

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 7, 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, STATS.

NOTICE

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

No. 94-1725-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Edgar Smith,

Defendant-Appellant,

Mohammad Yessin,

Defendant.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Affirmed and cause remanded.*

Before Wedemeyer, P.J, Fine and Schudson, JJ.

PER CURIAM. Edgar Smith appeals from the trial court order denying his motion to dismiss the criminal complaint charging him with conspiracy to receive stolen property, in violation of §§ 939.31 and 943.34(1)(c),

STATS.¹ He argues that the complaint is insufficient because it fails to allege a legally possible offense, fails to allege that he agreed with any co-conspirator to commit an offense, and fails to allege that he had a stake in the venture. We affirm.

Following the preliminary hearing in this case, Smith was bound over for trial. Smith's arraignment, however, was stayed to allow him the opportunity to appeal the trial court's denial of his motion to dismiss the complaint. On September 14, 1994, this court granted Smith leave to appeal. This court subsequently certified this case to the Wisconsin Supreme Court for resolution of two issues: (1) whether conspiracy under § 939.31 codifies a "unilateral" or "bilateral" conspiracy theory; and (2) whether conspiracy under § 939.31 includes the element of "stake in the venture." The supreme court accepted certification but, following oral argument, concluded:

- 1.The issues certified by the court of appeals, whether Wis. Stat. § 939.31 codifies the "unilateral" or "bilateral" theory of conspiracy and whether "stake in the venture" is an element of conspiracy, were not raised in the circuit court.
- 2.The argument of unilateral theory of conspiracy, if recognized under Wisconsin law, addresses those conspiracies involving one who with an intent to commit a crime conspires with a police officer or another lacking the criminal intent to commit the crime.
- 3.The only issues addressed by the circuit court and set forth in Smith's petition for leave to appeal are: (1) whether the complaint alleges sufficient facts to establish probable cause that a conspiracy existed between Smith and Yessin, and (2) whether legal impossibility constitutes a defense to conspiracy.

¹ The complaint actually refers to § 943.34(1)(3)(c), STATS., which, we assume, is a typographical error because § 943.34 has no subsection (3).

State v. Smith, 94-1725-CR, order dated June 20, 1996. Accordingly, the supreme court vacated the order accepting certification and remanded the appeal to this court.

The criminal complaint charges Smith and Mohammad Yessin with conspiracy to receive stolen cases of cigarettes with a value of more than \$4,500. The complaint alleges that on February 14, 1994, an undercover police officer sold the cigarettes to Yessin for \$1,000 as part of a "reverse sting" police investigation. The complaint explains that the undercover police gave Yessin information leading him to believe the cigarettes were stolen when, in fact, they had been provided to police by retail stores and other sources. The complaint further alleges Smith's involvement:

Smith stat[ed] that on February 13, 1994 Mohamud² Yessin came over to his house at approximately 8:15 a.m. and told him he had a \$1,000.00 and that he was going to get cigarettes cheap and wanted Smith to go along with him. Smith said they then went in Mohamud's car and drove over to 101st and Hampton. When they arrived Mohammed and Smith loaded approximately 10 cases of cigarettes into Mohammed's vehicle. Mohammed also told him 1 case of cigarettes was free. Mohamud Yessin then gave [the undercover officer] \$1,100.00 for the cigarettes. When [the undercover officer] left Mohamud told him [Smith] that the cigarettes were stolen.... Smith said that he had an idea that Mohamud was buying stolen cigarettes when they were driving over to the above-described location (101st and Hampton).

Smith argues that the complaint is insufficient because it lacks any allegation that he and Yessin "ever had a mutual understanding to accomplish the criminal objective of receiving stolen property." The State responds that it is "not essential that two or more persons actually agree to commit an offense. All

² Yessin's first name is inconsistently spelled throughout the trial court record and on appeal. It appears, however, that "Mohammad" is the correct spelling.

that is required for liability, rather, is that the culpable party subjectively believe he is agreeing with another to commit a crime." The State is correct.

A criminal complaint is sufficient if the alleged facts and reasonable inferences drawn from the alleged facts establish that the defendant probably committed the charged crime. *State v. Adams*, 152 Wis.2d 68, 73-74, 447 N.W.2d 90, 92 (Ct. App. 1980). Whether a complaint is sufficient presents an issue we review *de novo*. *Id.* at 74, 447 N.W.2d at 92.

Section 939.31, STATS., provides:

Except as provided in ss. 161.41(1x), 940.43(4) and 940.45(4), *whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime* may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

(Emphasis added.) Thus, the statute does not require that one person "agree" with another in order to violate § 939.31, STATS. To be a conspirator under the statute, a person may agree "*or combine*[] with another for the purpose of committing that crime." (Emphasis added.)

Here, the complaint alleges that Smith "had an idea that Mohamud was buying stolen cigarettes when they were driving over to the ... location" to get them. Nevertheless, according to the complaint, Smith helped Yessin load the cases of cigarettes into Yessin's car. Clearly, therefore, the complaint sufficiently alleged that Smith "combined with" Yessin to receive stolen property.

Smith also argues that the complaint is insufficient because the crime of receiving stolen property requires that "the property must be in fact

stolen,” and this complaint states that the cigarettes used by the police in this sting “were provided by retail stores and other sources and were not in fact stolen.” Thus, he contends, “legal impossibility” precludes probable cause in the complaint. Smith, however, offers no reply to the State's argument that *State v. Kordas*, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1995), leads to the conclusion “that legal impossibility is not a defense to the inchoate crime of conspiracy,” and “[a]ll that is required for liability ... is that the culpable party subjectively believe” that he or she is committing the crime. We agree that *Kordas* controls and, therefore, that the complaint is sufficient.

By the Court. – Order affirmed and cause remanded.

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