COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2007

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. 2007AP447-CR **Cir. Ct. No. 2005CF76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIJAH G. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Elijah G. Thomas has appealed from a judgment convicting him of a no contest plea of one count of third-degree sexual assault in

violation of WIS. STAT. § 940.225(3) (2003-04).[1] He has also appealed from an order denying his motion to withdraw his plea. We affirm the judgment and order.

¶2 Thomas' conviction arises from a complaint and an amended information charging him with violating WIS. STAT. § 948.025(1) by engaging in at least three acts of sexual intercourse with a child who had not yet reached the age of sixteen.[2] A person is guilty of violating § 948.025(1) if he commits three or more violations under WIS. STAT. § 948.02(1) or (2) within a specified period of time involving the same child.

¶3 On July 14, 2006, Thomas pled no contest to an amended charge of third-degree sexual assault in violation of WIS. STAT. § 940.225(3).[3] Section 940.225(3) provides that a person is guilty of third-degree sexual assault if he or she has sexual intercourse with a person without the consent of that person. After sentencing, Thomas moved to withdraw his no contest plea on the ground that there was no factual basis for it because the sexual intercourse between him and the victim, L.K.C., was consensual. He relied on a statement in the complaint indicating that L.K.C. "said all the incidents were consensual." He also relied on

[1] All references to the criminal statutes under which Thomas was charged and convicted are to the 2003-04 version of the Wisconsin Statutes. All other references are to the 2005-06 version of the statutes.

[2] The complaint erroneously cited WIS. STAT. § 948.025(1)(a) for this offense. The statutory basis for the charge was corrected in an amended information to reflect that the case was brought under § 948.025(1)(b).

[3] Prior to entering this plea, Thomas entered another plea of no contest to an amended charge of third-degree sexual assault. His motion to withdraw that plea was granted by the trial court, and a jury trial was held on the charge of repeated sexual assault of a child. Although the jury returned a verdict finding Thomas guilty, a mistrial was granted based upon statements made by one juror when the jury was polled. Subsequently, Thomas entered the no contest plea that underlies this appeal.

L.K.C.'s trial testimony, indicating that she agreed to the acts of sexual intercourse and that they were consensual.

¶4 The trial court denied the motion on the ground that a factual basis existed because the underage victim could not legally consent to engaging in sexual intercourse. It also determined that the plea was valid pursuant to ***State v. Harrell***, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994). We affirm the trial court's order on these same grounds.

¶5 When a postconviction motion to withdraw a no contest plea is filed, the defendant has the burden of showing by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. ***Id.*** at 414. Establishing a factual basis is necessary for a valid plea. ***State v. Lackershire***, 2007 WI 74, ¶34, __Wis. 2d __, 734 N.W.2d 23.

¶6 At the plea hearing, Thomas admitted that he wanted to plead no contest and give up his right to have the State prove the elements of third-degree sexual assault, which, as described to him in the plea colloquy and plea questionnaire, were that he had sexual intercourse with L.K.C. and that L.K.C. did not consent to the intercourse. The prosecutor indicated that two bases existed for finding a lack of consent. One was that the facts would support a greater offense, and the second was that L.K.C. could not consent as a matter of law because of her age. The trial court termed this "legal impossibility" for consent, and Thomas' defense counsel agreed. Thomas then personally affirmed that the trial court could accept the information in the criminal complaint to conclude that his behavior met the two elements of third-degree sexual assault that the trial court had just discussed.

¶7 On appeal, Thomas argues that because L.K.C.'s statement and testimony indicating that she consented to the sexual intercourse is undisputed, no factual basis could exist to convict him of third-degree sexual assault. We disagree.

¶8 Initially, we conclude that because the complaint alleged that L.K.C. was under the age of sixteen at the time Thomas engaged in sexual intercourse with her, it provided a factual basis for a finding of lack of consent. Consent has historically not been an element of a crime of sexual assault of a child because persons under a certain age are deemed incapable of giving consent. ***Harrell***, 182 Wis. 2d at 420. As is implicit in WIS. STAT. § 948.02(2), a person who has sexual contact or sexual intercourse with a person who has not achieved the age of sixteen is guilty of a felony because a child of that age is deemed legally incapable of giving consent.[4] Consequently, a reasonable inference from the complaint filed against Thomas was that L.K.C. could not consent to sexual intercourse because she was less than sixteen years old. A factual basis for the element of lack of consent therefore existed.[5]

[4] Authority to support the proposition that a factual basis for lack of consent exists because L.K.C. was under sixteen is also provided by ***Proper v. State***, 85 Wis. 615, 631, 55 N.W. 1035 (1893), wherein the court stated: "The prosecutrix was under the age of consent, and was conclusively incapable of consenting to the offense charged."

[5] In his appellant's brief, Thomas alleges that he was not asked if he understood and agreed that L.K.C.'s age was being relied upon to establish the element of lack of consent. However, this court understands his argument on appeal as being simply that there was no factual basis for his plea because L.K.C. consented to the acts of sexual intercourse. In any event, even if Thomas is objecting that he was not expressly asked whether he agreed that L.K.C.'s age could be relied upon to establish lack of consent, it is well established that a valid plea does not require that the defendant admit to the factual basis for the plea in his or her own words. ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836. The statements of defense counsel may suffice. ***Id.*** At the plea colloquy, Thomas' counsel affirmed that the parties were relying on L.K.C.'s age as the basis for establishing the element of lack of consent. In addition, (continued)

¶9 Even if L.K.C.'s age, standing alone, was insufficient to provide a factual basis for finding Thomas guilty of violating WIS. STAT. § 940.225(3), Thomas' plea was clearly valid under ***Harrell***. ***Harrell*** provides that in a plea bargain context, the requirements of WIS. STAT. § 971.08(1)(a) are met if the trial court satisfies itself that the plea is voluntarily and understandingly made and a factual basis exists for either the offense to which the plea is offered or to a more serious charge reasonably related to that offense. ***Harrell***, 182 Wis. 2d at 419. This is the case even when a true greater- and lesser-included offense relationship does not exist. ***Id.***

¶10 In this case, as in ***Harrell***, a factual basis clearly exists for the more serious charge with which Thomas was originally charged and that charge is reasonably related to the third-degree sexual assault charge to which he pled no contest. As previously noted, Thomas was originally charged with violating WIS. STAT. § 948.025(1)(b) based on allegations that he engaged in three or more acts of sexual intercourse with L.K.C. in violation of WIS. STAT. § 948.02(2). The acts violated § 948.02(2) because L.K.C. had not yet reached the age of sixteen. Violations of §§ 948.02(2) and 948.025(1)(b) constitute Class C felonies, in contrast to third-degree sexual assault, which constitutes only a Class G felony.

¶11 The facts as set forth in the complaint clearly provided a factual basis for convicting Thomas of violating WIS. STAT. §§ 948.02(2) and 948.025(1)(b) by engaging in sexual intercourse with a child who had not yet attained the age of sixteen. The voluntariness of L.K.C.'s participation in the

---

after the discussion of this element by counsel and the trial court, Thomas personally affirmed that the trial court could accept the information in the complaint to conclude that his behavior met the two elements of third-degree sexual assault that had just been discussed.

sexual intercourse was irrelevant to the issue of whether a violation of § 948.02(2) occurred.[6] Moreover, as in ***Harrell***, the charge of third-degree sexual assault was reasonably related to the more serious charge of violating § 948.02(2). *See* ***Harrell***, 182 Wis. 2d at 419-20. Consequently, in accordance with ***Harrell***, a factual basis existed for Thomas' no contest plea. *See* ***id.***

¶12 Thomas' attempts to distinguish ***Harrell*** or to establish that it is not good law are unavailing. He relies on three cases, all of which are distinguishable. In ***State v. Johnson***, 207 Wis. 2d 239, 558 N.W.2d 375 (1997), the defendant pled guilty to the same crime that was charged in the complaint, and the complaint failed to allege facts in regard to one element of the charge. *See* ***id.*** at 241-43. ***Johnson*** contained no issue related to entry of a plea to a less serious crime which is reasonably related to a more serious offense. For the same reason, ***State v. West***, 214 Wis. 2d 468, 571 N.W.2d 196 (Ct. App. 1997), does not assist Thomas.[7]

¶13 Thomas also relies on ***State v. Smith***, 202 Wis. 2d 21, 549 N.W.2d 232 (1996). However, ***Smith*** involved an ***Alford*** plea,[8] not a plea of no contest

[6] Thomas attempts to distinguish ***Harrell*** on the ground that, in that case, the victim's lack of consent was not alleged in the complaint or at the preliminary hearing. ***State v. Harrell***, 182 Wis. 2d 408, 416, 513 N.W.2d 676 (Ct. App. 1994). He relies on the fact that in contrast, L.K.C. stated that she consented to the sexual intercourse. However, this distinction is irrelevant because all that is required to establish a violation of WIS. STAT. § 948.02(2) is that the defendant had sexual intercourse or sexual contact with someone who has not reached the age of sixteen.

[7] In ***State v. West***, 214 Wis. 2d 468, 470, 571 N.W.2d 196 (Ct. App. 1997), the complaint alleged that the defendant committed two counts of conspiracy to commit insurance fraud, and the defendant entered guilty pleas to those two charges. His motion to withdraw his plea was granted as to one of the convictions because there was no evidence of conspiracy. ***Id.*** at 471. The court held that ***Harrell*** was inapplicable because the defendant did not enter a guilty plea to a less serious charge than a charge alleged in the complaint. ***Id.*** at 480.

[8] ***Alford*** pleas take their name from ***North Carolina v. Alford***, 400 U.S. 25 (1970), and are guilty pleas in which the defendant pleads guilty while either maintaining his or her innocence, or not admitting having committed the crime. ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995).

like here. ***Smith***, 202 Wis. 2d at 23. Because an ***Alford*** plea requires that the court be satisfied that there is strong evidence of guilt despite the defendant's protestations of innocence, the Wisconsin Supreme Court held that the holding of ***Harrell*** was not applicable to an ***Alford*** plea. ***Smith***, 202 Wis. 2d at 27-28. Because Thomas did not enter an ***Alford*** plea, ***Smith*** is inapposite. Because a factual basis existed for Thomas' plea of no contest to third-degree sexual assault, his judgment of conviction and the order denying postconviction relief are affirmed.

By the Court.—Judgment and order affirmed.

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