.
- Even if the court had subject matter jurisdiction, during the plea colloquy, the judge described the elements of the "new" version of the statute, and this is wholly inconsistent with the version of the offense alleged in the information (i.e. the "old" version). Thus, the judge utterly

failed to discuss the essential nature of the offense alleged in the information.

- Finally, the "facts" elicited by the judge during the plea colloquy, that Scott had sexual contact with the child on at least three occasion (that is, he committed three acts of first degree sexual assault), take this case wholly out of the purview of the old statute (which requires that fewer than three of the offenses first first degree sexual assaults of a child)

A. Standard of Appellate Review

> The "[g]eneral rule [is] that a defendant seeking to withdraw a guilty or no contest plea after sentencing must show " 'manifest injustice by clear and convincing evidence.' " [internal citations omitted]. This method, often referred to as the *Bentley* standard, *see id.,* ¶ 51, applies a two-step standard of review for motions to withdraw guilty or no contest pleas. *Id.,* ¶ 55.
>
> Under the first step of a *Bentley*-type review, a reviewing court must determine whether a defendant's postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief. [internal citations omitted] This presents a question of law subject to independent review. *Id.* Where a defendant's motion alleges facts that would entitle him to withdraw his plea, but the record conclusively demonstrates that the defendant is not entitled to relief, no evidentiary hearing is required. *Id.* Whether the record conclusively demonstrates that the defendant is entitled to no relief is also a question of law, subject to independent review. *Id.*

State v. Negrete, 2012 WI 92, ¶¶ 16-17, 343 Wis. 2d 1, 13–14,

819 N.W.2d 749, 755

B. Where there is a continuing offense, the controlling statute is determined as of the date of the last act constituting the offense.

"In contrast to the instantaneous nature of most crimes, a continuing offense is one which consists of a course of conduct enduring over an extended period of time." *John v. State*, 96 Wis. 2d 183, 188, 291 N.W.2d 502, 505 (1980) The court will find an offense to be continuing when, "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States,* 397 U.S. 112, 115, 90 S. Ct. 858, 860, 25 L. Ed. 2d 156 (1970).

Repeated sexual assault of a child is, almost by definition, a continuing offense. *See, e.g., State v. Johnson,* 2001 WI 52, ¶ 22, 243 Wis. 2d 365, 379, 627 N.W.2d 455, 462.

Since repeated sexual assault of a child is a continuing offense, the applicable statute is determined as of the date the last act constituting the offense is committed.

For example, "Even if the initial unlawful act may itself embody all of the elements of the crime, the criminal limitations period commences from the most recent act. . . Stated another way, the statute of limitations for a continuing offense does not begin to run until the last act is done which viewed by itself is a crime." *John v. State*, 96 Wis. 2d 183, 188, 291 N.W.2d 502,

505 (1980)

Additionally, in a situation very similar to the one presented here, the court specifically held that the statute in effect on the date the last act of a continuing offense is committed is the statute that controls. In, *State v. Ramirez*, 2001 WI App 158, 246 Wis. 2d 802, 633 N.W.2d 656 Ramirez fraudulently used another person's social security number to obtain employment at the Trek bicycle company. Months after Ramirez had obtained employment, the legislature created the "identity theft" law. When Ramirez's fraud was discovered, he was charged with identity theft. Ramirez claimed that this was an *ex post facto* application of the law. In affirming the conviction, the court of appeals held that since Ramirez continued to receive wages after the effective date of the identity fraud statute, it was a continuing offense and he could be charged with identity theft even though his first fraudulent use of the social security number predated the passage of the statute. The court wrote, "Since Ramirez's identity theft allowed him to obtain wages after the effective date of the statute, we hold that the application of the statute did not violate the *ex post facto* provisions of the Wisconsin Constitution." *Ramirez*, 2001 WI App 158, ¶ 18

For these reasons, the version of § 948.025(1)(b), Stats. that was in effect on August 31, 2008 is that statute that controls.

C. The court lacks subject matter jurisdiction to accept a guilty plea to a crime that does not exist.

"The failure to charge any offense known to law has also been termed jurisdictional. [internal citations omitted] "A complaint which charges no offense is jurisdictionally defective and void and the defect cannot be waived by a guilty plea, the court does not have jurisdiction." *Mack v. State*, 93 Wis. 2d 287, 295, 286 N.W.2d 563, 567 (1980)

Here, as to count four, the information alleged that the offense went from August 1, 2007 to August 31, 2008. Thus, the statute that was in effect on August 31, 2008 is the statute that governs.

On August 31, 2008, the version of § 948.025(1)(b), Stats., is as follows:

> 1) Whoever commits 3 or more violations under s. 948.02 (1) or (2) within a specified period of time involving the same child is guilty of:
>
> (a) A Class A felony if at least 3 of the violations were violations of s. 948.02 (1) (am).
>
> *(b) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1) (am), (b), or (c).*
>
> (c) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1) (am), (b), (c), or (d).
>
> (d) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1).
>
> (e) A Class C felony if at least 3 of the violations were violations of s. 948.02 (1) or (2)

The information in this case, though, alleged a violation of a version of the statute that had been amended as of March 26,

2008.[4] The language alleged in the information, that "fewer than three of the assaults were violations of sec. 948.92(1), Wis. Stats.", no longer existed at the time of Scott's plea.

For these reasons, the circuit court lacked subject matter jurisdiction to accept Scott's guilty plea to count four. The statute no longer existed as of the date on which Scott was alleged to have committed the last act constituting the continuing offense.

D. The circuit court's plea colloquy was defective because the court's oral description of the nature of the offense differed from the offense alleged in the information.

Even if the court had subject matter jurisdiction to accept Scott's plea, the court's plea colloquy was defective. The elements described by the judge during the plea colloquy were from the "new" version of § 948.025, Stats.[5], whereas the elements alleged in the information were from the "old" version of the statute[6]. Thus, this is not a matter of the judge merely failing to discuss the elements of the offense alleged in the information. Rather, the judge discussed the elements of an offense other than the one alleged in the information.

In, *State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232,

[4] 2007 Wis. Act 80, effective March 26, 2008, made significant amendments to § 948.025, Stats. (repeated sexual assault of a child). Among other things, the statute was amended so as to totally eliminate the language "fewer than three of the assaults were violations of sec. 948.02(1) Wis. Stats

[5] "At least 3 of the violations were violations of s. 948.02 (1) (am), (b), or (c)."

[6] "Fewer than 3 of the violations were violations of s. 948.02(1)"

233-234 (Wis. 1996), the court stated, "Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice." One of the situations where plea withdrawal is necessary to correct a manifest injustice is where the plea was entered without knowledge of the charge. *State v. Trochinski*, 253 Wis.2d 38, 644 N.W.2d 891 (2002).

The requirements for acceptance of a guilty plea are prescribed by statute. §971.08(1), Stats., provides that, "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 *t*he potential punishment if convicted." (emphasis provided).

A defendant seeking to withdraw his plea must show the following: (1) Establish that the record of the plea hearing was inadequate; and, (2) Affirmatively allege that the defendant did not understand the nature of the charge. If this is accomplished, the court must then conduct a hearing into whether the plea was validly entered. *See, e.g., State v. Howell,* 2007 WI 75, P27 (Wis. 2007) At such a hearing, the burden of proof is upon the state to establish that the defendant's plea was, nonetheless, knowing and voluntary.

Here, Scott's motion did not allege that he did not understand what the judge said to him in court. He did. The problem is that the elements that the judge described to Scott

were not the elements of the offense alleged in the information under which he was convicted.

E. The "facts" mentioned by the judge during the plea colloquy do not establish a violation of the "old" statute.

During the plea colloquy, the judge said the following:

> THE COURT: No. I think it means-- well, you are right, at least-- well-- *but on at least three occasions you touched the child with some part of your body on the vagina for the purpose of your own sexual gratification.* Do you understand this charge against you?

(emphasis provided; R:15-7)

If Scott did touch the child on her vagina, for purposes of sexual gratification, on at least three occasions, then these facts take case wholly out of the purview of the old version of § 948.025(1)(b), Stats (2005-06).

Recall that the old version of the statute requires that, "fewer than 3 of the violations were violations of s. 948.02(1)." *See* § 948.025(1)(b), Stats (2005-06) In other words, fewer than three of the violations were first degree sexual assault of a child.[7] Touching a child on the vagina for purposes of sexual gratification is the very definition of first degree sexual assault. *See,* § 948.01(5), Stats.

Thus, if Scott, "[O]n at least three occasions . . . touched

[7] § 948.02(1), Stats. (2005-06) provides that, "Whoever has sexual contact . . . with a person who has not attained the age of 13 years is guilty . . "

the child with some part of [his] body on the vagina for the purpose of your own sexual gratification", this would constitute three violations of first degree sexual assault of a child. Thus, the "facts" elicited by the judge during the plea colloquy do not satisfy the requirements of the "old" statute alleged in the information.

For this additional reason, the circuit court should have permitted Scott to withdraw his guilty plea to count four.

II. The court erred in denying Scott's motion to withdraw his guilty plea to count seven, because the record does not contain an adequate factual basis to establish that Scott possessed child pornography.

At the plea hearing, the court accepted the criminal complaint as the factual basis for Scott's guilty plea to count seven of the information (possession of child pornography).

Concerning count seven, the complaint alleged:

> Tina Gaspar talked to [MM], who stated that whenever they were at the defendant's house alone with him the defendant would put them in his lap and make them look at "nasty pictures" of naked girls and movies with naked males, females, and children. Gaspar stated that [MM] told her that she remembered one movie of a man peeing into a girl's mouth.

(R:9) The complaint also alleges that, "A forensic analysis of the defendant's computer revealed numerous images of child pornography. There is one specific photograph that was moved

to a “lost folder”, which means the item was deleted. It is a girl, clearly under age 18, with a penis in the photo ejaculating onto her face. The photo was deleted on December 20, 2011.” *Id.*

As will be set forth in more detail below, Tina Gaspar’s interview of MM is totally insufficient to establish that Scott possessed child pornography. The complaint alleges that they were “nasty pictures”, and in one of the pictures, a man was peeing into a girl’s mouth. Was is conspicuously missing is any allegation that any of the individuals in the images were under the age of eighteen years. Similarly, the allegations concerning the images on “Scott’s computer” is insufficient to permit an inference that Scott possessed those images. Simply calling the device “Scott’s computer”, with none of the surrounding circumstances, is a bald, conclusory allegation; and it is insufficient to establish possession.

A The factual basis requirement

> For a circuit court to accept a guilty plea, there must be an affirmative showing or “allegation and evidence” that a plea is knowingly, voluntarily, and intelligently made. [internal citations omitted] Wisconsin Stat. § 971.08(1)(b) sets forth an additional requirement that a circuit court must “[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.” This “factual basis” requirement is distinct from the above-stated “voluntariness” requirement for guilty pleas. [internal citations omitted] The factual basis requirement “protect [s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not

actually fall within the charge."

State v. Thomas, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 725, 605 N.W.2d 836, 842

B Possession of child pornography generally

948.12(1m), Stats., provides:

> Whoever possesses, or accesses in any way with the intent to view, any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances may be penalized under sub.(3):
>
> (a) The person knows that he or she possesses or has accessed the material.
>
> (b) The person knows, or reasonably should know, that the material that is possessed or accessed contains depictions of sexually explicit conduct.
>
> (c) The person knows or reasonably should know that the child depicted in the material who is engaged in sexually explicit conduct has not attained the age of 18 years.

"Possessed" means that the defendant knowingly had actual physical control of the recording. Wis JI-Criminal 2146A

C. The "factual basis" in the complaint is insufficient

The record of the plea hearing was inadequate because there was not an adequate factual basis for the allegation that Scott knowingly possessed the image that was alleged to be child pornography.

Tina Gaspar's interview of MM is totally insufficient to

establish that Scott possessed child pornography. The complaint alleges that Scott showed MM “nasty pictures”, and in one of the pictures, a man was peeing into a girl’s mouth. Plainly, this is sufficient to show that Scott possessed those “nasty” pictures. There is, however, no allegation that any of the individuals depicted in the images were under the age of eighteen years, and that Scott knew that the person was underage. Although an individual in the picture is described as a “girl”, the common meaning and usage of that word does not permit an inference that all “girls” are under the age of eighteen.

The complaint alleged that a pornographic image of a girl “clearly under the age of eighteen” was found on a device described as “Scott’s computer.” There were no further allegation to permit an inference that Scott was aware of the image and intended to exercise control over it. For example, was the computer located in a room to which only Scott typically had access? Did other persons have access to the computer, and was the image located in a password protected file? Did Scott make any admissions about the use of the computer, and what was contained on the hard drive? In the absence of allegations concerning such circumstances, it is simply insufficient to allege that the device where the images were found was “Scott’s computer.”

Additionally, Scott’s guilty plea, standing alone, does not amount to an admission that he knew the images were on his

computer.

> Despite the State's suggestion, *Rachwal* does not stand for the proposition that a guilty plea constitutes an admission per se. In fact, the court expressly recognized that a guilty plea may not constitute an admission if the judge fails to conduct the proper questioning so as to ascertain the meaning and potential consequences of such a plea. *Id.* at 512, 465 N.W.2d at 497. It is well established that the admission may not by statute be inferred or made by the defendant's attorney, but rather must be a direct and specific admission by the defendant.

State v. Zimmerman, 185 Wis. 2d 549, 555-56, 518 N.W.2d 303, 305 (Wis. Ct. App. 1994). The judge's colloquy with the defendant in *Zimmerman* was very similar to the colloquy in this case. Here is what the court of appeals wrote about the colloquy:

> It is true that Zimmerman did admit to being convicted of aggravated battery in Texas in 1983 and did admit to the facts as stated in the criminal information. However, at no time did Zimmerman admit that the prior conviction was less than five years from the date of the present conviction. Further, he was never asked about his confinement, and there was no admission by Zimmerman to a period of incarceration that would bring his 1983 conviction within the five-year statutory period. Therefore, we cannot conclude that Zimmerman gave a direct and specific admission to facts necessary to establish the repeater penalty enhancer.

Zimmerman, 185 Wis. 2d at 557.

Here, the fact that Scott may have implicitly admitted that the facts in the complaint were true is not sufficient to establish-- in the absence of any direct admission from Scott--

that he knew that the images were on “his computer.”

For these reasons, the circuit court erred in denying Scott’s motion to withdraw his guilty plea to count seven.

Conclusion

It is respectfully requested that the court of appeals reverse the order of the circuit court denying Scott’s postconviction motion to withdraw his guilty pleas; order that the pleas be withdrawn; and remand the matter to the circuit court for further proceedings.

Dated at Milwaukee, Wisconsin, this _____ day of October, 2016.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233

414.671.9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6107 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of October, 2016:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP001411 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Richard J. Scott,

Defendant-Appellant.

Defendant-Appellant's Brief and Appendix

A. Record on Appeal
B. Excerpt of plea colloquy
C. Circuit court's memorandum decision

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of

fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of October, 2016.

_____

Jeffrey W. Jensen