

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2004

Cornelia G. Clark
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. 03-3454-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00CF000024

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Robert Peterson appeals a judgment convicting him of second-degree sexual assault of a child, entered upon his guilty plea, and an order denying postconviction relief. Peterson argues (1) the trial court was without authority to accept his guilty plea based on his plea agreement that provided for a deferred entry of judgment; (2) court of appeals precedent is

inconsistent on this issue; and (3) the plea agreement failed to identify whether he would be convicted of a felony or misdemeanor sex offense. We reject his arguments and affirm the judgment and order.

¶2 Peterson was charged with two counts of second-degree sexual assault of a child. In an unrelated matter, he was also charged with misdemeanors. He reached a plea agreement to resolve both cases.

¶3 Under the agreement, he pled guilty to one count of misdemeanor theft, with the State recommending two years' probation with a number of conditions. Peterson also entered a guilty plea to one of the sexual assault charges, with the other dismissed and to be read in at sentencing. The plea agreement provided that the entry of judgment for the sexual assault charge would be deferred and, if Peterson successfully completed probation on the theft conviction, it would be amended to a misdemeanor sex offense.

¶4 The State explained the deferred entry of judgment provision as follows:

If [Peterson] successfully completes his probation [in the misdemeanor theft case,] at the end of the two-year period, the State will move to amend the felony charge to a misdemeanor offense of sexual contact with a person who is 16 but not yet 18. If he does not comply with his probation in that other case, the State would move to revoke the deferred prosecution agreement and he would face sentencing upon his guilty plea.

¶5 The court accepted Peterson's guilty plea on the misdemeanor theft and felony sexual assault charges. It sentenced Peterson to ninety days in jail on the theft, but stayed the sentence and placed him on two years' probation. The court accepted what the parties termed a "Deferred Prosecution Agreement" and signed an order adopting its terms.

¶6 The order stated that the disposition of the felony sexual assault charge was contingent upon Peterson's performance on probation, as follows:

If [Peterson] successfully complies with the terms and conditions of probation that were ordered in [the misdemeanor theft case], the State will move to amend Count 1 (Second Degree Sexual Assault of a Child) to a misdemeanor offense of sexual contact with a person under the age of 18.

....

If the defendant engages in behavior which subjects him to revocation proceedings, the State would make a motion to revoke the deferred prosecution agreement and enter judgment based upon the defendant's guilty plea to Second Degree Sexual Assault of a Child. The State would be permitted to do this even if probation was not ultimately revoked.

¶7 Nearly a year and a half later, probation revocation proceedings were initiated. The State subsequently moved for entry of judgment on Peterson's guilty plea to the sexual assault charge. The court found that a sufficient basis existed to revoke the deferred prosecution agreement and held a sentencing hearing. The court entered a judgment of conviction on the sexual assault charge and sentenced Peterson to eight years in prison. Peterson's postconviction motion was denied.

¶8 Peterson argues that the plea procedure was defective because at the time he entered his plea, it was undetermined whether he would be convicted of a misdemeanor or a felony. Peterson failed to preserve his claim of error. Peterson's position on appeal is in direct opposition to his position at the plea hearing. On that ground alone, it may be rejected. This court does not review invited error. *State v. Wollenberg*, 2004 WI App 20, ¶13, 268 Wis. 2d 810, 674 N.W.2d 916.

¶9 Here, as in *Wollenberg*, Peterson “expressly urged the court to adopt the terms of the plea agreement as recited by the prosecutor.” *Id.* In accepting Peterson’s guilty plea, “[t]he court followed the parties’ joint recommendations, and under such circumstances we do not allow a defendant to cry foul.” *Id.*; *see also State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (A litigant’s deliberate choice of strategy is binding and claim of error based on litigant’s own choice will not be considered on appeal.).

¶10 In *Wollenberg*, we rejected the defendant’s claim that his deferred entry of judgment should be overturned. *Id.*, 268 Wis. 2d 808, ¶1. As in *Wollenberg*, there is no suggestion that the plea colloquy failed to comply with WIS. STAT. § 971.08.¹ *Id.*, ¶5. The trial court established, among other things, Peterson’s understanding of the plea agreement, the elements of the theft and sexual assault charges, and the potential punishments. There is no question that plea bargaining must be attended by procedural safeguards to ensure that a defendant is not treated unfairly. *State v. Poole*, 131 Wis. 2d 359, 361, 394 N.W.2d 909 (Ct. App. 1986). Here, however, Peterson fails to identify any procedural irregularity and the record demonstrates his understanding of the plea agreement. Consequently, Peterson has not made a prima facie case for plea withdrawal. *See Wollenberg*, 268 Wis. 2d 810, ¶4.

¶11 Next, Peterson argues that “court of appeals precedent is inconsistent” as to whether deferred plea agreements may be accepted, citing *State v. Boyer*, 198 Wis. 2d 837, 543 N.W.2d 562 (Ct. App. 1995). *Boyer* must be

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

distinguished on two significant grounds. First, because *Boyer* involved drug offenses under WIS. STAT. § 161.41(3r), the court of appeals concluded plain statutory language precluded deferral. *Id.* at 842. Also, *Boyer* did not involve a deferred entry of judgment plea agreement. In contrast, Peterson’s conviction derives from his plea agreement and Peterson does not point to any statutory language that expressly excludes a deferred entry of plea agreement for his sexual assault crime. *Boyer* therefore is inapplicable. Peterson fails to identify any inconsistent court of appeals precedent.

¶12 Finally, Peterson argues that his plea was invalid because, at the time he entered it, the agreement contemplated that judgment would be entered for either a felony or a misdemeanor charge. He claims that the plea colloquy failed to inquire as to his understanding of the elements and penalties of the misdemeanor offense. He contends that it was error to accept a “contingent and variable plea.” We are unpersuaded. Any alleged error was corrected by entry of the judgment of conviction to the felony sexual assault charge to which he pled. *See Wollenberg*, 268 Wis. 2d 810, ¶22. Because Peterson was not convicted of a misdemeanor sex offense, any alleged confusion as to the elements or potential punishments as to that charge would lack prejudice and therefore not constitute grounds for reversal. *See* WIS. STAT. § 805.18(2). We reject Peterson’s implicit assertion that he is entitled to reap the benefit of the plea agreement while at the same time fail to fulfill his part of the bargain.

By the Court.—Judgment and order affirmed.

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

